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TAXATION CONVENTION WITH AUSTRIA

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF AUSTRIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME, SIGNED AT VIENNA ON MAY 31, 1996.



SEPTEMBER 4, 1996.—Convention 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.

U.S. GOVERNMENT PRINTING OFFICE

29–112 WASHINGTON : 1996

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *September 4, 1996.*

To the Senate of the United States:

I transmit herewith for Senate advice and consent to ratification the Convention Between the United States of America and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Vienna May 31, 1996. Enclosed is an exchange of notes with an attached Memorandum of Understanding, which provides clarification with respect to the application of the Convention in specified cases. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Convention.

This Convention, which is similar to tax treaties between the United States and other OECD nations, provides maximum rates of tax to be applied to various types of income and protection from double taxation of income. The Convention also provides for exchange of information to prevent fiscal evasion and sets forth standard rules to limit the benefits of the Convention to persons that are not engaged in treaty shopping.

I recommend that the Senate give early and favorable consideration to this Convention and give its advice and consent to ratification.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, August 30, 1996.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratification, the Convention Between the United States of America and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Vienna on May 31, 1996 ("the Convention"). Also enclosed for the information of the Senate is an exchange of notes with an attached Memorandum of Understanding, which provides clarification with respect to the application of the Convention in specified cases.

This Convention will replace the existing Convention Between the United States of America and the Republic of Austria for the Avoidance of Double Taxation with Respect to Taxes on Income signed on October 25, 1956. The new Convention maintains many provisions of the existing convention, but it also provides certain additional benefits and updates the text to reflect current tax treaty policies.

This Convention is similar to the tax treaties between the United States and other OECD nations. It provides maximum rates of tax to be applied to various types of income, protection from double taxation of income, exchange of information to prevent fiscal evasion, and standard rules to limit the benefits of the Convention to persons that are not engaged in treaty-shopping. Like other U.S. tax conventions, this Convention provides rules specifying when income that arises in one of the countries and is derived by residents of the other country may be taxed by the country in which the income arises (the "source" country).

The Convention establishes maximum rates of tax that may be imposed by the source country on specified categories of income, including dividends, interest, and royalties, to residents of the other country. The withholding rates on investment income are generally the same as in the present U.S.-Austrian treaty. Dividends from direct investments (holdings by a corporation of at least ten percent of the equity of a firm) are subject to tax by the source country at a rate of five percent. All other dividends are taxable at 15 percent. These rates are the same as in many recent U.S. treaties with OECD countries. In general, interest derived and beneficially owned by a resident of a Contracting State is taxable only in that State.

Royalties derived and beneficially owned by a resident of a Contracting State are generally taxable only in that State. However, royalties constituting consideration for the use of, or right to use, cinematographic films, or films, tapes, or other means of reproduction used for radio or television broadcasting may also be taxed in the Contracting State in which they arise, but the tax so charged may not exceed ten percent of the gross amount of the royalties. These tax withholdings do not apply, however, if the beneficial owner of the income is a resident of one Contracting State who carries on business in the other Contracting State in which the income arises. In that situation, the income is to be considered either business profit or income from independent personal services.

The taxation of capital gains under the Convention is a variation on the rule in the treaty currently in force with Austria and most recent U.S. tax treaties. In most other U.S. income tax treaties, gains from the sale of personal property are taxed only in the seller's State of residence unless they are attributable to a permanent establishment or fixed base in the other State. Under the proposed Convention, the other State may also tax gains from the sale of personal property that is removed from a permanent establishment or fixed base, to the extent that the gains accrued while the asset formed part of a permanent establishment or fixed base. Double taxation is prevented because the residence State must exclude from its tax base any gain taxed in the other State.

The proposed Convention generally follows the standard rules for taxation by one country of the business profits of a resident of the other. The non-residence country's right to tax such profits is limited to cases in which the profits are attributable to a permanent establishment located in that country.

As do all recent U.S. treaties, this Convention preserves the right of the United States to impose its branch profits tax in addition to the basic corporate tax on a branch's business. This tax is not imposed under the present treaty. The proposed Convention also accommodates a provision of the 1986 Tax Reform Act that attributes to a permanent establishment income that is earned during the life of the permanent establishment but is deferred and not received until after the permanent establishment no longer exists.

Consistent with U.S. treaty policy, the proposed Convention permits only the country of residence to tax profits from international carriage by ships or airplanes and income from the use or rental of ships, aircraft, or containers. Under the present treaty, such rental income is treated as royalty income, which may be taxed by the source country if the enterprise that earns the income has a permanent establishment in that country.

The taxation of income from the performance of personal services under the proposed Convention is essentially the same as that under other recent U.S. treaties with OECD countries. Unlike many U.S. treaties, however, the proposed Convention provides for the deductibility of cross-border contributions by temporary residents of one State to pension plans registered in the other State under limited circumstances.

Like other U.S. tax treaties and agreements, this Convention provides the standard anti-abuse rules for certain classes of investment income. In addition, the proposed Convention provides for the

elimination of another potential abuse relating to the granting of U.S. treaty benefits in the so-called "triangular cases," to third-country permanent establishments of Austrian corporations that are exempt from tax in Austria by operation of Austrian law. Under the proposed rule, full U.S. treaty benefits will be granted in these "triangular cases" only when the U.S.-source income is subject to a significant level of tax in Austria and in the country in which the permanent establishment is located. This anti-abuse rule does not apply in certain circumstances, including situations in which the United States taxes the profits of the Austrian enterprise under subpart F of the Internal Revenue Code.

The proposed Convention contains standard rules making its benefits unavailable to persons engaged in treaty-shopping. The current treaty contains no such anti-treaty-shopping rules. The proposed Convention also contains the standard rules necessary for administering the Convention, including rules for the resolution of disputes under the Convention and for exchange of information. The proposed Convention significantly expands the scope of the exchange of information between the United States and Austria. For example, U.S. tax authorities will be given access to Austrian bank information in connection with any "penal investigation."

The Convention authorizes the General Accounting Office and the Tax-Writing Committees of Congress to obtain access to certain tax information exchanged under the Convention for use in their oversight of the administration of U.S. tax laws and treaties.

This Convention is subject to ratification. It will enter into force on the first day of the second month following the exchange of instruments of ratification and will have effect with respect to taxes withheld by the source country for payments made or credited on or after the first day of the second month following entry into force and in other cases for taxable years beginning on or after the first day of January following the date on which the Convention enters into force. When the present convention affords a more favorable result for a taxpayer than the proposed Convention, the taxpayer may elect to continue to apply the provisions of the present convention, in its entirety, for one additional year.

This Convention will remain in force indefinitely unless terminated by one of the Contracting States. Either State may terminate the Convention after five years from its entry into force by giving at least six months of prior notice through diplomatic channels.

An exchange of notes with an attached Memorandum of Understanding accompanies the Convention and provides clarification with respect to the application of the Convention in specified cases. For example, the Memorandum specifies that the term "penal investigation," in connection with which U.S. tax authorities will be given access to Austrian bank information, applies to proceedings carried out by either judicial or administrative bodies. Of particular importance in expanding the exchange of tax information with Austria is the provision in the Memorandum that commencement of a criminal investigation by the Criminal Investigation Division of the Internal Revenue Service constitutes a "penal investigation."

A technical memorandum explaining in detail the provisions of the Convention will be prepared by the Department of the Treas-

ury and will be submitted separately to the Senate Committee on Foreign Relations.

The Department of the Treasury and the Department of State cooperated in the negotiation of the Convention. It has the full approval of both Departments.

Respectfully submitted,

LYNN E. DAVIS.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF AUSTRIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

The United States of America and the Republic of Austria, desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, have agreed as follows:

(T. Doc # 31)

ARTICLE 1

Personal Scope

1. Except as otherwise provided in this Convention, this Convention shall apply to persons who are residents of one or both of the Contracting States.

2. This Convention shall not restrict in any manner any exclusion, exemption, deduction, credit, or other allowance now or hereafter accorded

a) by the laws of either Contracting State, or

b) by any other agreement between the Contracting States.

3. Notwithstanding the provisions of subparagraph 2(b):

a) Notwithstanding any other agreement to which the Contracting States may be parties, a dispute concerning whether a measure is within the scope of this Convention shall be considered only by the competent authorities of the Contracting States, as defined in subparagraph 1(e) of Article 3 (General Definitions) of this Convention, and the procedures under this Convention exclusively shall apply to the dispute.

b) Unless the competent authorities determine that a taxation measure is not within the scope of this Convention, the nondiscrimination obligations of this Convention exclusively shall apply with respect to that

measure, except for such national treatment or most-favored-nation obligations as may apply to trade in goods under the General Agreement on Tariffs and Trade. No national treatment or most-favored-nation obligation under any other agreement shall apply with respect to that measure.

c) For the purpose of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any other form of measure.

