EXPLANATION OF PROPOSED PROTOCOL TO THE INCOME TAX TREATY BETWEEN THE UNITED STATES AND BARBADOS

Scheduled for a Hearing

Before the

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

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of the
JOINT COMMITTEE ON TAXATION

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INTRODUCTION

This pamphlet,[1] prepared by the staff of the Joint Committee on Taxation, describes the proposed protocol to the existing income tax treaty between the United States and Barbados (the "proposed protocol").[2] The proposed protocol was signed on July 14, 2004. The Senate Committee on Foreign Relations has scheduled a public hearing on the proposed protocol for September 24, 2004.[3]

Part I of the pamphlet provides a summary of the proposed protocol. Part II provides a brief overview of U.S. tax laws relating to international trade and investment and of U.S. income tax treaties in general. Part III provides a brief overview of relevant Barbados tax laws. Part IV contains an article-by-article explanation of the proposed protocol. Part V contains a discussion of issues relating to the proposed protocol.

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[1] This pamphlet may be cited as follows: Joint Committee on Taxation, *Explanation of Proposed Protocol to the Income Tax Treaty Between the United States and Barbados* (JCX-55-04), September 16, 2004. References to "the Code" are to the U.S. Internal Revenue Code of 1986, as amended.

[2] The proposed protocol is accompanied by official understandings implemented by an exchange of diplomatic notes (the "notes," collectively).

[3] For a copy of the proposed protocol, *see* Senate Treaty Doc. 108-26.

I. SUMMARY

The principal purposes of the existing treaty between the United States and Barbados are to reduce or eliminate double taxation of income earned by residents of either country from sources within the other country and to prevent avoidance or evasion of the taxes of the two countries. The existing treaty also is intended to promote close economic cooperation between the two countries and to eliminate possible barriers to trade and investment caused by overlapping taxing jurisdictions of the two countries.

The existing treaty was signed in 1984 and was amended by a protocol signed in 1991. The treaty is broadly similar to other U.S. income tax treaties, the 1996 U.S. model income tax treaty (the “U.S. model”), and the 1992 model income tax treaty of the Organization for Economic Cooperation and Development, as updated (the “OECD model”), with some substantive deviations from these treaties and models. The proposed protocol amends three articles of the existing treaty.

The proposed protocol replaces Article 22 (Limitation on Benefits) of the existing treaty with a new article designed primarily to eliminate certain inappropriate benefits that are available under the existing treaty. Specifically, the existing treaty allows a company that is legally resident in Barbados to claim the benefits of reduced U.S. withholding tax rates by virtue of being publicly traded, even in cases in which the company has no meaningful economic presence in Barbados and is subject to only nominal levels of taxation there. This aspect of the existing treaty has been a key element in some recent “corporate inversion” transactions that have been used by U.S.-based multinational enterprises to erode the U.S. tax base. The proposed protocol modifies the limitation-on-benefits provision of the existing treaty to prevent this and similar abuses. The proposed protocol also updates the provision in several respects to reflect recent developments in U.S. treaty policy.

The proposed protocol amends Article 26 (Exchange of Information) of the existing treaty, to promote greater conformity with more recent U.S. income tax treaties in this regard.

In addition, the proposed protocol expands the “saving clause” provision in Article 1 (General Scope) of the existing treaty to allow the United States to tax former long-term residents whose termination of residency has as one of its principal purposes the avoidance of tax. This provision allows the United States to apply amendments made in 1996 to the special tax rules under section 877 of the Code.

II. OVERVIEW OF U.S. TAXATION OF INTERNATIONAL TRADE AND INVESTMENT AND U.S. TAX TREATIES

This overview briefly describes certain U.S. tax rules relating to foreign income and foreign persons that apply in the absence of a U.S. tax treaty. This overview also discusses the general objectives of U.S. tax treaties and describes some of the modifications to U.S. tax rules made by treaties.

A. U.S. Tax Rules

The United States taxes U.S. citizens, residents, and corporations on their worldwide income, whether derived in the United States or abroad. The United States generally taxes nonresident alien individuals and foreign corporations on all their income that is effectively connected with the conduct of a trade or business in the United States (sometimes referred to as "effectively connected income"). The United States also taxes nonresident alien individuals and foreign corporations on certain U.S.-source income that is not effectively connected with a U.S. trade or business.

Income of a nonresident alien individual or foreign corporation that is effectively connected with the conduct of a trade or business in the United States generally is subject to U.S. tax in the same manner and at the same rates as income of a U.S. person. Deductions are allowed to the extent that they are related to effectively connected income. A foreign corporation also is subject to a flat 30-percent branch profits tax on its "dividend equivalent amount," which is a measure of the effectively connected earnings and profits of the corporation that are removed in any year from the conduct of its U.S. trade or business. In addition, a foreign corporation is subject to a flat 30-percent branch-level excess interest tax on the excess of the amount of interest that is deducted by the foreign corporation in computing its effectively connected income over the amount of interest that is paid by its U.S. trade or business.

U.S.-source fixed or determinable annual or periodical income of a nonresident alien individual or foreign corporation (including, for example, interest, dividends, rents, royalties, salaries, and annuities) that is not effectively connected with the conduct of a U.S. trade or business is subject to U.S. tax at a rate of 30 percent of the gross amount paid. Certain insurance premiums earned by a nonresident alien individual or foreign corporation are subject to U.S. tax at a rate of one or four percent of the premiums. These taxes generally are collected by means of withholding.

Specific statutory exemptions from the 30-percent withholding tax are provided. For example, certain original issue discount and certain interest on deposits with banks or savings institutions are exempt from the 30-percent withholding tax. An exemption also is provided for certain interest paid on portfolio debt obligations. In addition, income of a foreign government or international organization from investments in U.S. securities is exempt from U.S. tax.

U.S.-source capital gains of a nonresident alien individual or a foreign corporation that are not effectively connected with a U.S. trade or business generally are exempt from U.S. tax, with two exceptions: (1) gains realized by a nonresident alien individual who is present in the United States for at least 183 days during the taxable year, and (2) certain gains from the disposition of interests in U.S. real property.

Rules are provided for the determination of the source of income. For example, interest and dividends paid by a U.S. citizen or resident or by a U.S. corporation generally are considered U.S.-source income. Conversely, dividends and interest paid by a foreign corporation generally are treated as foreign-source income. Special rules apply to treat as foreign-source income (in whole or in part) interest paid by certain U.S. corporations with foreign businesses and to treat as U.S.-source income (in whole or in part) dividends paid by certain foreign corporations with U.S. businesses. Rents and royalties paid for the use of property in the United States are considered U.S.-source income.

