111TH CONGRESS
1st Session

SENATE

TREATY DOC.
111–3

PROTOCOL AMENDING TAX CONVENTION WITH NEW ZEALAND

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND NEW ZEALAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME, SIGNED ON DECEMBER 1, 2008, AT WASHINGTON

JUNE 16, 2009.—Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

79–112 WASHINGTON : 2009

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *June 16, 2009*

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to its ratification, the Protocol Amending the Convention between the United States of America and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, signed on December 1, 2008, at Washington (the "proposed Protocol"). I also transmit for the information of the Senate the report of the Department of State, which includes an Overview of the proposed Protocol.

This proposed Protocol provides for the elimination of withholding taxes on certain cross-border direct dividend payments and on cross-border interest payments to certain financial enterprises. The proposed Protocol reduces the existing Convention's 10-percent limit on withholding taxes on cross-border payments of royalties to 5 percent.

The proposed Protocol contains a comprehensive provision designed to prevent "treaty shopping," which is the inappropriate use of a tax treaty by third-country residents. The proposed Protocol also provides for the exchange of information between tax authorities of the two countries to facilitate the administration of each country's tax laws.

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

BARACK OBAMA.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, May 21, 2009.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Protocol Amending the Convention between the United States of America and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on December 1, 2008, at Washington (the "proposed Protocol"). The proposed Protocol was negotiated to bring the existing income tax Convention with New Zealand (the "existing Convention") into closer conformity with current U.S. tax treaty policy, and in recognition of the importance of the United States' economic relations with New Zealand. I recommend that the proposed Protocol be transmitted to the Senate for its advice and consent to ratification.

The proposed Protocol provides for the elimination of withholding taxes on certain cross-border direct dividend payments and on cross-border interest payments to certain financial enterprises. It reduces the existing Convention's 10-percent limit on withholding taxes on cross-border payments of royalties to 5 percent.

The proposed Protocol contains a comprehensive provision designed to prevent "treaty shopping," which is the inappropriate use of a tax treaty by third-country residents. It also provides for the exchange of information between tax authorities in the two countries to facilitate the administration of each country's tax laws. An overview of key provisions of the proposed Protocol is enclosed with this report.

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

Respectfully submitted.

HILLARY RODHAM CLINTON.

Enclosures: as stated.

OVERVIEW

The Protocol amending the income tax Convention with New Zealand (proposed Protocol) was negotiated to bring the existing Convention, concluded in 1982 (existing Convention), into closer conformity with current U.S. tax treaty policy. There are, as with all bilateral tax conventions, some variations from these norms. In the proposed Protocol, these differences reflect particular aspects of New Zealand law and treaty policy, the interaction of U.S. and New Zealand law, and U.S.-New Zealand economic relations.

TAXATION OF INVESTMENT INCOME

The withholding tax rates on investment income in the proposed Protocol are generally the same as or lower than those in the existing Convention. The proposed Protocol reduces or eliminates source-country taxation of dividends distributed by a company resident in one Contracting State to a resident in the other Contracting State. More specifically, the proposed Protocol provides for the elimination of source-country taxation of certain direct dividends (i.e., where an 80 percent ownership threshold is met). The proposed Protocol also generally allows for taxation at source of 5 percent on dividends when a 10 percent ownership threshold is met, and 15 percent on all other dividends.

The proposed Protocol updates the treatment of dividends paid by U.S. Regulated Investment Companies and Real Estate Investment Trusts to prevent the inappropriate use of those structures to avoid U.S. withholding taxes on outbound dividends.

The proposed Protocol eliminates source-country taxation of interest paid to banks and certain other financial enterprises when the payer of the interest is not a related party. Consistent with current U.S. tax treaty policy, source-country tax maybe imposed on certain contingent interest and payments from a U.S. Real Estate Mortgage Investment Conduit.

The proposed Protocol reduces the existing Convention's 10 percent limit on source-country withholding tax on cross-border payments of royalties to 5 percent.