4. Notwithstanding any provision of this Convention except paragraph 5 of this Article, a Contracting State may tax its residents (as determined under Article 4 (Resident)), and by reason of citizenship may tax its citizens, as if this Convention had not come into effect. For this purpose the term "citizen" shall include a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of 10 years following such loss.

5. The provisions of paragraph 4 shall not affect:

a) the benefits conferred by a Contracting State under paragraph 2 of Article 9 (Associated Enterprises), paragraph 4 of Article 13 (Capital Gains), subparagraph b) of paragraph 1 and paragraph 3 of Article 18 (Pensions), Articles 22 (Relief from Double Taxation), 23 (Non-Discrimination) and 24 (Mutual Agreement Procedure); and

b) the benefits conferred by a Contracting State under Articles 19 (Government Service), 20 (Students and Trainees) and 26 (Diplomatic Agents and Consular Officers), upon individuals who are not citizens of that State, and who, in the case of the United States, do not have immigrant status.

ARTICLE 2

Taxes Covered

1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State.

2. The existing taxes to which this Convention shall apply are:

a) In the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes);

b) In Austria:

(i) die Einkommensteuer (the income tax); and

(ii) die Koerperschaftsteuer (the corporation tax).

3. The Convention shall apply also to any identical or substantially similar taxes which are imposed by a Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States

shall notify each other of any significant changes which have been made in their respective taxation laws and shall notify each other of any official published material concerning the application of this Convention, including explanations, regulations, rulings, or judicial decisions.

4. For the purpose of Article 23 (Non-Discrimination), this Convention shall also apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof. For the purpose of paragraphs 1 to 5 of Article 25 (Exchange of Information and Administrative Assistance), this Convention shall also apply to taxes of every kind imposed by a Contracting State.

ARTICLE 3

General Definitions

1. For the purposes of this Convention:

a) the term "person" includes an individual, an estate, a trust, a company and any other body of persons;

b) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

c) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of

a Contracting State and an enterprise carried on by a resident of the other Contracting State;

d) the term "international traffic" means any transport by a ship or aircraft, except where such transport is solely between places in the other Contracting State;

e) the term "competent authority" means:

(i) in the United States: the Secretary of the Treasury or his delegate; and

(ii) in Austria: the Federal Minister of Finance or his delegate;

f) (i) the term "United States" means the United States of America, but does not include Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory;

(ii) when used in a geographical sense, the term "United States" means the states thereof and the District of Columbia. Such term also includes (A) the territorial sea thereof and (B) the sea bed and subsoil of the submarine areas adjacent to that territorial sea, over which the United States exercises sovereign rights in accordance with international law for the purpose of exploration for and exploitation of the natural resources of such areas, but only to the extent that the person, property, or activity to which this

Convention is being applied is connected with such exploration or exploitation;

g) the term "Austria" means the Republic of Austria;

h) the term "nationals" means:

(i) all individuals possessing the nationality of a Contracting State; and

(ii) all legal persons, partnerships and associations deriving their status as such from the laws in force in a Contracting State.

2. As regards the application of this Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires and subject to the provisions of Article 24 (Mutual Agreement Procedure), have the meaning which it has under the laws of that State concerning the taxes to which this Convention applies.

ARTICLE 4

Resident

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of the person's domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that:

a) this term does not include any person who is liable to tax in that State in respect only of income from sources in that State;

b) in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners, beneficiaries or grantor;

c) in the case of an individual who is not a resident of Austria under paragraph 1, this term includes an individual who is a U.S. citizen or an alien admitted to the United States for permanent residence (a "green card" holder) only if the individual has a substantial presence, permanent home or habitual abode in the United States; and

d) the term includes a Contracting State or a political subdivision or local authority thereof or any agency or instrumentality of any such State, subdivision or authority.

2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his or her status shall be determined as follows:

a) The individual shall be deemed to be a resident of the State in which he or she has a permanent home

available; if such individual has a permanent home available in both States, or in neither State, he or she shall be deemed to be a resident of the State with which his or her personal and economic relations are closer (center of vital interests);

b) If the State of the individual's center of vital interests cannot be determined, he or she shall be deemed to be a resident of the State in which he or she has an habitual abode;

c) If the individual has an habitual abode in both States or in neither of them, he or she shall be deemed to be a resident of the State of which he or she is a national;

d) If the individual is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavor to settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then if it is created under the laws of a Contracting State or a political subdivision thereof it shall be deemed to be a resident of that State.

4. Where by reason of the provisions of paragraph 1 a person other than an individual or a company is a resident of both Contracting States, the competent authorities of the Contracting States shall settle the question by mutual

agreement and determine the mode of application of the Convention to such person.

ARTICLE 5

Permanent Establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop; and

f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.

3. A building site or construction or installation project, or an installation or drilling rig or ship used for the exploration or development of natural resources, constitutes a permanent establishment only if it has remained in that State more than 12 months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display, or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in subparagraphs a) to e) of this paragraph.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person, other than an agent of an independent status to whom paragraph 6 applies, is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to

have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

ARTICLE 6

Income From Real Property

1. Income derived by a resident of a Contracting State from real property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term "real property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to real property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of real property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as real property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of real property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from real property of an enterprise and to income from real property used for the performance of independent personal services.

5. A resident of one of the Contracting States who is liable to tax in the other Contracting State on income from

real property situated in the other Contracting State may elect for any taxable year to compute the tax on such income on a net basis as if such income were attributable to a permanent establishment in such other Contracting State. Any such election shall be binding for the taxable year of the election and all subsequent taxable years unless the competent authorities of the Contracting States, pursuant to a request by the taxpayer made to the competent authority of the Contracting State of which the taxpayer is a resident, agree to terminate the election.

ARTICLE 7

Business Profits

1. The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the business profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the business

profits which it might be expected to make if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions.

3. In determining the business profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest, and other expenses incurred for the purposes of the enterprise as a whole (or the part thereof which includes the permanent establishment), whether incurred in the State in which the permanent establishment is situated or elsewhere.

4. No business profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5. For the purposes of the preceding paragraphs, the business profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where business profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

(T. Doc 31)

7. For the purposes of this Convention, "business profits" includes income derived from the rental of tangible personal property.

8. The provisions of paragraphs 1 to 7 shall also apply to income derived by a sleeping partner in a sleeping partnership (Stille Gesellschaft) under Austrian law.

9. In applying paragraphs 1 and 2 of Article 7 (Business Profits), paragraph 4 of Article 10 (Dividends), paragraph 3 of Article 11 (Interest), paragraph 4 of Article 12 (Royalties), paragraph 3 of Article 13 (Capital Gains), Article 14 (Independent Personal Services) and paragraph 2 of Article 21 (Other Income), any income earned during the existence of, and attributable to, a permanent establishment or fixed base is taxable in the Contracting State in which such permanent establishment or fixed base is situated even if the payments in respect of such income are deferred until such permanent establishment or fixed base has ceased to exist.

ARTICLE 8

Shipping and Air Transport

1. Profits of an enterprise of a Contracting State from the operation in international traffic of ships or aircraft shall be taxable only in that State.

2. For purposes of this Article, profits from the operation in international traffic of ships or aircraft

include profits derived from the rental on a full or bareboat basis of ships or aircraft if operated in international traffic by the lessee or if such rental profits are incidental to other profits described in paragraph 1.

3. Profits of an enterprise of a Contracting State from the use, rental or maintenance of containers (including trailers, barges, and related equipment for the transport of containers) used in international traffic shall be taxable only in that State.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

ARTICLE 9

Associated Enterprises

1. Where

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or

b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

It is understood, however, that the fact that associated enterprises have concluded arrangements, such as cost-sharing arrangements or general services agreements, for or based on the allocation of executive, general administrative, technical and commercial expenses, research and development expenses and other similar expenses, is not in itself a condition as meant in the preceding sentence.

2. Where a Contracting State includes in the profits of an enterprise of that State, and taxes accordingly, profits on which an enterprise of the other Contracting State has been charged to tax in that other State, and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to

the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

ARTICLE 10

Dividends

1. Dividends paid by a company which 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, the tax so charged shall not exceed:

a) 5 percent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which 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.

Subparagraph b) and not subparagraph a) shall apply in the case of dividends paid by a United States person that is a Regulated Investment Company. Subparagraph a) shall not apply to dividends paid by a United States person that is a Real Estate Investment Trust, and subparagraph b) shall

apply only if the dividend is beneficially owned by an individual holding less than a 10 percent interest in the Real Estate Investment Trust. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which 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; and income from arrangements, including debt obligations, carrying the right to participate in, or determined with reference to, profits, to the extent so characterized under the law of the Contracting State in which the income arises.

4. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State, of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs 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 a case, the provisions of Article 7

(Business Profits) or Article 14 (independent Personal Services), as the case may be, shall apply.

5. Where a company is a resident of a Contracting State, the other Contracting State may not impose any tax on the dividends paid by the company, except insofar as

a) such dividends are paid to a resident of that other State; or

b) the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State.

6. A company which is a resident of Austria and which has a permanent establishment in the United States or which is subject to tax on a net basis in the United States on items of income that may be taxed in the United States under Article 6 (Income from Real Property) or under paragraph 1 of Article 13 (Capital Gains), may be subject in the United States to a tax in addition to the tax allowable under the other provisions of this Convention. Such tax, however, may be imposed only on:

a) the portion of the business profits of the company attributable to the permanent establishment; and

b) the portion of the income referred to in the preceding sentence which is subject to tax under Article 6 (Income From Real Property) or Article 13

(Capital Gains), which represents the "dividend equivalent amount" as that term is defined under the laws of the United States as it may be amended from time to time without changing the general principle thereof.

7. The tax referred to in paragraph 6 shall not be imposed at a rate exceeding the rate specified in subparagraph a) of paragraph 2.

ARTICLE 11

Interest

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

2. The term "interest" as used in this Convention means income from debt claims of every kind, whether or not secured by a 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 or prizes attaching to such securities, bonds or debentures, and including an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit. Penalty charges for late payment shall not be regarded as interest for the purpose of this Convention. However, the term "interest"

does not include income dealt with in Article 10 (Dividends).

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other 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 14 (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 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.

5. The provisions of paragraph 1 shall not apply:

a) to an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit; or

b) to interest that is contingent interest of a type that does not qualify as portfolio interest under United States law, and to equivalent amounts under Austrian law.

The classes of interest described in this paragraph are subject to tax in the Contracting State in which the interest arises under the provisions of the internal law of that State.

ARTICLE 12

Royalties

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

2. However, such royalties may also be taxed in the Contracting State in which they arise, if they constitute consideration for the use of, or right to use, cinematograph films, or films, tapes or other means of reproduction used for radio or television broadcasting; but the tax so charged may, not exceed 10 percent of the gross amount of the royalties.

3. The term "royalties" as used in this Convention means payments of any kind received as a consideration for

the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films or films or tapes used for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or other like right or property, or for information concerning industrial, commercial or scientific experience. The term "royalties" also includes gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs 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 14 (Independent Personal Services), as the case may be, shall apply.

5. 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 person deriving the royalties 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 law of each Contracting State, due regard being had to the other provisions of this Convention.

6. Royalties shall be deemed to arise in a Contracting State to the extent that such royalties are paid with respect to the use of, or the right to use, rights or property within that State.

ARTICLE 13

Capital Gains

1. Gains derived by a resident of a Contracting State from the alienation of real property situated in the other Contracting State may be taxed in that other State.

2. For purposes of paragraph 1, the term "real property situated in the other Contracting State",

a) where the United States is the other Contracting State, includes real property referred to in Article 6 which is situated in the United States, a United States real property interest, and an interest in a partnership, trust or estate, to the extent attributable to real property situated in the United States; and

b) where Austria is the other Contracting State, includes:

(i) real property referred to in Article 6 (Income From Real Property) which is situated in Austria; and

(ii) shares or similar rights in a company the assets of which consist, directly or indirectly, mainly of such real property.

3. Gains from the alienation of personal property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of personal property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

4. Gains from the alienation of movable property that a resident of a Contracting State has or had in the other Contracting State and which is removed from that other Contracting State may be taxed in that other State in accordance with its law, but only to the extent of the gain that accrued during the time the asset formed part of the business property of a permanent establishment or fixed base that the resident has or had in that other State. Such gain

may also be taxed in the first-mentioned Contracting State in accordance with its laws. However, the first-mentioned State must exclude from the base of its tax any gain that is or has been taxed in the other Contracting State in accordance with the first sentence of this paragraph.

5. Gains derived by an enterprise of a Contracting State from the alienation of ships, aircraft or containers operated by such enterprise in international traffic shall be taxable only in that State, and gains described in paragraph 3 of Article 12 (Royalties) shall be taxable only in accordance with the provisions of Article 12 (Royalties).

6. Gains from the alienation of any property other than that referred to in the preceding paragraphs, shall be taxable only in the Contracting State of which the alienator is a resident.

7. Where property was transferred by a resident of the United States to an Austrian company as a capital contribution and, in application of the Austrian Reorganization Tax Act (Umgrundungssteuergesetz), no capital gains taxation took place, a subsequent alienation of the respective shares in the Austrian company shall remain taxable in Austria until the year 2010.

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ARTICLE 14

Independent Personal Services

Income derived by an individual who is a resident of a Contracting State from the performance of personal services in an independent capacity shall be taxable only in that State, unless such services are performed in the other Contracting State and the income is attributable to a fixed base regularly available to the individual in that other State for the purpose of performing his or her activities.

ARTICLE 15

Dependent Personal Services

1. Subject to the provisions of Articles 18 (Pensions) and 19 (Government Service), salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183

days in any twelve-month period commencing or ending in the fiscal year concerned;

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment as a member of the regular complement of a ship or aircraft operated in international traffic may be taxed only in that Contracting State.

ARTICLE 16

Limitation on Benefits

1. A person which is a resident of a Contracting State and derives income from the other Contracting State shall be entitled, in that other Contracting State, to benefits of this Convention only if such person is:

a) an individual;

b) a Contracting State or a political subdivision or local authority thereof;

c) engaged in the active conduct of a trade or business in the first-mentioned Contracting State (other than the business of making or managing

investments, unless these activities are banking or insurance activities carried on by a bank or insurance company), the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business, and, with respect to income derived in connection with that trade or business, the trade or business is substantial in relation to the activity carried on in the other Contracting State giving rise to the income in respect of which treaty benefits are being claimed in that other Contracting State;

d) a person, if:

(i) more than 50 percent of the beneficial interest in such person (or in the case of a company, more than 50 percent of the number of shares of each class of the company's shares) is owned, directly or indirectly, by persons entitled to benefits of this Convention under subparagraphs (a), (b), (e), (f) or (g) of this paragraph or who are citizens of the United States; and

(ii) not more than 50 percent of the gross income of such person is used, directly or indirectly, to meet liabilities (including liabilities for interest or royalties) to persons who are not entitled to benefits of this Convention under subparagraph (a), (b), (e), (f)

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or (g) of this paragraph and are not citizens of the United States;

e) a company in whose principal class of shares there is substantial and regular trading on a recognized stock exchange;

f) a company that is at least 90 percent owned, directly or indirectly, by not more than five companies referred to in subparagraph e), provided that each person in the chain of ownership is a resident of a Contracting State, and provided further that the owner of any remaining portion of the company is an individual resident of a Contracting State;

g) an entity which is a not-for-profit organization (including pension funds and private foundations), and which, by virtue of that status, is generally exempt from income taxation in the Contracting State of which it is a resident, provided that more than half of the beneficiaries, members or participants, if any, in such organization are persons that are entitled, under this Article, to the benefits of the Convention; or

h) a recognized headquarters company for a multinational corporate group.

2. A person that is not entitled to the benefits of the Convention pursuant to the provisions of paragraphs 1 and 4 may, nevertheless, be granted the benefits of the

Convention if the competent authority of the Contracting State in which the income in question arises so determines. The competent authority of the Contracting State in which the income arises will consult with the competent authority of the other Contracting State before denying benefits of this Convention that have been requested under this paragraph.

3. For purposes of subparagraph e) of paragraph 1, the term "a recognized stock exchange" means:

a) the NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange for purposes of the U.S. Securities Exchange Act of 1934;

b) the Vienna Stock Exchange; and

c) any other stock exchange agreed upon by the competent authorities of the Contracting States.

4. Where an enterprise of Austria derives interest or royalty income from the United States, and that income is attributable to a permanent establishment which the enterprise has in a third jurisdiction (other than a Contracting State), the benefits of paragraph 1 of Article 11 (Interest) and paragraphs 1 and 2 of Article 12 (Royalties), respectively, shall not apply to any such item of income, if the profits of that permanent establishment

are subject to an aggregate effective rate of tax in Austria and the third jurisdiction which is less than 60 percent of the general rate of company tax applicable in Austria. The preceding sentences of this paragraph shall not apply:

a) to interest derived in connection with or incidental to the active conduct of a trade or business carried on by the permanent establishment in the third jurisdiction (other than the business of making or managing investments, unless these activities are banking or insurance activities carried on by a bank or insurance company);

b) to royalties that are received as a compensation for the use of, or the right to use, intangible property produced or developed by the permanent establishment itself; and

c) to income derived by an enterprise of Austria if the United States taxes the profits of such enterprise according to the provisions of subpart F of part III of subchapter N of chapter 1 of subtitle A of the Internal Revenue Code of 1986, as it may be amended from time to time without changing the general principle thereof.