Because the United States taxes U.S. citizens, residents, and corporations on their worldwide income, double taxation of income can arise when income earned abroad by a U.S. person is taxed by the country in which the income is earned and also by the United States. The United States seeks to mitigate this double taxation generally by allowing U.S. persons to credit foreign income taxes paid against the U.S. tax imposed on their foreign-source income. A fundamental premise of the foreign tax credit is that it may not offset the U.S. tax liability on U.S.-source income. Therefore, the foreign tax credit provisions contain a limitation that ensures that the foreign tax credit offsets only the U.S. tax on foreign-source income. The foreign tax credit limitation generally is computed on a worldwide basis (as opposed to a "per-country" basis). The limitation is applied separately for certain classifications of income. In addition, a special limitation applies to the credit for foreign taxes imposed on foreign oil and gas extraction income.

For foreign tax credit purposes, a U.S. corporation that owns 10 percent or more of the voting stock of a foreign corporation and receives a dividend from the foreign corporation (or is otherwise required to include in its income earnings of the foreign corporation) is deemed to have paid a portion of the foreign income taxes paid by the foreign corporation on its accumulated earnings. The taxes deemed paid by the U.S. corporation are included in its total foreign taxes paid and its foreign tax credit limitation calculations for the year in which the dividend is received.

B. U.S. Tax Treaties

The traditional objectives of U.S. tax treaties have been the avoidance of international double taxation and the prevention of tax avoidance and evasion. Another related objective of U.S. tax treaties is the removal of the barriers to trade, capital flows, and commercial travel that may be caused by overlapping tax jurisdictions and by the burdens of complying with the tax laws of a jurisdiction when a person's contacts with, and income derived from, that jurisdiction are minimal. To a large extent, the treaty provisions designed to carry out these objectives supplement U.S. tax law provisions having the same objectives; treaty provisions modify the generally applicable statutory rules with provisions that take into account the particular tax system of the treaty partner.

The objective of limiting double taxation generally is accomplished in treaties through the agreement of each country to limit, in specified situations, its right to tax income earned from its territory by residents of the other country. For the most part, the various rate reductions and exemptions agreed to by the source country in treaties are premised on the assumption that the country of residence will tax the income at levels comparable to those imposed by the source country on its residents. Treaties also provide for the elimination of double taxation by requiring the residence country to allow a credit for taxes that the source country retains the right to impose under the treaty. In addition, in the case of certain types of income, treaties may provide for exemption by the residence country of income taxed by the source country.

Treaties define the term “resident” so that an individual or corporation generally will not be subject to tax as a resident by both treaty countries. Treaties generally provide that neither country will tax business income derived by residents of the other country unless the business activities in the taxing jurisdiction are substantial enough to constitute a permanent establishment or fixed base in that jurisdiction. Treaties also contain commercial visitation exemptions under which individual residents of one country performing personal services in the other will not be required to pay tax in that other country unless their contacts exceed certain specified minimums (e.g., presence for a set number of days or earnings in excess of a specified amount). Treaties address passive income such as dividends, interest, and royalties from sources within one country derived by residents of the other country either by providing that such income is taxed only in the recipient's country of residence or by reducing the rate of the source country's withholding tax imposed on such income. In this regard, the United States agrees in its tax treaties to reduce its 30-percent withholding tax (or, in the case of some income, to eliminate it entirely) in return for reciprocal treatment by its treaty partner.

In its treaties, the United States, as a matter of policy, generally retains the right to tax its citizens and residents on their worldwide income as if the treaty had not come into effect. The United States also provides in its treaties that it will allow a credit against U.S. tax for income taxes paid to the treaty partners, subject to the various limitations of U.S. law.

The objective of preventing tax avoidance and evasion generally is accomplished in treaties by the agreement of each country to exchange tax-related information. Treaties generally provide for the exchange of information between the tax authorities of the two countries when such information is necessary for carrying out provisions of the treaty or of their domestic tax laws. The obligation to exchange information under the treaties typically does not require either country to carry out measures contrary to its laws or administrative practices or to supply information that is not obtainable under its laws or in the normal course of its administration or that would reveal trade secrets or other information the disclosure of which would be contrary to public policy. The Internal Revenue Service (the “IRS”), and the treaty partner's tax authorities, also can request specific tax information from a treaty partner. This can include information to be used in a criminal investigation or prosecution.

Administrative cooperation between countries is enhanced further under treaties by the inclusion of a “competent authority” mechanism to resolve double taxation problems arising in individual cases and, more generally, to facilitate consultation between tax officials of the two governments.

Treaties generally provide that neither country may subject nationals of the other country (or permanent establishments of enterprises of the other country) to taxation more burdensome than the taxation it imposes on its own nationals (or on its own enterprises). Similarly, in general, neither treaty country may discriminate against enterprises owned by residents of the other country.

At times, residents of countries that do not have income tax treaties with the United States attempt to use a treaty between the United States and another country to avoid U.S. tax. To prevent third-country residents from obtaining treaty benefits intended for treaty country residents only, treaties generally contain an “anti-treaty-shopping” provision that is designed to limit treaty benefits to bona fide residents of the two countries.

III. OVERVIEW OF BARBADOS TAX LAW[4]

A. National Income Taxes

Overview

Barbados imposes federal income tax on net taxable income under the Income Tax Act of 1996 (the "Income Tax Act"). Barbados has a unitary income tax system under which income of all kinds is aggregated and subject to a single tax. The types of income subject to tax include business income, income from the holding of an office, and income from employment, as well as interest, dividends, and royalties. There is no income tax on capital gains.

Individuals

Individuals resident and domiciled in Barbados are subject to tax on their worldwide income. Taxable income includes remuneration from an office or employment, director's fees, taxable profits from a trade or business, interest, dividends, royalties, trust income (whether or not received), partnership income, and the benefit of below-market loans. Dividends received by individuals from resident companies carry a tax credit and are grossed up accordingly, subjecting dividends to a final tax at a rate of 12.5 percent. The income tax generally applies at a rate of 20 percent on the first BBD[5] 24,200 and 40 percent thereafter. Gross assessable income up to BBD 17,500 is not subject to tax. Specially qualified individuals working in the international business and financial services sector may qualify to exempt up to 35 percent of their income from taxation. No tax is levied on capital gains.