TAXATION OF BUSINESS INCOME

The proposed Protocol preserves the U.S. right to impose its branch profits tax on U.S. branches of New Zealand corporations. The proposed Protocol also accommodates a provision of existing U.S. domestic law that attributes to a permanent establishment income that is earned during the life of the permanent establishment but is not received until after the permanent establishment no longer exists.

TAXATION OF PERSONAL SERVICES INCOME

The proposed Protocol replaces the existing Convention's rules regarding the taxation of independent personal services by individuals. Under the proposed Protocol, an individual performing services in the other country will become taxable in the other country only if the individual has a fixed place of business in that country.

ANTI-ABUSE PROVISIONS

The proposed Protocol replaces the existing Convention's "Limitation on Benefits" article with a comprehensive and modernized provision that is consistent with current U.S. tax treaty practice. The updated provision is designed to address "treaty shopping," which is the inappropriate use of a tax treaty by third-country residents.

The proposed Protocol incorporates updated rules that provide that a former citizen or long-term resident of the United States may, for the period of ten years following the loss of such status, be taxed in accordance with the laws of the United States. The proposed Protocol also coordinates the U.S. and New Zealand tax rules to address the new U.S. "mark-to-market" provisions that apply to individuals who relinquish U.S. citizenship or terminate long-term residency.

EXCHANGE OF INFORMATION

The proposed Protocol replaces the existing Convention's tax information exchange provisions with updated rules that are consistent with current U.S. tax treaty practice. The proposed Protocol allows the tax authorities of each country to exchange information relevant to carrying out the provisions of the Convention or the domestic tax laws of either country. The proposed Protocol allows the United States to obtain information (including from financial institutions) from New Zealand whether or not New Zealand needs the information for its own tax purposes.

ENTRY INTO FORCE

The proposed Protocol will enter into force on the date of the later note in an exchange of diplomatic notes in which the Parties notify each other that their respective applicable procedures for ratification have been satisfied. It will have effect, with respect to taxes withheld at source, for amounts paid or credited on or after the first day of the second month next following the date on which the proposed Protocol enters into force. With respect to other taxes, the proposed Protocol will have effect in the United States for taxable years beginning on or after the first day of January next following the date upon which the proposed Protocol enters into force, and in New Zealand for taxable years beginning on or after the first day of April next following the date on which the proposed Protocol enters into force. The provisions of the proposed Protocol on exchange of information, however, will have effect from the date of entry into force of the proposed Protocol.

PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND NEW ZEALAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

The Government of the United States of America and the Government of New Zealand, desiring to amend the Convention Between the United States of America and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Wellington on July 23, 1982 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article I

1. Paragraph 3 of Article 1 (General Scope) of the Convention shall be deleted and replaced by the following:

"3. Except to the extent provided in paragraph 4, this Convention shall not affect the taxation by a Contracting State of its residents (as determined under Article 4 (Residence)) and its citizens. Notwithstanding the other provisions of this Convention, a former citizen or former long-term resident of a Contracting State may, for the period of ten years following the loss of such status, be taxed in accordance with the laws of that Contracting State."

2. Article 1 (General Scope) of the Convention shall be amended by adding the following paragraphs:

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

(i) for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 24 (Mutual Agreement Procedure) of this Convention; and

(ii) the provisions of Article XVII (National Treatment) of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 23 (Non-Discrimination) of this Convention.

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

6. An item of income, profit or gain derived through an entity that is fiscally transparent under the laws of either Contracting State shall be considered to be derived by a resident of a State to the extent that the item is treated for purposes of the taxation law of such Contracting State as the income, profit or gain of a resident."

Article II

Article 2 (Taxes Covered) of the Convention shall be deleted and replaced by the following:

"Article 2

TAXES COVERED

1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property.

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

(a) in the case of New Zealand: the income tax (hereinafter referred to as New Zealand tax;

(b) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security and unemployment taxes), and the Federal excise taxes imposed with respect to private foundations (hereinafter referred to as United States tax).

4. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any changes that have been made in their respective taxation or other laws that significantly affect their obligations under this Convention."

Article III

1. Paragraph 1(b) of Article 3 (General Definitions) of the Convention shall be deleted and replaced by the following:

"(b) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes according to the laws of the state in which it is organized;"

2. Paragraph 1(d) of Article 3 (General Definitions) of the Convention shall be deleted and replaced by the following:

"(d) 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; the terms also include an enterprise carried on by a resident of a Contracting State through an entity that is treated as fiscally transparent in that Contracting State;"

3. Paragraph 1(g) of Article 3 (General Definitions) of the Convention shall be deleted and replaced by the following:

"(g) the term "United States" means the United States of America, and includes the states thereof and the District of Columbia; such term also includes the territorial sea thereof, the sea bed and subsoil of the submarine areas adjacent to that territorial sea, and any area beyond that territorial sea, over which the United States exercise sovereign rights in accordance with international law; the term, however, does not include Puerto Rico, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, Guam or any other United States possession or territory;"

4. Paragraph 1(h) of Article 3 (General Definitions) of the Convention shall be deleted and replaced by the following:

"(h) the term "New Zealand" means the territory of New Zealand but does not include Tokelau; it also includes any area beyond the territorial sea designated under New Zealand legislation and in accordance with international law as an area in which New Zealand may exercise sovereign rights with respect to natural resources;"

5. Paragraph 1(j) of Article 3 (General Definitions) of the Convention shall be amended by deleting the final "." and replacing it with ";"

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

"(k) the term "national" of a Contracting State means:

(i) any individual possessing the nationality or citizenship of that State; and

(ii) any legal person, partnership or association deriving its status as such from the laws in force in that State;

(l) the term "pension fund" means any person established in a Contracting State that is:

(i) operated principally either:

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

(B) to earn income for the benefit of one or more persons described in clause (A); and

(ii) is either:

(A) in the case of New Zealand, a superannuation scheme registered under the Superannuation Schemes Act 1989, a KiwiSaver Scheme registered under the KiwiSaver Act 2006, the New Zealand Superannuation Fund, or the Government Superannuation Fund; or

(B) in the case of the United States, generally exempt from income taxation in the United States;

(m) the term "enterprise" applies to the carrying on of any business; and

(n) the term "business" includes the performance of professional services and other activities of an independent character."

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

"3. As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, or the competent authorities agree to a common meaning pursuant to the provisions of Article 24 (Mutual Agreement Procedure), have the meaning which it has at that time under the law of that State concerning the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."

Article IV

1. Paragraph 1 of Article 4 (Residence) of the Convention shall be deleted and replaced by the following:

"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 domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State. The term "resident of a Contracting State" also includes:

(a) a pension fund established in that State; and

(b) an organization that is established and maintained in that State exclusively for religious, charitable, scientific, artistic, cultural, or educational purposes,

notwithstanding that all or part of its income or gains may be exempt from tax under the domestic law of that State."

2. Paragraph 2(c) of Article 4 (Residence) of the Convention shall be amended by deleting the word "citizen" and replacing it with the word "national".

3. Paragraph 2(d) of Article 4 (Residence) of the Convention shall be amended by deleting the word "citizen" and replacing it with the word "national".

4. Paragraph 4 of Article 4 (Residence) of the Convention shall be amended by deleting the words "shall be treated as a resident of neither Contracting State for purposes of the Convention" and replacing them with the words "will not be treated as a resident of either Contracting State for purposes of its claiming any benefits provided by the Convention".

Article V

Article 7 (Business Profits) of the Convention shall be amended by adding the following paragraphs:

"8. In applying this Article, paragraph 6 of Article 10 (Dividends), paragraph 4 of Article 11 (Interest), paragraph 4 of Article 12 (Royalties), and paragraph 6 of Article 13 (Alienation of Property), any income or gain attributable to a permanent establishment during its existence is taxable in the Contracting State where such permanent establishment is situated even if the payments are deferred until such permanent establishment has ceased to exist.