5. The competent authorities shall, in accordance with the provisions of Article 25 (Exchange of Information and Administrative Assistance), exchange such information as is necessary for carrying out the provisions of this Article

and safeguarding, in cases envisioned therein, the application of their domestic law.

ARTICLE 17

Artistes and Athletes

1. Notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services) and 15 (Dependent Personal Services), income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his or her personal activities as such exercised in the other Contracting State, may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or her or borne on his or her behalf, from such activities do not exceed twenty thousand United States dollars ($20,000) or its equivalent in Austrian shillings for the taxable year concerned.

2. Where income in respect of activities exercised by an entertainer or an athlete in his or her capacity as such accrues not to that entertainer or athlete but to another person, that income may, notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services), and 15 (Dependent Personal Services), be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised. The preceding

sentence, shall not apply if it is established that neither the entertainer or athlete, nor persons related thereto, participate directly or indirectly in the profits of such other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions.

3. Where, in cases other than those dealt with in the first sentence of paragraph 2, payment in respect of activities exercised by an entertainer or an athlete in his or her capacity as such is made not to that entertainer or athlete but to another person, that payment may, notwithstanding the provisions of Articles 7 (Business Profits) or 14 (Independent Personal Services), be subject to a withholding tax in the Contracting State in which the activities of the entertainer or athlete are exercised; upon request of that other person the withholding tax shall be refunded insofar as the amount of tax withheld exceeds the tax liability of the entertainer or athlete as determined under paragraph 1. Refund claims must be accompanied by documentation required by that Contracting State.

ARTICLE 18

Pensions

1. Subject to the provisions of Article 19 (Government Service),

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a) pensions and other similar remuneration beneficially derived by a resident of a Contracting State in consideration of past employment shall be taxable only in that State, and

b) social security payments and other public pensions paid by a Contracting State to an individual who is a resident of the other Contracting State or a citizen of the United States shall be taxable only in the first-mentioned Contracting State.

2. Annuities derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State. The term "annuities" as used in this paragraph means a stated sum paid periodically at stated times during a specified number of years, under an obligation to make the payments in return for adequate and full consideration (other than services rendered).

3. Alimony paid by a resident of a Contracting State to a resident of the other Contracting State shall be taxable only in the first-mentioned Contracting State. The term "alimony" as used in this paragraph means periodic payments made pursuant to a written separation agreement or a decree of divorce, separate maintenance, or compulsory support.

4. Periodic payments, not dealt with in paragraph 3, for the support of a minor child made pursuant to a written separation agreement or a decree of divorce, separate

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maintenance, or compulsory support, paid by a resident of a Contracting State to a resident of the other Contracting State, shall be exempt from tax in both Contracting States.

5. a) Contributions borne by an individual who renders dependent personal services in a Contracting State to a pension scheme established in and recognized for tax purposes in the other Contracting State shall be deducted, in the first-mentioned State, in determining the individual's taxable income, and treated in that State, in the same way and subject to the same conditions and limitations as contributions made to a pension scheme that is recognized for tax purposes in that first-mentioned State, provided that:

(i) the individual was not a resident of that State, and was contributing to the pension scheme, immediately before he or she began to exercise employment in that State; and

(ii) the pension scheme is accepted by the competent authority of that State as generally corresponding to a pension scheme recognized as such for tax purposes by that State.

b) For the purposes of sub-paragraph a):

(i) the term "a pension scheme" means an arrangement in which the individual participates in order to secure retirement benefits payable in

respect of the dependent personal services referred to in subparagraph a); and

(ii) a pension scheme is recognized for tax purposes in a State if the contributions to the scheme would qualify for tax relief in that State.

ARTICLE 19

Government Service

1. Wages, salaries, and similar remuneration, including pensions, annuities, or similar benefits, paid from public funds of a Contracting State or a political subdivision or a local authority thereof to a citizen of that Contracting State for labor or personal services performed as an employee of that Contracting State or political subdivision or local authority thereof in the discharge of governmental functions shall be taxable only by that Contracting State.

2. The provisions of Articles 14 (Independent Personal Services), 15 (Dependent Personal Services), 17 (Artistes and Athletes), and 18 (Pensions) shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

3. Paragraph 1 shall also apply to remuneration paid to the Austrian Foreign Trade Representatives of the Austrian Federal Economic Chamber and to the staff members

of the Austrian Foreign Trade Offices to the extent that they are discharging governmental functions in the United States, provided that the recipients of such remuneration are citizens of Austria.

ARTICLE 20

Students and Trainees

Payments received by a student, apprentice, or business trainee who is, or was immediately before visiting a Contracting State, a resident of the other Contracting State, and who is present in the first-mentioned State for the purpose of full-time education at a recognized educational institution, or for full-time training, shall not be taxed in that State, provided that such payments arise outside that State, and are for the purpose of the individual's maintenance, education, or training. The exemption from tax provided by this Article shall apply to an apprentice or business trainee only for a period of time not exceeding three years from the date the apprentice or trainee first arrives in the first-mentioned Contracting State for the purpose of his or her training.

ARTICLE 21

Other Income

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing

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Articles of this Convention shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income other than income from real property as defined in paragraph 2 of Article 6 (Income From Real Property), if the person deriving the income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or 14 (Independent Personal Services), as the case may be, shall apply.

ARTICLE 22

Relief from Double Taxation

1. In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or citizen of the United States as a credit against the United States tax on income:

a) the income tax paid to Austria by or on behalf of such citizen or resident; and

b) in the case of a United States company owning at least 10 percent of the voting stock of a company which is a resident of Austria and from which the United States company receives dividends, the income tax paid to Austria by or on behalf of the distributing company with respect to the profits out of which the dividends are paid.

For the purposes of this paragraph, the taxes referred to in paragraphs 2b) and 3 of Article 2 (Taxes Covered) shall be considered income taxes.

2. Where a United States citizen is a resident of Austria:

a) with respect to items of income that under the provisions of this Convention are exempt from United States tax or that are subject to a reduced rate of United States tax when derived by a resident of Austria who is not a United States citizen, Austria shall allow as a credit against Austrian tax, only the tax paid, if any, that the United States may impose under the provisions of this Convention, other than taxes that may be imposed solely by reason of citizenship under the saving clause of paragraph 4 of Article 1 (Personal Scope);

b) for purposes of computing United States tax on those items of income referred to in subparagraph a), the United States shall allow as a credit against

United States tax the income tax paid to Austria after the credit referred to in subparagraph a); the credit so allowed shall not reduce the portion of the United States tax that is creditable against the Austrian tax in accordance with subparagraph a); and

c) for the exclusive purpose of relieving double taxation in the United States under subparagraph b), items of income referred to in subparagraph a) shall, notwithstanding anything in paragraph 4, be deemed to arise in Austria to the extent necessary to avoid double taxation of such income under subparagraph b).

3. In the case of Austria, double taxation shall be avoided as follows:

a) Where a resident of Austria derives income which, in accordance with the provisions of this Convention, may be taxed in the United States (other than solely by reason of citizenship in accordance with paragraph 4 of Article 1 (Personal Scope)), Austria shall allow as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in the United States. Such deduction shall not, however, exceed that part of the income tax as computed before the deduction is given which is attributable to the income that may be taxed in the United States. A tax levied according to paragraph 6 of Article 10 (Dividends) shall be attributable to the taxable income

derived by the permanent establishment in the year for which that tax is levied.

b) Where in accordance with any provision of the Convention income derived by a resident of Austria is exempt from tax in Austria, Austria may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

4. For the purposes of allowing relief from double taxation pursuant to paragraph 1 of this Article, and subject to such source rules in the domestic laws of the Contracting States as apply for the purpose of limiting the foreign tax credit, the source of income and profits shall be determined exclusively as follows:

a) income and profits derived by a resident of a Contracting State which may be taxed in the other Contracting State in accordance with this Convention (other than solely by reason of citizenship in accordance with paragraph 4 of Article 1 (Personal Scope)) shall be deemed to arise in that other State;

b) income and profits derived by a resident of a Contracting State which may not be taxed in the other Contracting State in accordance with this Convention shall be deemed to arise in the first-mentioned State.

The rules of this paragraph shall not apply in determining credits against United States tax for foreign taxes other

than the taxes referred to in paragraphs 2b) and 3 of Article 2 (Taxes Covered).