Corporations

Under the Income Tax Act, Barbados generally imposes a corporation tax on the net taxable income of companies incorporated or registered in Barbados, as well as any foreign companies carrying on business or having an office or place of business in Barbados. Resident companies (companies managed and controlled from Barbados) are subject to tax on their worldwide income. Double taxation is generally avoided if a double taxation treaty is in force, which allows a credit against Barbados tax for foreign taxes paid on overseas income. The standard corporation tax rate for 2004 is 33 percent. Branches or subsidiaries pay an additional 10 percent of corporation tax if profits have been remitted. However, if profits are reinvested in Barbados, other than for replacement of fixed assets, the additional tax is not imposed. Profits from business and trading operations are calculated according to standard accounting principles and include interest, royalties, and rents. Foreign-source dividends are included in profits for tax purposes. Dividends distributed from one resident company to another are exempt from tax. Losses may be carried forward 10 years; there are no loss carry-back provisions.

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[4] The information in this section relates to Barbados law and is based on the Joint Committee staff's review of publicly available sources. The description is intended to serve as a general overview; it may not be fully accurate in all respects, as many details have been omitted and simplifying generalizations made for ease of exposition.

[5] Barbados maintains a fixed exchange rate with the U.S. dollar (BBD 1.98 = USD 1.00).

B. International Aspects of Barbados Tax Law

Residency

Individuals domiciled and resident in Barbados are subject to tax on their worldwide income, whether or not remitted in Barbados. The Income Tax Act does not define domicile, but it is usually acquired by birth or by a conscious decision to reside permanently in the country. Residence is defined as presence in a country for more than 182 days in a calendar year. Nondomiciliary residents are taxed on income from sources in Barbados and income remitted to Barbados, whereas nondomiciliary nonresidents are taxed only on income from sources in Barbados.

Barbados imposes a corporation tax on companies, including companies incorporated or registered in Barbados, and foreign companies carrying on business or having an office or place of business in Barbados. Resident companies are taxed on their worldwide income. A resident company is one that is incorporated in or managed and controlled from Barbados. Nonresident companies are taxed only on income derived from business actually conducted in Barbados. Nonresident companies are taxed at a flat rate of 15 percent on dividends, interest, royalties, and management fees derived from a Barbados source. Barbados resident companies apply a withholding tax of 12.5 percent and 15 percent on interest and dividend payments to residents and nonresidents, respectively, subject to reduction by treaty.

Offshore Operations

Barbados has enacted several special tax regimes to make the country an attractive jurisdiction for the incorporation or registration of international businesses. Offshore companies are taxed at a rate significantly lower than the standard rate for local companies.

International Business Companies

The International Business Company ("IBC") is the most widely used vehicle for offshore operations in Barbados. The International Business Companies Act of 1991 defines an IBC as a company that carries on business in international manufacturing or international trade or commerce from within Barbados. A company wishing to operate as an IBC must obtain a license from the Ministry of Economic Development. The law limits the issue of an IBC license to companies that are incorporated or registered in Barbados. In addition, no more than 10 percent of a company's assets may accrue on liquidation to shareholders or lenders resident in the CARICOM region,[6] and no more than 10 percent of the interest and dividend payments made by a company may go to individuals resident in the CARICOM region. IBCs pay income tax at rates ranging from one to 2.5 percent and enjoy an exemption from all withholding taxes.

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[6] The Caribbean Common Market and Community (CARICOM) was established by the Treaty of Chaguramas in 1973. Member countries include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St.Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

International Banks

The activities of international banks are regulated by the International Financial Services Act of 2002. This act, which repealed the Offshore Banking Act of 1980, provides tax and other incentives for international banking business conducted from Barbados. In order to engage in international banking, companies must obtain the consent of the Minister of Finance, incorporate under the Barbados Companies Act of 1982, restrict business activities to offshore banking from within Barbados, and include among its directors at least one resident citizen of Barbados. International banks pay tax on banking profits at rates ranging from one to 2.5 percent. No other direct tax or capital gains tax is imposed on the profits or gains of the bank.

Exempt Insurance Companies

The Barbados Exempt Insurance Act was passed in 1983 to create a regime for establishing Barbados as a location for international insurance businesses. In order to be eligible for exempt status, the company's equity must be owned by persons resident outside the CARICOM region, and the company must insure against risks located outside Barbados. Exempt insurance companies are not taxed during their first 15 years of existence. Thereafter, they are taxed at a rate of two percent on their first $250,000 (U.S.) of profits.

Qualifying Insurance Companies

A 1998 law allows international insurance companies owned by Barbados residents or which insure a certain amount of local risk to register as qualifying insurance companies ("QICs"). A QIC is entitled to tax concessions if at least 90 percent of its premiums originated, and at least 90 percent of its risks are insured, outside the CARICOM region. A QIC's profits are taxed at an effective rate of no more than 2.8 percent.

Societies with Restricted Liabilities

The Societies with Restricted Liabilities Act of 1995 was passed to position Barbados favorably in the international financial services market. An entity formed under the act (an "SRL") enjoys limited liability and may be treated as a corporation, partnership, or a disregarded entity for U.S. tax purposes. SRLs are mainly used for international transactions and are prohibited from acquiring or holding land leased for business purposes. SRLs must be organized in Barbados and continuously maintain a registered office and agent in Barbados. SRLs pay tax on income at rates ranging from one to 2.5 percent. SRLs are exempt from withholding taxes on dividends and interest payments.

C. Other Taxes

In addition to the income taxes described above, other taxes are levied upon transactions, including a value added tax at a standard 15 percent rate (financial services are exempt), customs and excise duties, a stamp tax, and a property transfer tax. Barbados does not have gift or inheritance taxes. Land taxes are imposed upon land value at rates from 0.4 percent to one percent, depending upon whether land is improved or unimproved. If the landowner is foreign, the rate is three percent for unimproved land and two percent for improved land. Payroll taxes fund Barbados's national insurance and social security systems. Many imported and locally produced items are subject to a consumption tax with rates ranging from six percent to 30 percent.

IV. EXPLANATION OF PROPOSED PROTOCOL

Article 1. General Scope

The proposed protocol expands the "saving clause" provision in Article 1 (General Scope) of the existing treaty to include former long-term residents whose termination of residency had as one of its principal purposes the avoidance of tax.