9. Where:

(a) a resident of a Contracting State beneficially owns (whether directly or through one or more interposed fiscally transparent entities or trusts) a share of the profits of a business of an enterprise carried on in the other Contracting State by the trustee(s) of a trust other than a trust which is treated as a company for tax purposes; and

(b) in relation to that enterprise, that resident would have a permanent establishment in that other State if the resident carried on the business of the enterprise in its own capacity,

then the business of the enterprise carried on by the trustee(s) shall be deemed to be a business carried on in the other State by that resident through a permanent establishment situated in that other State and the resident's share of profits may be taxed in the other State but only so much of them as is attributable to that permanent establishment."

Article VI

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

"Article 10

DIVIDENDS

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

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

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

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

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

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

   (a) satisfies the conditions of clause (i) or (ii) of paragraph 2(c) of Article 16 (Limitation on Benefits);

   (b) satisfies the conditions of clauses (i) and (ii) of paragraph 2(e) of Article 16, provided that the company satisfies the conditions described in paragraph 3 of that Article with respect to the dividends; or

   (c) has received a determination pursuant to paragraph 4 of Article 16 with respect to this paragraph.

4. (a) Paragraphs 2(a) and 3 shall not apply in the case of dividends paid by a U.S. Regulated Investment Company (RIC) or a U.S. Real Estate Investment Trust (REIT). In the case of dividends paid by a RIC, paragraph 2(b) shall apply. In the case of dividends paid by a REIT, paragraph 2(b) shall apply only if:

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

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

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

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

5. For purposes of this Article, the term "dividends" means income from shares or other rights participating in profits, as well as income that is subjected to the same taxation

treatment as income from shares under the laws of the State of which the payer is a resident.

6. The provisions of paragraphs 2 and 3 shall not apply if the beneficial owner 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, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 (Business Profits) shall apply.

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

8. A company that is a resident of New Zealand and that has a permanent establishment in the United States or that is subject to tax in the United States on a net basis on its income that may be taxed in the United States under Article 6 (Income from Real Property) or under paragraph 1 of Article 13 (Alienation of Property) 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 on only the portion of the business profits of the company attributable to the permanent establishment and the portion of the income that is subject to tax under Article 6 or under paragraph 1 of Article 13 that, in the United States, represents the dividend equivalent amount of such profits or income.

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

   (a) satisfies the conditions of clause (i) or (ii) of paragraph 2(c) of Article 16 (Limitation on Benefits);

   (b) satisfies the conditions of clauses (i) and (ii) of paragraph 2(e) of Article 16, provided that the company satisfies the conditions described in paragraph 3 of that Article with respect to an item of income, profit or gain described in paragraph 8 of this Article; or

   (c) has received a determination pursuant to paragraph 4 of Article 16 with respect to this paragraph."

Article VII

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

"Article 11

INTEREST

1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a

resident of the other Contracting State, the tax so charged shall not exceed 10 percent of the gross amount of the interest.

3. Notwithstanding paragraph 2, interest shall be exempt from tax by the Contracting State where it arises if the interest is:

   (a) beneficially owned by the other Contracting State or an instrumentality of that Contracting State which is not subject to tax on its income by that State;

   (b) beneficially owned by a resident of the other Contracting State with respect to debt obligations guaranteed or insured by that State or an instrumentality of that State which is not subject to tax on its income by that State; or

   (c) beneficially owned by a resident of the other Contracting State that is either:

      (i) a bank; or

      (ii) an enterprise substantially deriving its gross income from the active and regular conduct of a lending or finance business involving transactions with unrelated parties;

   that is unrelated to the payer of the interest. For purposes of this subparagraph (c), the term "lending or finance business" includes the business of:

      (A) making loans;

      (B) purchasing or discounting accounts receivable, notes, or installment obligations;

      (C) engaging in finance leasing (including entering into finance leases and purchasing, servicing, and disposing of finance leases and related leased assets);

      (D) issuing letters of credit or providing guarantees; or

      (E) providing charge and credit card services.