ARTICLE 23

Non-Discrimination

1. Nationals of a Contracting State shall not be subjected in the other State to any taxation or any requirement connected therewith, which is other or more burdensome that the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of Article 1 (Personal Scope), also apply to persons who are not residents of one or both of the Contracting States. However, for the purposes of United States tax, a United States national who is not a resident of the United States and an Austrian national who is not a resident of the United States are not in the same circumstances.

2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favorably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation

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purposes on account of civil status or family responsibilities which it grants to its own residents.

3. Except where the provisions of paragraph 1 of Article 9 (Associated Enterprises), paragraph 4 of Article 11 (Interest), or paragraph 5 of Article 12 (Royalties) apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same condition as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

4. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

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5. Nothing in this Article shall be construed as preventing a Contracting State from imposing the tax described in paragraphs 6 and 7 of Article 10 (Dividends).

6. The provisions of this Article shall apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof.

ARTICLE 24

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him or her in taxation not in accordance with the provisions of this Convention, he or she may, irrespective of the remedies provided by the domestic law of those States, present his or her case to the competent authority of the Contracting State of which he or she is a resident or national.

2. The competent authority shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

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3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. In particular the competent authorities of the Contracting States may agree:

a) to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;

b) to the same allocation of income, deductions, credits, or allowances between persons;

c) to the same characterization of particular items of income;

d) to a common determination of the State in which an item of income arises; and

e) to a common meaning of a term.

They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. The competent authorities of the Contracting States shall consult together with a view to developing a commonly agreed application of the provisions of this Convention, including the provisions of Article 16 (Limitation on

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Benefits). The competent authorities of the Contracting States may each prescribe regulations to carry out the purposes of this Convention.

ARTICLE 25

Exchange of Information and Administrative Assistance

1. The competent authorities of the Contracting States shall spontaneously or upon request exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by this Article insofar as the taxation thereunder is not contrary to the Convention. The carrying out of provisions of the domestic laws of the Contracting States concerning taxes includes penal investigations with regard to fiscal offenses relating to taxes covered by this Article. The competent authorities of the Contracting States may agree on information which shall be furnished on a regular basis. The exchange of information is not restricted by Article 1 (Personal Scope). Any information received 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, or the determination of appeals in relation to, or the

oversight of the administration of the taxes covered by this Article. 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.

2. In no case shall the provisions of paragraph 1 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 which 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 which 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.

3. If information concerning taxes is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if the tax of the first-mentioned State were the tax of that other State and were being imposed by that other State. If specifically requested by the competent authority of a

Contracting State, the competent authority of the other Contracting State shall 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, or writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of such other State with respect to its own taxes.

4. The tax authorities of a Contracting State may deliver documents to persons in the other Contracting State by using postal services. Each Contracting State shall, for purposes of its taxes, determine in accordance with its domestic law the legal efficacy or sufficiency of documents so delivered.

5. The preceding paragraphs likewise apply to assistance carried out under penal investigation procedures. However, requests for arrest of persons are not covered by the present Convention.

6. For the purpose of the preceding paragraphs of this Article, this Convention shall apply to taxes of every kind imposed by a Contracting State.

7. The Contracting States undertake to lend each other support and assistance in the collection of taxes to the extent necessary to ensure that relief granted by the present Convention from taxation imposed by a Contracting

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State does not inure to the benefit of persons not entitled thereto, provided that:

a) the requesting State must produce a copy of a document certified by its competent authority specifying that the sums referred to for the collection of which it is requesting the intervention of the other State, are finally due and enforceable;

b) a document produced in accordance with the provisions of paragraph 7 shall be rendered enforceable in accordance with the laws of the requested State. It is specified that under current Austrian legislation, such documents must be rendered enforceable by the Regional Finance Directorates (Finanzlandesdirektionen);

c) the requested State shall effect recovery in accordance with the rules governing the recovery of similar tax debts of its own; however, tax debts to be recovered shall not be regarded as privileged debts in the requested State. In the Republic of Austria, judicial execution shall be requested by the Finanzprokuratur or by the finance office delegated to act on his behalf; and

d) appeals concerning the existence or amount of the debt shall lie only to the competent tribunal of the requesting State.

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The provisions of this paragraph shall not impose upon either Contracting State the obligation to carry out administrative measures different from those used in the collection of its own tax, or which would be contrary to its sovereignty, security, public policy or its essential interests.

ARTICLE 26

Diplomatic Agents and Consular Officers

Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

ARTICLE 27

Application of the Convention

Nothing in this Agreement shall be construed so as to preclude either Contracting State from applying any withholding tax system according to its domestic laws. However, if the Agreement provides for an exemption from or a reduction of tax, the amount withheld in excess of the limitations prescribed by the Agreement shall be refunded upon request of the taxpayer entitled to the relief in question.

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ARTICLE 28

Entry into Force

1. This Convention shall be subject to ratification. The instruments of ratification shall be exchanged at _____ as soon as possible.

2. The Convention shall enter into force on the first day of the second month following the exchange of instruments of ratification. Its provisions allocating taxation rights shall have effect, in respect of taxes withheld at source, for amounts paid or credited on or after the first day of the second month next following, and in respect of taxes on other income, for fiscal periods beginning on or after the first day of January next following, the date on which the Convention enters into force.

3. Where any greater relief from tax would have been afforded to a person entitled to the benefits of the Convention between the United States of America and the Republic of Austria with respect to taxes on income, signed in Washington on October 25, 1956 (hereinafter referred to as "the 1956 Convention") under that Convention than under this Convention, the 1956 Convention shall, at the election of such person, continue to have effect in its entirety for the first assessment period or taxable year following the date on which this Convention would otherwise have effect under the provisions of paragraph 2.

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4. The 1956 Convention shall cease to have effect in respect of income to which this Convention applies in accordance with paragraphs 2 or 3 of this Article. The 1956 Convention shall terminate on the last date on which it has effect in accordance with the foregoing provisions of this Article.

ARTICLE 29

Termination

This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention at any time after 5 years from the date on which this Convention enters into force provided that at least 6 months prior notice of termination has been given in writing through diplomatic channels. In such event, the Convention shall cease to have effect in respect of tax withheld at the source, for amounts paid or credited on or after, and in respect of other taxes, to fiscal periods beginning on or after, the first day of January next following the expiration of the 6 month period.

IN WITNESS THEREOF the undersigned, being duly authorized by their respective Governments, have signed this Convention.

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DONE at Vienna in duplicate, in the English and German languages, the two texts having equal authenticity, this 31st day of May, 1996.

FOR THE UNITED STATES OF AMERICA:

Jeanne Hunt

FOR THE REPUBLIC OF AUSTRIA:

J. Fenero-Waldner

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EMBASSY OF THE
UNITED STATES OF AMERICA

Vienna, May 31, 1996

Excellency:

I have the honor to refer to the Convention signed today between the Republic of Austria and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. There is attached to this note a Memorandum of Understanding with respect to certain provisions of that Convention for the purpose of giving guidance both to taxpayers and to the tax authorities of our two countries in interpreting these provisions.

If the provisions stated in the Memorandum of Understanding meet with the approval of the Government of the Republic of Austria, this note and your reply thereto will indicate that our Governments share a common understanding.

Accept, Excellency, the expression of my highest consideration.

Dr. iur. Benita Ferrero-Waldner,
The State Secretary,
Federal Ministry for Foreign Affairs,
Vienna.

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Memorandum of Understanding

Re Interpretation of the Convention

It is understood that provisions of the Treaty that are drafted according to the corresponding provisions of the Organization for Economic Cooperation and Development (OECD) Model Tax Convention on Income and on Capital shall generally be expected to have the same meaning as expressed in the OECD Commentary thereon. The understanding in the preceding sentence will not apply with respect to the following

a) any reservations or observations to the OECD Model or its Commentary by either Contracting State;

b) any contrary interpretations in this Memorandum of Understanding;

c) any contrary interpretation in a published explanation by one of the Contracting States that has been provided to the competent authority of the other Contracting State prior to the entry into force of the Convention; and

d) any contrary interpretation agreed to by the competent authorities after the entry into force of the Convention.

The Commentary - as it may be revised from time to time - constitutes a means of interpretation in the sense of the Vienna Convention on the Law of Treaties of May 23, 1969.

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Re Article 4 (Residence of pass-through entities)

It is understood that the income derived or paid by pass-through entities, such as limited liability companies, is to be treated as the income of a resident of a Contracting State only to the extent that the income is subject to tax in that State in the hands of the beneficial owner or owners of the income as the income of a resident of that Contracting State. Thus, the determination of the residence of such entities for purposes of the Convention is to be made on the same basis as that of a partnership.