The general scope article describes the persons who may claim the benefits of the existing treaty. The treaty generally applies to residents of the United States and Barbados, with specific modifications to such scope in other articles. Like all U.S. income tax treaties and the U.S. model, the treaty includes a "saving clause." Under this clause, with specific exceptions, the treaty does not affect the taxation by either treaty country of its residents or its citizens. Thus, the United States may continue to tax its citizens who are residents of Barbados as if the treaty were not in force.

The existing treaty contains a provision under which the saving clause (and therefore the U.S. jurisdiction to tax) applies for U.S. tax purposes to a former U.S. citizen whose loss of citizenship status had as one of its principal purposes the avoidance of U.S. tax; such application is limited to the 10-year period following the loss of citizenship status.

The proposed protocol expands the saving clause provision in the existing treaty to include former long-term residents whose termination of residency had as one of its principal purposes the avoidance of tax. The expansion of this provision makes the treaty consistent with amendments to the U.S. tax rules under Code section 877 in 1996 related to former citizens and former long-term residents who relinquish citizenship or terminate residency.

Prior to the enactment of the Health Insurance Portability and Accountability Act of 1996, section 877 of the Code provided special rules for the imposition of U.S. income tax on former U.S. citizens for a period of 10 years following the loss of citizenship; these special tax rules applied to a former citizen only if his or her loss of U.S. citizenship had as one of its principal purposes the avoidance of U.S. income, estate or gift taxes. The Health Insurance Portability and Accountability Act of 1996 expanded section 877 to apply also to certain former long-term residents of the United States. For purposes of applying the special tax rules to former citizens and long-term residents, individuals who meet a specified income tax liability threshold or a specified net worth threshold generally are considered to have lost citizenship or resident status for a principal purpose of U.S. tax avoidance.

The proposed protocol updates the existing treaty to reflect the reach of U.S. taxing jurisdiction under section 877 as expanded in 1996. Accordingly, the saving clause in the proposed protocol permits the United States to impose the special tax rules on former U.S. long-term residents who terminate residency with a principal purpose of avoiding U.S. income, estate, or gift taxes.

The term "long-term resident" is defined under U.S. domestic laws. The United States defines "long-term resident" as an individual (other than a U.S. citizen) who is a lawful permanent resident of the United States in at least eight of the prior 15 taxable years. An individual is not treated as a lawful permanent resident for any taxable year if such individual is treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country and the individual does not waive the benefits of such treaty applicable to residents of the foreign country.

Article 2. Limitation on Benefits

In general

The existing treaty was intended to limit double taxation caused by the interaction of the tax systems of the United States and Barbados as they apply to residents of the two countries. At times, however, residents of third countries attempt to use a treaty. This use is known as "treaty shopping," which refers to a situation in which a person who is not a resident of either treaty country seeks certain benefits under the income tax treaty between the two countries. Under certain circumstances, and without appropriate safeguards, the third-country resident may be able to secure these benefits indirectly by establishing a corporation or other entity in one of the treaty countries, which entity, as a resident of that country, is entitled to the benefits of the treaty. Limitation-on-benefits provisions seek to prevent this sort of treaty shopping and limit the benefits of the treaty to qualified residents of the two countries.

The proposed protocol replaces Article 22 (Limitation on Benefits) of the existing treaty with a new article that both generally updates the provision and addresses a particular problem that has arisen under that provision.

Inappropriate benefits available under the existing treaty

The existing treaty allows treaty benefits to be claimed in circumstances in which there is no possibility of meaningful double taxation arising as a result of the interaction of the U.S. and Barbados tax systems. Specifically, the existing treaty allows a company that is legally resident in Barbados to claim the benefits of reduced U.S. withholding tax rates by virtue of being publicly traded, even if the company's stock is traded primarily on a U.S. stock exchange (as opposed to a Barbados stock exchange), and even in cases in which the Barbados-resident company has no meaningful economic presence in Barbados and is subject to only nominal levels of taxation there (e.g., as an IBC).

This aspect of the existing treaty has been a key element in some recent "corporate inversion" transactions that have been used by U.S.-based multinational enterprises to erode the U.S. tax base. Simply stated, in an inversion transaction, a U.S. corporation effectively reincorporates as a foreign corporation in a low-tax jurisdiction, thereby replacing the U.S. parent corporation of a multinational corporate group with a foreign parent corporation.[7] Such a transaction places the group in a position to realize two main U.S. tax benefits: (1) removing

[7] For more detailed description and analysis of inversion transactions, *see, e.g.*, Joint Committee on Taxation, *Background and Description of Present-Law Rules and Proposals Relating to Corporate Inversion Transactions* (JCX-52-02), June 5, 2002; U.S. Treasury Department, Office of Tax Policy, *Corporate Inversion Transactions: Tax Policy Implications*, May 17, 2002.

some or all of the group's foreign operations and income from the U.S. taxing jurisdiction; and (2) reducing the U.S. taxes that otherwise would be incurred on income from the group's U.S. operations, through the use of various "earnings stripping" strategies (e.g., having a U.S. group member make large payments of deductible interest or royalties to the new foreign parent, which will be subject to little or no residence-country tax on such payments). The first benefit, removing the group's foreign operations from the U.S. taxing jurisdiction, generally does not depend critically on the existence of a comprehensive income tax treaty between the United States and the jurisdiction in which the new foreign parent corporation is resident. The second benefit, however, involving erosion of the U.S. tax base on U.S.-source income through earnings stripping strategies, does depend critically on the existence of such a treaty.[8] Without treaty-based reductions of withholding tax rates on items such as interest and royalties, the tax benefits of the deduction for the U.S. company making the payment would be substantially offset by imposition of a 30-percent U.S. withholding tax.

It has become clear that the existing treaty has been used by inverted corporations to facilitate base-eroding earnings stripping strategies in the United States. The availability of special tax regimes under Barbados law (e.g., IBCs), combined with reduced, five-percent withholding tax rates on interest and royalties under the treaty, makes the treaty very attractive for this purpose. The existing limitation-on-benefits provision allows benefits to be extended to all publicly traded corporations that are resident in one of the two treaty countries, with no requirement that the public trading occur in the company's country of legal residence. Thus, a U.S. corporation primarily traded on a U.S. stock exchange can execute an inversion transaction that results in a Barbados IBC winding up as the parent of the corporate group, and the group's U.S. companies can make treaty-benefited payments to the parent, based on the fact that the parent's stock continues to be publicly traded on U.S. markets.[9] The U.S. deductions generally provide the benefit of reducing a 35-percent corporate income tax, and the combination of a treaty-reduced five-percent rate of U.S. withholding tax on the payment and a nominal rate of Barbados tax on the receipt of the payment leave the tax benefit of the deductions largely intact. Absent application of the treaty, U.S. withholding tax would be imposed at the full 30-percent rate, thus substantially eliminating the overall tax benefit of the earnings stripping arrangement.