4. The provisions of paragraphs 2 and 3 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, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 (Business Profits) shall apply.

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

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

the laws of each Contracting State, due regard being had to the other provisions of the Convention.

7. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums or prizes attaching to such securities, bonds or debentures, and all other income that is subjected to the same taxation treatment as income from money lent by the taxation law of the Contracting State in which the income arises. Income dealt with in Article 10 (Dividends) and penalty charges for late payment shall not be regarded as interest for the purposes of this Convention.

8. Notwithstanding the provisions of paragraphs 1, 2 and 3:

   (a) interest arising in the United States that is contingent interest of a type that does not qualify as portfolio interest under United States law may be taxed by the United States but, if the beneficial owner of the interest is a resident of New Zealand, the interest may be taxed at a rate not exceeding 15 percent of the gross amount of the interest; and

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

9. In the case of the United States, the excess, if any, of the amount of interest allocable to the profits of a company resident in the other Contracting State that are either attributable to the permanent establishment in the United States or subject to tax in the United States under Article 6 (Income from Real Property) or paragraph 1 of Article 13 (Alienation of Property) over the interest paid by that permanent establishment or trade or business in the United States shall be deemed to arise in the United States and be beneficially owned by a resident of the other Contracting State. The tax imposed under this Article on such interest shall not exceed the rate provided for in paragraph 2, unless the company is described in paragraph 3, in which case it shall be exempt from such taxation in that other Contracting State.

10. Notwithstanding paragraph 3, interest referred to in subparagraph (c) of that paragraph may be taxed in the State in which it arises at a rate not exceeding 10 percent of the gross amount of the interest if:

   (a) in the case of interest arising in New Zealand, it is paid by a person that has not paid approved issuer levy in respect of the interest. This subparagraph (a) shall not apply if New Zealand does not have an approved issuer levy, or the payer of the interest is not eligible to elect to pay the approved issuer levy, or if the rate of the approved issuer levy payable in respect of such interest exceeds two percent of the gross amount of the interest. For the purposes of this Article, "approved issuer levy" includes any identical or substantially similar charge payable by the payer of interest arising in New Zealand enacted after the date of this Convention in place of approved issuer levy; or

   (b) it is paid as part of an arrangement involving back-to-back loans or other arrangement that is economically equivalent and intended to have a similar effect to back-to-back loans.

11. Nothing in this Article shall be construed as restricting, in any manner, the right of a Contracting State to apply any anti-avoidance provisions of its taxation law."

Article VIII

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

"Article 12

ROYALTIES

1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 5 percent of the gross amount of the royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematographic films, films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. The term "royalties" also includes income or gains from the alienation of any property or rights described in this paragraph to the extent that such income or gains are contingent on productivity, use or disposition of such property or rights.

4. The provisions of paragraph 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, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 (Business Profits) shall apply.

5. (a) Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether the person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment then such royalties shall be deemed to arise in the State in which the permanent establishment is situated.

   (b) Where subparagraph (a) does not operate to deem royalties as arising in either Contracting State and the royalties relate to the use of, or the right to use, in one of the Contracting States, any property or right described in paragraph 3, the royalties shall be deemed to arise in that State.

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

ARTICLE IX

1. Paragraph 6 of Article 13 (Alienation of Property) of the Convention shall be deleted and replaced by the following:

"6. Income or gains from the alienation of personal property which are attributable to a permanent establishment which an enterprise of a Contracting State has or had in the other Contracting State, and gains from the alienation of such permanent establishment (alone or with the whole enterprise) may be taxed in that other State."

2. Article 13 (Alienation of Property) of the Convention shall be amended by adding the following new paragraph 7:

"7. Where an individual who, upon ceasing to be a resident of one of the Contracting States, is treated under the taxation law of that State as having alienated any property for its fair market value and is taxed in that State by reason thereof, the individual may elect to be treated for purposes of taxation in the other Contracting State as if the individual had, immediately before ceasing to be a resident of the first-mentioned State, alienated and reacquired such property for an amount equal to its fair market value at such time."