Re Article 4 (Center of vital interests in the case of foreign assignments)

The center of vital interests may not be determinable solely by reviewing the circumstances prevailing in one single year; a longer period may have to be taken into consideration.

Re Article 6 (Income derived from the exploitation of rights in immovable property)

Article 6 applies likewise to income derived from the exploitation of rights in immovable property. Thus, a U.S. corporation being the lessee of an Austrian building that is owned by a German corporation would be liable to Austrian taxation on the income received by virtue of sublease contracts concluded with the actual users of the premises; the mere fact that the U.S. corporation does not hold immovable property in

Austria (because the rights of a lessee in the immovable property, being the source of income, are to be considered as movable assets) does not prevent the application of Article 6.

Re Article 10 (Effects of paragraph 1 for the country of source)

Paragraph 1 sets out that dividends "may be taxed" in the country of residence; a rule of that type does not prevent the country of source from also taxing such dividends. In the case of a U.S. REIT with an Austrian substantial participation the limitations provided in paragraph 2 do not affect the source country; this country therefore preserves its full right of taxation.

Re Article 16 (Anti-abuse concept of the treaty)

Special provisions of the treaty designed to curb abusive international transactions and to exclude them from treaty benefits, like Article 16, are not to be understood as preventing a Contracting State from applying a "substance over form" evaluation of facts in other cases not particularly covered by a specific anti-abuse clause of the treaty.

Re Article 16 (Limitation on Benefits)

The following understandings have been reached with respect to the application of Article 16:

Paragraph 1(c)

It is intended that the provisions of subparagraph 1(c) will be self executing. Unlike the provisions of paragraph 2, claiming

benefits under this subparagraph does not require advance competent authority ruling or approval. The tax authorities may, of course, on review, determine that the taxpayer has improperly interpreted the subparagraph and is not entitled to the benefits claimed.

Agreement has been reached on certain interpretations with respect to particular terms used in the treaty provision:

"Engaged in the active conduct of a trade or business"

A person that is a resident of one of the States is considered to be engaged in the active conduct of a trade or business in that State not only if such person is directly so engaged but also, e.g., if such person

(i) is a partner in a partnership so engaged;

(ii) is a person in which a controlling beneficial interest is held by a single person which is engaged in the active conduct of a trade or business in that State;

(iii) is a person in which a controlling beneficial interest is held by a group of five or fewer persons each member of which is engaged in activity in that State which is a component part of or directly related to the trade or business in that State;

(iv) is a company that is a member of a group of companies that form or could form a consolidated group for tax purposes according to the law of that State (as applied without regard to the residence of such companies), and the

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group is engaged in the active conduct of a trade or business in that State;

(v) owns, either alone or as a member of a group of five or fewer persons that are qualified persons or residents of an "identified state", a controlling beneficial interest in a person that is engaged in the active conduct of a trade or business in the State in which the owner is resident;

(vi) is together with another person that is so engaged, under the common control of a person (or a group of five or fewer persons) which (or, in the case of a group, each member of which) is a qualified person or a resident of an "identified state".

"Identified state" means any third country, identified by agreement of the competent authorities, which has effective provisions for the exchange of information with the State in which the person being tested under the above provisions is a resident.

Derived in connection with, or incidental to

Income is derived in connection with or is incidental to a trade or business, e.g., if the income-producing activity in Austria is a line of business which forms a part of or is complementary to the trade or business conducted in the United States by the income recipient or if the income in question is produced by assets forming part of the business property of the income

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recipient as recognized under the taxation law of the Contracting State in which the trade or business is carried on.

It is understood that in the case of associated enterprises the active conduct of the trade or business of the income recipient resident in one of the Contracting States must be substantial in relation to the activity carried on by an associated enterprise in the other Contracting State giving rise to the income in respect of which treaty benefits are being claimed in that other Contracting State. Whether the trade or business of the income recipient is substantial will generally be determined by reference to its proportionate share of the trade or business in the other State, the nature of the activities performed and the relative contributions made to the conduct of the trade or business in both States. In any case, however, the trade or business of the income recipient will be deemed to be substantial if, for the preceding taxable year, the average of the ratios for the following factors exceeds 10 percent and each of the ratios exceeds 7.5 percent, provided that for any separate factor that does not meet the 7.5 percent test in the first preceding taxable year the average of the ratios for that factor in the three preceding taxable years may be substituted:

(i) the ratio of the value of assets used or held for use in the active conduct of the trade or business by the income recipient in the first-mentioned State to all, or, as the case may be, the proportionate share of the value of

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such assets so used or held for use by the trade or business producing the income in the other State;

(ii) the ratio of gross income derived from the active conduct of the trade or business by the income recipient in the first-mentioned State to all, or, as the case may be, the proportionate share of the gross income so derived by the trade or business producing the income in the other State; and

(iii) the ratio of the payroll expense of the trade or business for services performed within the first-mentioned State to all, or, as the case may be, the proportionate share of the payroll expense of the trade or business for services performed in the other State.

The following examples reflect understandings reached by the negotiators as to the intended scope of subparagraph 1(c). The examples are structured for purposes of exposition in terms of an Austrian entity claiming U.S. treaty benefits. They are not intended to be exhaustive, but are merely illustrative of the kinds of considerations which are relevant in making a determination as to whether a particular case falls within the scope of subparagraph 1(c).

Example I

Facts: An Austrian resident company is owned by three persons, each resident in a different third country. The company is engaged in an active

manufacturing business in Austria. It has a wholly-owned subsidiary in the United States which has been capitalized with debt and equity. The subsidiary is engaged in selling the output of the Austrian parent. The active manufacturing business in Austria is substantial in relation to the activities of the U.S. subsidiary. Are the subsidiary's interest and dividend payments to its Austrian parent eligible for treaty benefits in the United States?

Analysis: Treaty benefits would be allowed because the treaty requirements that the U.S. income is "derived in connection with or is incidental to" the Austrian active business, and that the Austrian business is substantial in relation to the U.S. income generating activity is substantial, are satisfied. This conclusion is based on two elements in the fact pattern presented: (1) the income is connected with the active Austrian business -- in this example in the form of a "downstream" connection; and (2) the active Austrian business is substantial in relation to the business of the U.S. subsidiary.

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Example II

Facts: The facts are the same as Example I except that while the income is derived by the Austrian parent of the U.S. subsidiary, the relevant business activity in Austria is carried on by an Austrian subsidiary corporation. The Austrian subsidiary's activities meet the business relationship and substantiality tests of the business connection provision, as described in the preceding example. Are the U.S. subsidiary's dividends and interest payments to the Austrian parent eligible for U.S. treaty benefits?

Analysis: Benefits are allowed because the two Austrian entities (i.e., the one deriving the income and the one carrying on the substantial active business in Austria) are related. Benefits are not denied merely because the income is earned by an Austrian holding company and the relevant activity is carried on in Austria by an Austrian subsidiary. The existence of a similar holding company structure in the United States would not affect the right of the Austrian parent to treaty benefits. Thus, if the Austrian parent owns a subsidiary in the United States which is, itself, a holding company for the group's U.S. activities,

which are related to the business activity in Austria, dividends paid by the U.S. holding company to the Austrian parent holding company would be tested for eligibility for benefits in the same way as described above, ignoring the fact that the activities are carried on by one entity and the income in respect of which benefits are claimed is paid by another, related, entity.

Example III

Facts: An Austrian resident company is owned by three persons, each resident in a different third country. The company is the worldwide headquarters and parent of an integrated international business carried on through subsidiaries in many countries. The company's wholly-owned U.S. and Austrian subsidiaries manufacture in their countries of residence products which are part of the group's product line. The United States subsidiary has been capitalized with debt and equity. The active manufacturing business of the Austrian subsidiary is substantial in relation to the activities of the U.S. subsidiary. The Austrian parent manages the worldwide group and also performs research and development to improve the manufacture of the

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group's product line. Are the U.S. subsidiary's dividend and interest payments to its Austrian parent eligible for treaty benefits in the United States?

Analysis: Treaty benefits would be allowed because the treaty requirement that the United States income is "derived in connection with or is incidental to" the Austrian active business is satisfied. This conclusion is based on two elements in the fact pattern presented: (1) the income is connected with the Austrian active business because the United States subsidiary and the Austrian subsidiary manufacture products which are part of the group's product line, the Austrian parent manages the worldwide group, and the parent performs research and development that benefits both subsidiaries; and (2) the active Austrian business is substantial in relation to the business of the U.S. subsidiary.

Example IV

A third-country resident establishes an Austrian corporation for the purpose of acquiring a large U.S. manufacturing company. The sole business activity of the Austrian corporation (other than

holding the stock of the U.S. corporation) is the operation of a small retailing outlet which sells products manufactured by the U.S. company. Is the Austrian corporation entitled to treaty benefits under subparagraph 1 (c) with respect to dividends it receives from the U.S. manufacturer?