Thus, in a situation presenting no risk of significant double taxation arising from the interaction of the U.S. and Barbados tax systems, treaty provisions that were designed to mitigate such double taxation are instead used to facilitate purely tax-motivated transactions that erode the U.S. tax on income earned from business operations conducted within the United States. As explained in detail below, the proposed protocol includes rules designed to prevent the use of the treaty for these purposes.

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[8] In the case of interest, the strategy also relies on a taxpayer's ability to avoid application of section 163(j) of the Code, which was designed to limit earnings stripping. In some cases, section 482 of the Code also may serve to limit stripping transactions.

[9] The parent company actually may be incorporated in a tax-haven jurisdiction that does not have a comprehensive income tax treaty with the United States, but the company can establish a registered office in Barbados for the purpose of taking advantage of the U.S.-Barbados treaty.

General overview of proposed limitation-on-benefits provision

The proposed limitation-on-benefits article provides that a treaty-country resident is entitled to treaty benefits only if such resident is described in one of the following categories:

(1) an individual;

(2) one of the two governments or a political subdivision or local authority thereof;

(3) a company that satisfies a public company test, and certain subsidiaries of such companies;

(4) an entity that satisfies an ownership test and a base erosion test;

(5) a tax-exempt entity organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes; or

(6) a tax-exempt pension plan or employee benefit arrangement that meets an ownership test.

Alternatively, a resident that does not fit into any of the above categories may claim treaty benefits under the active business test. In addition, a person that does not satisfy any of the above requirements may be entitled to the benefits of the proposed treaty if the source country's competent authority so determines.

Even if a person would qualify for treaty benefits by reason of being included on the enumerated list above or satisfying the active business test, such person is not entitled to the treaty's reduced rates of withholding taxes on dividends, interest, and royalties if such person is entitled to income tax benefits under a "special tax regime" (such as the Barbados IBC regime). As explained in detail below, this modification, as well as changes to the public company test listed as item (3) above, serve to curtail the inappropriate benefits available under the existing treaty.

Individuals

Under the proposed protocol, individual residents of the United States and Barbados are entitled to all treaty benefits. However, if such an individual receives income as a nominee on behalf of a third country resident, and thus is not the beneficial owner of such income, benefits may be denied.

Governmental entities

The proposed protocol provides that the governments of the United States and Barbados, and any political subdivision or local authority thereof, are entitled to all treaty benefits.

Publicly traded companies

The public company test of the proposed protocol allows treaty benefits to be claimed by two categories of companies: publicly traded companies and subsidiaries of publicly traded companies.

A company is entitled to all the benefits of the treaty as a publicly traded company if its principal class of shares is: (1) listed on a recognized stock exchange located in the treaty country in which the company is resident; (2) primarily traded on a recognized stock exchange located in such treaty country; and (3) regularly traded on one or more recognized stock exchanges. In the case of a company resident in Barbados, the company also may satisfy the second requirement above if it is primarily traded on either the Jamaica Stock Exchange or the Trinidad Stock Exchange.

The requirement that a company's principal class of shares be primarily traded on a stock exchange in its country of residence (or, in the case of Barbados, in Jamaica or Trinidad) represents an important departure from the rule of the existing treaty, which allowed companies to qualify for treaty benefits on the basis of public trading in either treaty country. Thus, as described above, an inverted corporation now resident in Barbados, but continuing to be traded primarily on a U.S. stock exchange, could satisfy the rule of the existing treaty on the strength of that public trading in the United States. Under the new rule, such a corporation would not be able to qualify for treaty benefits under the public trading test, because its principal class of shares would not be primarily traded in its country of residence (or in Jamaica or Trinidad). This new rule should prove to be relatively robust, as companies will find place of trading to be much less manipulable than legal residence as a non-tax matter. Thus, this modification of the existing treaty should curtail the inappropriate benefits available under the treaty with respect to inverted corporations, as well as corporations that establish similar structures by means other than corporate inversion.[10]

A company is entitled to all the benefits of the treaty as a subsidiary of a publicly traded company if: (1) at least 50 percent of the company's principal class of shares is owned directly or indirectly by companies that are publicly traded under the test described above; and (2) the company satisfies the requirements of the "base erosion" clause of the limitation-on-benefits article. In the case of indirect ownership, each intermediate owner must be a person entitled to treaty benefits under this same provision.

For purposes of these rules, the term "recognized stock exchange" includes the NASDAQ system and any stock exchange registered with the Securities and Exchange Commission as a national securities exchange for purposes of the Securities Exchange Act of 1934. The term also includes the Barbados Stock Exchange, the Jamaica Stock Exchange, and the Trinidad Stock Exchange. The competent authorities of the two treaty countries also can agree to extend the term to include other exchanges.

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[10] In addition, even if this rule should prove to be less robust than anticipated, it is reinforced by a separate rule denying certain treaty benefits to beneficiaries of special tax regimes such as the Barbados IBC regime, as described in further detail below.

The term “principal class of shares” is not defined in the proposed protocol or in the existing treaty. As described in the Treasury Department’s Technical Explanation (the “Technical Explanation”), under paragraph 2 of Article 3 (General Definitions) of the existing treaty, the term will be defined under the laws of the treaty country whose taxes are at issue in a particular case -- generally the source country. Under U.S. tax law, a company’s principal class of shares is generally considered to be the common shares of the company representing the majority of the aggregate voting power and value of the company. If the company does not have such a class of shares, then the principal class of shares is the class or any combination of classes of shares that represents, in the aggregate, a majority of the voting power and value of the company. The term “shares” for this purpose includes depositary receipts for shares (e.g., American Depositary Receipts (“ADRs”)) or trust certificates for shares.

The term “primarily traded” also is not defined in the proposed protocol or in the existing treaty. Thus, as above, the term will be defined under the laws of the treaty country whose taxes are at issue in a particular case. In the case of the United States, the Technical Explanation states that the term is understood to have the meaning it has under Treas. reg. section 1.884-5(d)(3), relating to the branch tax provisions of the Code. Under these rules, stock of a corporation is primarily traded in a company’s residence country if the number of shares in the company’s principal class of shares that are traded during the taxable year on all recognized stock exchanges in the company’s residence country exceeds the number of shares in the company’s principal class of shares that are traded during that year on established securities markets in any other single country.

The term “regularly traded” also is not defined in the proposed protocol or in the existing treaty. Again, the term accordingly will be defined under the laws of the treaty country whose taxes are at issue in a particular case. In the case of the United States, the Technical Explanation states that the term is understood to have the meaning it has under Treas. reg. section 1.884-5(d)(4)(i)(B), relating to the branch tax provisions of the Code. Under these regulations, a class of shares is considered to be regularly traded if: (1) trades in the class of shares are made in more than de minimis quantities on at least 60 days during the taxable year; and (2) the aggregate number of shares in the class traded during the year is at least 10 percent of the average number of shares outstanding during the year.[11] The regular trading requirement can be met by trading on any recognized exchange or exchanges located in either treaty country. The Technical Explanation states that trading on one or more recognized stock exchanges may be aggregated for purposes of this requirement. The Technical Explanation also states that authorized but unissued shares are not considered for purposes of this test.

Ownership and base erosion tests

An entity that is a resident of one of the treaty countries is entitled to treaty benefits under the proposed protocol if it satisfies both an ownership test and a base erosion test.

[11] The Technical Explanation states that Treas. reg. sec. 1.884-5(d)(4)(i)(A), (ii) and (iii) will not be taken into account for purposes of defining the term “regularly traded” under the proposed protocol.

In order to satisfy the ownership test, on at least half the days of the taxable year, shares or other beneficial interests representing more than 50 percent of the beneficial interest in the entity must be owned (directly or indirectly) by certain persons qualifying for treaty benefits under other provisions of the limitation-on-benefits article (i.e., individuals, governmental entities, parent companies that meet the public company test, tax-exempt entities operating for charitable or other specified purposes, and tax-exempt employee benefit arrangements). All such persons and intermediate owners must be residents of the same treaty country as the entity in question. Persons eligible for the benefits of a special tax regime (such as the Barbados IBC regime) are not qualifying owners for these purposes.

The base erosion test is satisfied only if less than 50 percent of the entity's gross income for the taxable year is paid or accrued, directly or indirectly, in the form of deductible payments to persons who are not qualifying persons as described in the preceding paragraph. The Technical Explanation states that for this purpose, where reductions in U.S. tax are sought, the term "gross income" has the same meaning as under domestic law (i.e., section 61 of the Code and the regulations thereunder). The Technical Explanation also states that, for purposes of this test, deductible payments include neither arm's length payments in the ordinary course of business for services or tangible property, nor depreciation and amortization deductions.

Tax-exempt and charitable organizations

A tax-exempt entity resident in a treaty country and operated exclusively for religious, charitable, scientific, literary, or educational purposes is entitled to all the benefits of the treaty. There is no requirement that specified percentages of the beneficiaries of these organizations be residents of the United States or Barbados.

Exempt employee benefits organizations

A tax-exempt plan, scheme, fund, trust, company, or other arrangement established in a treaty country and operated exclusively to administer or provide employee benefits is entitled to all the benefits of the proposed protocol if, as of the close of the end of the prior taxable year, more than 50 percent of the beneficiaries, members, or participants of the organization are entitled to the benefits of the treaty. According to the Technical Explanation, for purposes of this provision, the term "beneficiaries" should be understood to refer to the persons receiving benefits from the organization.

Active business test

Under the proposed protocol, a treaty-country resident that is not entitled to all benefits of the treaty nevertheless may receive benefits with respect to certain items of income that are connected to an active trade or business conducted in its residence country.

Under the general rule, a resident of a treaty country engaged in the active conduct of a trade or business in that country may obtain treaty benefits with respect to an item of income derived in the other treaty country, provided that the item of income is derived in connection with, or is incidental to, that trade or business.

In general, a trade or business comprises activities that constitute (or could constitute) an independent economic enterprise carried on for profit. To constitute a trade or business, the activities conducted by the resident ordinarily must include every operation which forms a part of, or a step in, a process by which an enterprise may earn income or profit. The determination of whether activities constitute an active trade or business is determined under all the facts and circumstances. A person actively conducts a trade or business if it regularly performs active and substantial management and operational functions through its own officers or employees. In this regard, one or more of such activities may be carried out by independent contractors under the direct control of the resident. However, in determining whether the corporation actively conducts a trade or business, the activities of independent contractors shall be disregarded.

The business of making or managing investments for the resident's own account will be considered to be a trade or business only when part of banking, insurance or securities activities conducted by a bank or insurance company. Such activities conducted by a person other than a bank or an insurance company will not be considered to be the conduct of an active trade or business, nor would they be considered to be the conduct of an active trade or business if conducted by a bank or insurance company other than as part of the company's banking or insurance business.

For this purpose, a person will be treated as a bank only if: (1) it is licensed to accept deposits from residents of its residence country and to conduct, in that country, lending or other banking activities; (2) it regularly accepts deposits from customers who are residents of its residence country in the ordinary course of its business, and the amount of deposits shown on the company's balance sheet is substantial; and (3) it regularly makes loans to customers in the ordinary course of its trade or business. A person will be treated as an insurance company only if: (1) it is licensed to insure risks of residents of its residence country; and (2) it regularly insures (not including reinsurance) risks of customers who are residents of its residence country.

The Technical Explanation states that, because a headquarters operation is in the business of managing investments, a company that functions solely as a headquarters company will not be considered to be engaged in an active trade or business under the test described above.

In cases in which the trade or business generating the item of income in question is carried on either by the person deriving the income or by any associated enterprises through activities in the source country, the trade or business carried on in the residence country must be substantial in relation to the activity in the source country. According to the Technical Explanation, this requirement is intended to prevent a company from qualifying for source-country treaty benefits by engaging in relatively de minimis business activities in the residence country. The determination of substantiality is made based upon all facts and circumstances, and, according to the Technical Explanation, takes into account the relative sizes of the trades or businesses in each treaty country (measured by reference to asset values, income and payroll expenses), the nature of the activities performed in each treaty country, and the relative contributions made to that trade or business in each treaty country. The Technical Explanation further states that in making each determination or comparison, due regard will be given to the relative sizes of the U.S. and Barbados economies.

The proposed protocol also provides a safe harbor, under which a trade or business may be deemed substantial based on a comparison of the income recipient's asset value, gross income, and payroll expense in the residence country with the corresponding amounts in the source country, with reference to either the preceding taxable year, or the average of the preceding three years. In order to qualify for the safe harbor, the average of these three ratios must exceed 10 percent, and each individual ratio must exceed 7.5 percent. In cases in which less than all of the activity of a trade or business is attributable to a particular resident, only a proportionate share of the relevant activities will be taken into account.

According to the Technical Explanation, the substantiality test, which applies only to income earned by related parties, is intended to focus only on potentially abusive cases, and should not apply to situations thought to be non-abusive, even though the income recipient resident in one treaty country may be very small in relation to the entity generating income in the source country. For example, the Technical Explanation states that a small Barbados bank that makes a loan to a very large unrelated U.S. business would not have to pass a substantiality test in order to receive treaty benefits.

In determining whether a person is engaged in an active trade or business, the activities of a partnership are attributed to each of its partners. In addition, activities conducted by persons "connected" to a person are attributed to such person. A person is connected to another if such person possesses 50 percent or more of the beneficial interest in the other (or if the other possesses 50 percent or more of the beneficial interest in such person). For this purpose, a person is connected to a company if such person owns shares representing 50 percent or more of the aggregate voting power and value of the company or 50 percent or more of the beneficial equity interest in the company. A person also is connected to another if a third person possesses 50 percent or more of the beneficial interest in both such person and the other person. For this purpose, if either person is a company, the threshold relationship with respect to such company or companies is 50 percent or more of the aggregate voting power and value or 50 percent or more of the beneficial equity interest. Finally, a person is connected to another if, based upon all the facts and circumstances, one controls the other, or the two are under common control.

Grant of treaty benefits by competent authority

A person that is not entitled to treaty benefits under the other provisions of the limitation-on-benefits article nevertheless may be granted benefits under the treaty at the discretion of the competent authority of the source country.

The notes accompanying the proposed protocol provide specific guidance as to the exercise of this discretion in the case of an employee benefits organization that fails to satisfy the requirement that 50 percent or more of its beneficiaries, members, or participants be persons entitled to the benefits of the treaty. In such a case, the U.S. competent authority will favorably consider the following factors: (1) the organization is established in Barbados; (2) the sponsoring employer of the organization is a resident of Barbados entitled to the benefits of the treaty (other than a person eligible for a special tax regime); (3) more than 30 percent of the beneficiaries, members, or participants of the organization are persons entitled to the benefits of the treaty; and (4) more than 70 percent of the beneficiaries, members, or participants of the organization are individuals resident in a member of the Caribbean Community.

Denial of withholding tax reductions for beneficiaries of special tax regimes

The proposed protocol contains a separate rule that denies the benefits of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties) of the treaty to a person that is entitled to income tax benefits under the provisions of a special tax regime, even if such person otherwise would be entitled to treaty benefits under the general limitation-on-benefits rules.[12] A special tax regime is defined as any legislation or administrative practice that provides for an effective tax rate substantially lower than the generally applicable tax rate for companies or individuals, as appropriate.

The notes specify several regimes under Barbados law that are special tax regimes for these purposes: (1) the Exempt Insurance Act; (2) the International Financial Services Act; (3) the International Business Companies Act; (4) the Societies with Restricted Liability Act; and (5) the Insurance (Miscellaneous Provisions) Act.[13] The notes further provide that any legislation or administrative practice enacted or adopted after the signing of the proposed protocol pursuant to which the income of a person is entitled to the same or substantially similar tax benefits to those granted under a regime mentioned in the previous sentence will constitute a special regime. The Technical Explanation states that, in determining whether a person is entitled to the same or substantially similar benefits to the tax regimes identified in the notes, consideration will be given to all facts and circumstances, including, for example, whether a tax regime imposes tax on an artificially low taxable base.

No aspect of current U.S. tax law was identified in the notes as constituting a special tax regime.

Like the modifications to the public trading rule described above, this modification should curtail inappropriate benefits that are available under the existing treaty. This rule represents a significant improvement on the existing treaty, in that it disallows some of the major benefits of the treaty in cases that do not involve any meaningful risk of double taxation. Nevertheless, as discussed in part V.B. of this pamphlet, some may question why this approach was limited to withholding tax reductions, instead of being extended to all benefits available under the treaty.

Article 3. Exchange of Information

Article 3 of the proposed protocol clarifies that the information exchanged under Article 26 (Exchange of Information) of the treaty includes information held by financial institutions, nominees, or persons acting in an agency or fiduciary capacity (but does not include information that would reveal confidential communications between a client and an attorney, solicitor or

[12] For purposes of this rule, a partnership, estate, or trust is treated as a person entitled to the benefits of a special tax regime to the extent that such partnership, estate, or trust is treated as a resident of a treaty country under paragraph 1 of Article 4 (Residence) by reason of income of such partnership, estate, or trust being subject to tax in the hands of a person or persons entitled to the benefits of a special tax regime.

[13] *See* part III.B. of this pamphlet for a description of these regimes.

other legal representative, where the client seeks legal advice). The Technical Explanation states that, in the case of the United States, the scope of the privilege for such confidential communications is coextensive with the attorney-client privilege under U.S. law. The treaty countries also may obtain and exchange information relating to the ownership of legal persons.

Article 4. Entry Into Force

Article 4 of the proposed protocol relates to the entry into force of the modifications contained therein. The proposed protocol provides that it shall be subject to ratification by both treaty countries, and instruments of ratification shall be exchanged as soon as possible. The proposed protocol will enter into force upon the exchange of instruments of ratification.

The proposed protocol 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 following the date on which the proposed protocol enters into force. For all other taxes, the proposed protocol will have effect for taxable years beginning on or after January first of the year following entry into force.

V. ISSUES

A. Potential Availability of Inappropriate Benefits Under Other U.S. Treaties

As discussed in part IV of this pamphlet, the proposed protocol modifies the existing treaty to eliminate certain inappropriate benefits that are available under the treaty. The problem stems from the fact that the existing treaty allows a company that is legally resident in Barbados to claim the benefits of reduced U.S. withholding tax rates by virtue of being publicly traded, even in cases in which the company has no meaningful economic presence in Barbados and is subject to only nominal levels of taxation there, pursuant to a special tax regime such as the IBC regime. Thus, in a situation presenting no risk of significant double taxation arising from the interaction of the U.S. and Barbados tax systems, treaty provisions that were designed to mitigate such double taxation are instead used to facilitate purely tax-motivated transactions that erode the U.S. tax on income earned from business operations conducted within the United States. As described in detail above, the proposed protocol modifies the limitation-on-benefits provision of the existing treaty to prevent this and similar abuses. As amended, this treaty should prove much less suitable for use in tax-motivated structures that rely on inappropriate treaty benefits.

While evidence from recent corporate inversion transactions suggests that the U.S.-Barbados treaty has been the preferred treaty for this sort of tax-motivated arrangement, it is not clear that this is the only treaty in the U.S. tax treaty network that may be suitable for these or similar inappropriate uses. The Committee may wish to ask the Treasury Department whether it has similar concerns about any other treaties in the U.S. network, and if so, what measures are being taken to address those concerns.

B. Treatment of Special Tax Regimes Outside the Context of Withholding Taxes

The proposed protocol specifically denies the benefits of reduced withholding tax rates on dividends, interest, and royalties in cases in which the recipient of the payment is entitled to income tax benefits under the provisions of a special tax regime, such as the Barbados IBC regime. The denial of withholding tax reductions in cases involving special tax regimes is one way in which the proposed protocol seeks to eliminate inappropriate benefits that are available under the existing treaty.[14]

While this rule represents significant progress in eliminating inappropriate treaty benefits, some may question why the proposed protocol does not deny *all* tax reductions available under the treaty to beneficiaries of special tax regimes, instead of denying only the withholding tax reductions. For example, suppose a Barbados IBC that is generally entitled to treaty benefits conducts a trade or business in the United States. Under U.S. statutory tax law, the IBC would be subject to U.S. tax on the income effectively connected with that trade or business in a manner similar to that in which a domestic taxpayer would be taxed. However, under Article 7 (Business Profits) of the existing treaty, the United States would not be allowed to tax the IBC on this income unless the trade or business also rose to the level of a "permanent establishment," which generally requires a slightly higher level of presence and activity than the U.S. trade or business threshold. This is a standard source-country concession in income tax treaties worldwide, but some may question why the United States would make this concession in a case in which a special tax regime ensures that there is no risk of meaningful double taxation arising from the interaction of the two countries' tax systems.[15]

To the extent that a special tax regime applies, the beneficiary of the regime enjoys tax benefits similar to those offered by tax havens. The same reasons that support the U.S. policy of not concluding comprehensive income tax treaties with tax havens arguably would support a similar policy of not extending the benefits of comprehensive income tax treaties to persons that enjoy tax-haven-type benefits under the laws of a treaty country.

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[14] As noted in part IV of this pamphlet, it is not the only way in which the proposed protocol curtails inappropriate treaty benefits. The modification of the public trading rule in the limitation-on benefits article is also an important measure in this regard, and that rule operates independently of the rule dealing specifically with special tax regimes.

[15] In addition, even if the IBC's business presence in the United States did rise to the level of a permanent establishment, thus allowing the United States to tax the profits attributable to the business, it appears that the IBC might be entitled to the benefits of Article 13A (Branch Tax) of the existing treaty. This would not affect the basic taxation of the business profits as they are earned, but it could allow a reduced rate of U.S. branch profits tax to apply when the profits are remitted back to the IBC, even though the branch profits tax is essentially a substitute for the dividend withholding tax that would apply if the business were conducted through a separate U.S. subsidiary.

On the other hand, the practical significance of not denying these other treaty benefits to beneficiaries of special tax regimes is not clear. At present, there is little reason to believe that this feature of the proposed protocol will leave open any important avenue of abuse, but some may argue that it would have been best to foreclose this possibility entirely. It should be emphasized that the proposed protocol curtails the known inappropriate benefits that have been claimed under the existing treaty, through both the special tax regimes rule and the public company rule of the limitation-on-benefits article. As such, the proposed protocol should be viewed as a significant improvement by those concerned about these inappropriate benefits, even if some may argue that the proposed protocol is imperfect in minor respects.

C. Qualification of Dividends Received by U.S. Residents From Barbados Corporations for Reduced U.S. Tax Rates

In the United States, under the Jobs and Growth Tax Relief Reconciliation Act of 2003 ("JGTRRA"), dividends received by an individual shareholder from domestic corporations are generally taxed at the preferential rates that apply to certain capital gains. Dividends received from "qualified foreign corporations" are also eligible for this rate preference. The term "qualified foreign corporation" includes a foreign corporation that is eligible for the benefits of a comprehensive income tax treaty with the United States which the Treasury Department determines to be satisfactory for purposes of the rate-preference provision, and which includes an exchange of information program.[16] In legislative history to JGTRRA, the House and Senate conferees indicated that the existing treaty between the United States and Barbados was not satisfactory for this purpose:

> The conferees do not believe that the current income tax treaty between the United States and Barbados is satisfactory for this purpose because that treaty may operate to provide benefits that are intended for the purpose of mitigating or eliminating double taxation to corporations that are not at risk of double taxation. The conferees intend that, until the Treasury Department issues guidance regarding the determination of treaties as satisfactory for this purpose, a foreign corporation will be considered to be a qualified foreign corporation if it is eligible for the benefits of a comprehensive income tax treaty with the United States that includes an exchange of information program other than the current U.S.-Barbados income tax treaty.[17]

Consistent with this legislative history, the Treasury Department announced in a notice that the existing treaty is not satisfactory for purposes of the rate-preference provision.[18] In that same notice, the Treasury Department indicated that "the amendment or renegotiation of existing tax treaties" may be a factor in deciding whether to amend its list of qualifying treaties.[19] The Committee may wish to ask the Treasury Department whether it intends to amend its list of qualifying treaties to include the U.S.-Barbados treaty, once the modifications made by the proposed protocol enter into force. In addition, if the Treasury Department does intend to add this treaty to the list of qualifying treaties, the Committee may wish to ask how companies that are eligible for the benefits of a special tax regime will be treated for these purposes, as such

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[16] The term also effectively includes certain other corporations that are publicly traded in the United States. *See* Code sec. 1(h)(11)(C)(ii).

[17] H.R. Conf. Rep. No. 108-126, 108th Cong., 1st Sess. 42 (2003).

[18] Notice 2003-69, 2003-42 I.R.B. 851, Oct. 20, 2003.

[19] *Id.*

companies may be eligible for some, but not all, benefits of the treaty under the proposed protocol.[20]

[20] *See* part V.B of this pamphlet for a discussion of issues relating to the treatment of special tax regimes under the proposed protocol.