3. Article 13 (Alienation of Property) of the Convention shall be amended by renumbering the current paragraph 7 as new paragraph 8.

Article X

1. Article 14 (Independent Personal Services) of the Convention shall be deleted and the succeeding Articles shall not be renumbered.

2. Paragraph 4 of Article 6 (Income from Real Property) shall be amended by deleting the words "and to income from real property used for the performance of independent personal services".

3. Paragraph 2(c) of Article 15 (Dependent Personal Services) shall be amended by deleting the words "or a fixed base".

4. Paragraph 1 of Article 17 (Artistes and Athletes) shall be amended by deleting the words "Articles 14 (Independent Personal Services) and" and replacing them with the word "Article".

5. Paragraph 2 of Article 17 (Artistes and Athletes) shall be amended by deleting the words "Articles 7 (Business Profits) and 14 (Independent Personal Services)", and replacing them with the words "Article 7 (Business Profits)".

6. Paragraph 3 of Article 19 (Government Service) shall be amended by deleting the words "14 (Independent Personal Services),".

Article XI

Article 16 (Limitation on Benefits) of the Convention shall be deleted and replaced by the following:

"Article 16

LIMITATION ON BENEFITS

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

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

(a) an individual;

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

(c) a company, if:

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

(A) its principal class of shares is primarily traded on one or more recognized stock exchanges located in the Contracting State of which the company is a resident; or

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

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

(d) a person described in paragraphs 1(a) or 1(b) of Article 4 (Residence) of this Convention, provided that, in the case of a person described in subclause (A) of clause (i) of paragraph 1(l) of Article 3 (General Definitions), more than 50 percent of the person's beneficiaries, members or participants are individuals resident in either Contracting State; or

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

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

(ii) less than 50 percent of the person's gross income for the taxable year, as determined in the person's State of residence, is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State

entitled to the benefits of this Convention under subparagraph (a), subparagraph (b), clause (i) of subparagraph (c), or subparagraph (d) of this paragraph in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank that is not related to the payor).

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

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

(c) In determining whether a person is "engaged in the active conduct of a trade or business" in a Contracting State under subparagraph (a) of this paragraph, activities conducted by a partnership in which that person is a partner and activities conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or another person possesses at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons.

4. If a resident of a Contracting State is neither a qualified person pursuant to the provisions of paragraph 2 nor entitled to benefits with respect to an item of income under paragraph 3 of this Article the competent authority of the other Contracting State may, nevertheless, grant the benefits of this Convention, or benefits with respect to a specific item of income, if it determines that the establishment, acquisition or maintenance of such person and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention.

5. Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State derives income from the other Contracting State, and that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction, the tax benefits that would otherwise apply under the other provisions of the Convention will not apply to that income if the combined tax that is actually paid with respect to such income in the first-mentioned Contracting State and in the third

jurisdiction is less than 60 percent of the tax that would have been payable in the first-mentioned State if the income were earned in that Contracting State by the enterprise and were not attributable to the permanent establishment in the third jurisdiction. Any dividends, interest or royalties to which the provisions of this paragraph apply shall be subject to tax in the other Contracting State at a rate that shall not exceed 15 percent of the gross amount thereof. Any other income to which the provisions of this paragraph apply shall be subject to tax under the provisions of the domestic law of the other Contracting State, notwithstanding any other provision of the Convention. The provisions of this paragraph shall not apply if:

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

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

6. For purposes of this Article:

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

(i) 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 under the U.S. Securities Exchange Act of 1934;

(ii) the New Zealand Stock Market; and

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

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

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

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

Article XII

1. The last sentence of paragraph 1 of Article 22 (Relief from Double Taxation) shall be deleted and replaced by the following:

"For the purposes of this paragraph, the taxes referred to in paragraphs 3(a) and 4 of Article 2 (Taxes Covered) shall be considered income taxes."