Analysis: The dividends would not be entitled to benefits. Although there is, arguably, a business connection between the U.S. and the Austrian businesses, the "substantiality" requirement of the subparagraph is not met.

Example V

Facts: Austrian, German and Belgian corporations create a joint venture in the form of a partnership organized in Austria to manufacture a product in a developing country. The joint venture owns a U.S. sales corporation, which pays dividends to the joint venture. Are these dividends eligible for U.S.-Austrian treaty benefits?

Analysis: Under Article 4, only the Austrian partner is a resident of Austria for purposes of the treaty. The question arises under this treaty, therefore, only with respect to the Austrian partner's share

of the dividends. If the Austrian partner meets the ownership and base erosion tests of subparagraph 1(d) or the public trading tests of subparagraphs 1(e) or 1(f), it is entitled to benefits without reference to subparagraph 1(c). If not, the analysis of the previous examples would be applied to determine eligibility for benefits under 1(c). The determination of treaty benefits available to the German and Belgian partners will be made under the United States treaties with Germany and Belgium.

Example VI

Facts: An Austrian corporation, a German corporation and a Belgian corporation create a joint venture in the form of an Austrian resident corporation in which they take equal shareholdings. The joint venture corporation engages in an active manufacturing business in Austria. Income derived from that business that is retained as working capital is invested in U.S. Government securities and other U.S. debt instruments until needed for use in the business. Is interest paid on these instruments eligible for U.S.-Austrian treaty benefits?

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Analysis: The interest would be eligible for treaty benefits. Interest income earned from short-term investment of working capital is incidental to the business in Austria of the Austrian joint venture corporation.

Paragraph 1(h)

A person shall be considered a recognized headquarter company if:

a) it provides in its state of residence 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 State of residence of the headquarter 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 State;

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

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f) it is subject to the same income taxation rules in its country of residence as other persons entitled to the benefits of this Convention; and

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

If the income requirements for being considered a recognized headquarter company (subparagraphs b, c, or d) 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.

Paragraph 2

Paragraph 2 of Article 16 provides that a resident of a Contracting State that derives income from the other Contracting State and is not entitled to the benefits of the Convention under any of the provisions of paragraph 1, may, nevertheless, be granted benefits at the discretion of the competent authority of the Contracting State in which the income arises. The paragraph itself provides no guidance to competent authorities or taxpayers as to how the discretionary authority is to be exercised. This memorandum of understanding is intended to provide some discussion and guidance.

It is assumed that, for purposes of implementing paragraph 2, a taxpayer will be permitted to present his case to his competent authority for an advance determination based on the facts, and

will not be required to wait until the tax authorities of one of the Contracting States have determined that benefits are denied. In these circumstances, it is also expected that if the competent authority determines that benefits are to be allowed, benefits will be allowed retroactively to the time of entry into force of the relevant treaty provision or the establishment of the structure in question, whichever is later.

In making determinations under paragraph 2, the competent authority shall take into account as a guideline whether the establishment, acquisition, or maintenance of such person or the conduct of its operations has or had as its principal purpose the obtaining of benefits under the Convention. It is understood that the competent authorities will take into account all relevant facts and circumstances. The factual criteria that the competent authorities are expected to take into account may include, among others, the existence of a clear business purpose for the structure and location of the income earning entity in question; the conduct of an active trade or business (as opposed to a mere investment activity) by such entity; a valid business nexus between that entity and the activity giving rise to the income; and, the extent to which the entity, if it is a corporation, would be entitled to treaty benefits comparable to those afforded by this Convention if it had been incorporated in the country of residence of the majority.

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The following example illustrates the application of some of these principles:

Facts: Austrian, German and Belgian companies, each of which is engaged directly or through its affiliates in substantial active business operations in its country of residence, decide to cooperate in the development, production and marketing of an advanced passenger aircraft through a corporate joint venture with its statutory seat in Austria. The development, production and marketing aspects of the project are carried out by the individual joint venturers in their respective countries of residence. The joint venture company, which is staffed with a significant number of managerial and financial personnel seconded by the joint venturers, acts as the general headquarters for the joint venture, responsible for the overall management of the project including coordination of the functions separately performed by the individual joint venturers on behalf of the joint venture company, the investment of working capital contributed by the joint venturers and the financing of the project's additional capital requirements through public and private borrowings. The joint venture

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company derives portfolio investment income from U.S. sources. Is this income eligible for benefits under the U.S.-Austrian treaty?

Analysis: If the joint venture corporations's activities constitute an active business and the income is connected to that business, benefits would be allowed under subparagraph 1(c). If not, it is expected that the U.S. competent authority would determine that treaty benefits should be allowed in accordance with paragraph (2) under the facts presented, particularly in view of (i) the clear business purpose for the formation and location of the joint venture company; and (ii) the significant headquarters functions performed by that company in addition to financial functions.

International Economic Integration

It is understood that Austria's membership in the European Union (EU) will become an element in the determination under paragraph 2 of eligibility for benefits of Austrian companies with significant non-Austrian, but EU Member, ownership, or with significant business activities carried on in EU member States as well as in Austria. The special U.S. ties to Canada and Mexico under the North American Free Trade Agreement will have a similar

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impact on competent authority determinations under paragraph 2 with respect to Austrian benefits claimed by U.S. residents.

In addition to reflecting Austria's EU membership in competent authority determinations under paragraph 2, it is also understood that the United States and Austria will discuss whether a need exists to amend Article 16 to reflect the closer relationship between Austria and its EU partners. If such amendments appear desirable, a Protocol to this Convention will be promptly negotiated to reflect this understanding.

Re Article 17 (Treatment of orchestras)

Paragraph 1 of Article 17 relates only to individuals. Legal entities operating an orchestra (like associations, municipalities, and states) are, according to paragraph 1, not taxable in the country where such orchestra performs, although such entities may be subject to tax in the country of performance under paragraph 2 of this Article or under Article 7 (Business Profits). The individual musicians would be taxable there, but only if their annual remuneration received for the performances in the host state exceeded the threshold of 20,000 U.S. dollars. In the case of a monthly paid salary only that portion of the monthly pay may become taxable which is allocable to the days physically spent in the host country. If, however, a performance-related global payment is made, then the whole amount

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shall be taken into consideration without any deduction for periods of preparation spent outside the host state.

Re Article 18 (social security payments)

The term "social security payments" as used in this article is not restricted to old age pensions but refers to all sorts of social security benefits, e.g., also to benefits granted in kind and to payments made in compensation for work-related diseases or accidents. The term "other public pensions" as used in subparagraph 1(b) is intended to refer to tier 1 Railroad Retirement benefits.

Re Article 19 (coverage of personnel)

It is understood that an entity (e.g., an Embassy or Consulate) performing governmental functions within the meaning of Article 19 paragraph 1 is acting through all of its personnel; therefore, personnel engaged in activities such as driving and cleaning are to be considered as acting in the "discharge of governmental functions" and are thus covered by Article 19 paragraph 1.

Re Article 22 (Relief from Double Taxation), paragraph 1

It is understood that paragraph 1 of Article 22, which requires the United States to grant a foreign tax credit for Austrian taxes "in accordance with the provisions and subject to the limitations of the law of the United States", refers to the laws as of the date of entry into force of the treaty, as they may be

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subsequently amended. U.S. law contains rules designed to ensure that all taxpayers pay a certain minimum liability -- the Alternative Minimum Tax ("AMT"). Although the AMT may be reduced by foreign tax credits, such credits cannot reduce it to zero, but can offset only 90 percent of the AMT. It is agreed that this 90 percent AMT limitation is consistent with the general U.S. commitment to provide a foreign tax credit.

Re Article 22 (Relief from Double Taxation), paragraph 1

Calculation of dividend gross-up and the deemed-paid credit.

U.S. parent companies calculate their U.S. taxes based on the income received from certain of their foreign subsidiaries[1] plus the foreign taxes credited to this income.

Under U.S. law (Section 902 of the Internal Revenue Code), when a U.S. parent receives dividends from its Controlled Foreign Corporation (CFC), the taxes paid to the foreign government by the CFC are "deemed paid" by the U.S. parent. These deemed paid

[1]If a U.S. corporation owns ten percent or more of the voting stock of a foreign corporation from which it receives a dividend, it will be deemed to have paid the foreign income taxes paid by the subsidiary attributable to that dividend. The "deemed paid" (or "indirect") foreign tax credit extends to taxes paid on dividends distributed by second and third tier foreign corporations if the parent of each meets the ten percent voting stock requirement. But, for these lower tier subsidiaries, the U.S. parent must have an indirect ownership in such subsidiaries of at least five percent.

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taxes are added to the direct foreign withholding taxes paid for purposes of calculating the foreign tax credit.

The deemed paid credit is calculated as the ratio of dividends received to after-tax foreign earnings multiplied by creditable foreign taxes, which usually only include income taxes but may in special cases include other taxes that are considered to be equivalent" to income taxes or to be paid "in lieu" of an income tax.

The deemed-paid credit is calculated as:

$$\text{Deemed-paid Credit} = \frac{\text{Dividends received}}{\text{After-tax net earnings and profits of foreign corporation}} \times \text{creditable foreign taxes}$$

The U.S. parent must "gross up" the dividend received from the foreign subsidiary by the amount of the foreign taxes deemed paid. The total grossed-up foreign dividend equals the actual dividend received plus the foreign taxes deemed paid on this dividend.

The total foreign tax credit allowed equals the sum of withholding taxes plus the deemed paid credit. The foreign tax credit is limited to the ratio of foreign-source taxable income to total worldwide taxable income multiplied by the U.S. tax liability. This approach allows an averaging of high and low foreign tax rates. Such averaging, however, can take place only

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within a single income basket. The Code provides for a number of baskets for various classes of income for purposes of calculating foreign tax credits (e.g., passive income, high withholding tax, and financial services income). Excess FTCs may be carried forward five years and backward two years.

When dividends paid by the CFC exceed current earnings, the excess of current dividends over current income is attributed to previous years' undistributed incomes in reverse order, last year first. Since 1986, firms are required to pool all post-1986 CFC earnings and foreign taxes to construct a multiple-year average foreign tax rate for purposes of calculating the indirect FTC. The pooling of earnings and profits is used only for determining the amount of the deemed foreign tax credit and is not used for other purposes.

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Example: A U.S. parent has a wholly-owned Austrian subsidiary that pays out all of its income. Assume Austria imposes a 34 percent corporate income tax and a 5 percent dividend withholding tax. The U.S. taxes worldwide income at a 35 percent rate.

Pre-tax earnings of Austrian CFC	100.0
Austrian corporate income tax (34%)	34.0
Post-tax Austrian earnings	66.0
Dividend withholding tax (5%)	3.3
Foreign creditable tax	
Direct withholding tax	3.3
Deemed-paid credit for subsidiary's income tax	34.0
Creditable taxes	37.3
U.S. Income	
Dividend received	66.0
Austrian deemed-paid tax	34.0
Total grossed-up income	100.0
U.S. tax (35%)	35.0
Foreign tax credit	35.0
Net U.S. tax due	0

Re Article 23 (Treatment of losses incurred in Austrian PEs)

Article 23 paragraph 2 requires that losses incurred in an Austrian permanent establishment of a U.S. corporation must be granted a carry forward under the same conditions which would be applicable if that permanent establishment were one of an Austrian enterprise. In the latter case, losses can be carried forward over a period of 7 years to the extent that they cannot be offset against other income of that enterprise.

Re Article 23 (Distribution of appreciated property)

Under U.S. law, a U.S. corporation that is liquidated is taxed on the gain on the appreciated property it distributes. There is an

exception in the case of property distributed to a U.S. parent corporation by a U.S. subsidiary controlled 80 percent or more by the parent, on the theory that the appreciation on that property will be taxable when the parent disposes of the asset. The exception does not apply when property is distributed to parent corporations that are tax-exempt, and generally it does not apply when property is distributed to foreign parent corporations, because the tax is deferred only if it can be collected on a subsequent distribution. As this distinction in tax treatment is not dependent on whether the stock is owned by foreign or U.S. persons, but on whether the recipients are subject to U.S. corporate tax, it is understood that this rule is not inconsistent with paragraph 5 of Article 23.

Re Article 23 (Partnership withholding)

U.S. law requires that a partnership that derives income effectively connected with a U.S. trade or business withhold 20 percent of distributions to foreign partners. Such withholding does not apply to distributions to U.S. partners. The withholding tax is not a final liability, but is a prepayment of tax which will be refunded to the extent that it exceeds the partner's liability. It is understood that this is a reasonable collection mechanism, not in conflict with Article 23.

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Re Article 23 (S corporation election)

U.S. law permits a small corporation (35 or fewer individual shareholders) to elect to have its income taxed in the hands of the shareholders, rather than at the corporate level, as if it were a partnership. This election is available only if all the shareholders are U.S. citizens or residents, who are fully subject to U.S. tax at the individual level, so that, for example, they can take into account losses, deductions or credits. Nonresident aliens are not subject to U.S. tax on a net basis, and, therefore, do not qualify as S corporation shareholders. This election distinguishes between U.S. and foreign persons not on the basis of nationality, but because they are taxed differently. It is understood that this distinction is not in conflict with Article 23.

Re Article 24 (The nature of the mutual agreement procedure)

The mutual agreement procedure is not intended to create new treaty law but is fully governed by the provisions of the treaty and of internal legislation. One of its main purposes is to find a coordinated understanding of treaty provisions that leaves room for diverging interpretations. The mutual agreement procedure shall open the possibility to find an agreed position between the contracting parties as to which interpretation shall be given precedence in order to reflect best the real intention of the treaty.

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Re Article 25 (Exchange of information)

The Contracting States agree that appropriate committees of the U.S. Congress and the U.S. General Accounting Office (GAO) shall be afforded access to the information exchanged under this treaty where such access is necessary to carry out their oversight responsibilities. Any information provided to these organizations shall be used only for such purposes. The effect of this understanding is to make clear that the treaty authorizes the Finance Committee, the Ways and Means Committee and the Joint Committee on Taxation, as well as the GAO, to have access to all information received under the treaty under the above-described conditions.

On the part of Austria under the same conditions disclosure of information to the Accounting Court (Rechnungshof) and to Committees of Parliament is permitted.

Re Article 25 (Judicial procedures)

It is understood that a request for administrative assistance duly presented by the competent authority and meeting the requirements as set out in Article 25 cannot be rejected by the requested State merely because the request was made for the purposes of pending judicial proceedings in tax matters.

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Re Article 25 (penal investigations)

It is understood that the term "penal investigations" applies to proceedings carried out by either judicial or administrative bodies. For example, the commencement of a criminal investigation by the Criminal Investigation Division of the Internal Revenue Service constitutes a penal investigation.

Re Article 25 (bank secrecy)

On the basis of paragraph 19 of the OECD Commentary on Article 26 of the OECD Model Convention, it is agreed that provisions on bankers' discretion (bank secrecy rules) do not constitute a professional, trade, business, industrial, or commercial secret. This opinion is, inter alia, supported by German and Austrian jurisprudence (Decision of the German Bundesfinanzhof of 20 February 1979, VII R 1 6/78, BStBl. 11, 1979, 268 and Ruling of the Verwaltungsgerichtshof of 27 February 1992, 86/17/0169, (ÖStZB 1992, 580).

Re Article 25 (No recovery of penalties)

It is understood that the mutual assistance in the recovery of taxes includes interest but does not include the collection of fines or other penalties.

Re Article 25 ("Essential-interest-clause")

It is agreed that the "essential interest clause" can be invoked by a Contracting State if he or she is requested to recover a tax

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on behalf of the other Contracting State and if he or she denies that the tax in question is levied in accordance with the provisions of this Convention.

Re Article 25 (Ambulatory application of the Article)

It is understood that for purposes of this Article the requested State shall be obligated to obtain the requested information according to its procedures at the time of the request.

Re Article 25 (Mutual assistance) and Article 28 (Entry into Force)

It is understood that the mutual assistance article (Article 25) does not allocate taxation rights; it is therefore not confined to taxes levied, or to information coming into existence, after the date referred to in the second sentence of paragraph 2 of Article 28.

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THE STATE SECRETARY
FOR
FOREIGN AFFAIRS

Vienna, May 31, 1996

Excellency,

I have the honor to acknowledge receipt of your Note of May 31, 1996 which reads as follows:

"I have the honor to refer to the Convention signed today between the Republic of Austria and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. There is attached to this note a Memorandum of Understanding with respect to certain provisions of that Convention for the purpose of giving guidance both to the taxpayers and to the tax authorities of our two countries in interpreting these provisions.

If the provisions stated in the Memorandum of Understanding meet with the approval of the Government of the Republic of Austria, this note and your reply thereto will indicate that our Governments share a common understanding."

I have the honor to inform you that my Government agrees to the proposals contained in your Note.

Accept, Excellency, the expression of my highest consideration.

R. Ferrero-Waldner

(Dr. Benita FERRERO-WALDNER)

Dr. Swanee HUNT
Ambassador of the United States
of America

Vienna

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