2. Paragraph 2 of Article 22 (Relief from Double Taxation) of the Convention shall be amended by deleting the final sentence.

3. Paragraph 5 of Article 22 (Relief from Double Taxation) of the Convention shall be deleted and replaced by the following:

"5. No provision of this Convention relating to source of income shall apply in determining credits against United States tax for foreign taxes other than those referred to in paragraphs 3(a) and 4 of Article 2 (Taxes Covered)."

Article XIII

Article 23 (Non-Discrimination) of the Convention shall be deleted and replaced by the following:

"Article 23

NON-DISCRIMINATION

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith that is more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall also apply to persons who are not residents of one or both of the Contracting States. However, for the purposes of United States taxation, United States nationals who are subject to tax on a worldwide basis are not in the same circumstances as nationals of New Zealand who are not residents of the United States.

2. The taxation on a permanent establishment that an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities.

3. The provisions of paragraphs 1 and 2 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 purposes on account of civil status or family responsibilities that it grants to its own residents.

4. Except where the provisions of paragraph 1 of Article 9 (Associated Enterprises), paragraph 6 of Article 11 (Interest), or paragraph 6 of Article 12 (Royalties) apply, interest, royalties, and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of the first-mentioned resident, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.

5. 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 that is more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6. Nothing in this Article shall be construed as preventing the United States from imposing a tax as described in paragraph 8 of Article 10 (Dividends).

7. This Article shall not apply to any provision of the taxation laws of a Contracting State which is reasonably designed to prevent or defeat the avoidance or evasion of taxes."

Article XIV

Article 25 (Exchange of Information and Administrative Assistance) shall be deleted and replaced by the following:

"Article 25

EXCHANGE OF INFORMATION AND ADMINISTRATIVE ASSISTANCE

1. The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes of every kind imposed by a Contracting State to the extent that the taxation thereunder is not contrary to the Convention, including information relating to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, such taxes. The exchange of information is not restricted by paragraph 1 of Article 1 (General Scope) or Article 2 (Taxes Covered).

2. Any information received under this Article by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to above, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

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

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

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

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

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

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

6. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings).

7. Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto. This paragraph shall not impose upon either of the Contracting States the obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy.

8. The requested State shall allow representatives of the requesting State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination."

Article XV

Paragraph 1 of the Protocol to the Convention shall be deleted and replaced by the following:

"1. With reference to Articles 11 and 12:

If in any future double taxation convention with any other country, New Zealand agrees to limit its taxation at source on any interest or royalties to rates lower than the ones provided in this Convention, New Zealand shall notify the United States, and the Contracting States shall, at the request of the United States, and without undue delay, consult each other with a view to concluding an additional protocol to incorporate such lower rates into this Convention."

Article XVI

1. This Protocol shall be subject to ratification in accordance with the applicable procedures in the United States and New Zealand. The Contracting States shall notify each other in writing, through diplomatic channels, when their respective applicable procedures have been satisfied.

2. The Protocol shall enter into force on the date of the later of the notifications referred to in paragraph 1. The provisions of this Protocol shall have effect:

   (a) in respect of taxes withheld at source, for amounts paid or credited on or after the first day of the second month next following the date on which the Protocol enters into force;

   (b) in the United States, in respect of other taxes, for taxable periods beginning on or after the first day of January next following the date on which the Protocol enters into force;

   (c) in New Zealand, in respect of other taxes, for taxable periods beginning on or after the first day of April next following the date on which the Protocol enters into force.

3. Notwithstanding paragraph 2, the provisions of Article 25 (Exchange of Information and Administrative Assistance) shall have effect from the date of entry into force of this Protocol, without regard to the taxable period to which the matter relates."

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE at Washington, in duplicate, this first day of December 2008, in the English language.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

Robert M. Kimmitt

FOR THE GOVERNMENT OF
NEW ZEALAND: