DEPARTMENT OF THE TREASURY TECHNICAL EXPLANATION OF THE SECOND PROTOCOL SIGNED ON JULY 14, 2004, AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND BARBADOS FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME, SIGNED ON DECEMBER 31, 1984

This is a technical explanation of the Second Protocol signed at Washington on July 14, 2004 (the "Protocol"), amending the Convention between the United States of America and Barbados for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Bridgetown on December 31, 1984 (the "1984 Convention"), as amended by a protocol signed at Washington, D.C. on December 18, 1991 (the "1991 Protocol"). The term "Convention" refers to the 1984 Convention as modified by both the 1991 Protocol and the Protocol.

Negotiations took into account the U.S. Treasury Department's current tax treaty policy and the Treasury Department's Model Income Tax Convention, published on September 20, 1996 (the "U.S. Model"). Negotiations also took into account the Model Tax Convention on Income and on Capital, published by the Organization for Economic Cooperation and Development, as updated in January 2003 (the "OECD Model"), and recent tax treaties concluded by both countries.

The Protocol was accompanied by Understandings (the "Understandings"), implemented through an exchange of notes, indicating the views of the negotiators and of the States with respect to Article 22 (Limitation on Benefits) of the Convention. The Understandings also provided that the Understandings accompanying the 1991 Protocol (the "1991 Understandings") continue to apply for purposes of applying Article 22 of the Convention, except to the extent that the 1991 Understandings are inconsistent with the provisions of Article 22 (as amended by the Protocol). The Understandings and the 1991 Understandings are discussed in connection with the relevant portions of the Protocol.

The Technical Explanation is an official guide to the Protocol. It reflects the policies behind particular Protocol provisions, as well as understandings reached with respect to the application and interpretation of the Protocol. This Technical Explanation should be read together with the Technical Explanations of the 1984 Convention and the 1991 Protocol.

References in the Technical Explanation to "he" or "his" should be read to mean "he or she" or "his or her."

Article I

Article I of the Protocol modifies paragraph 3 of Article 1 of the Convention which permits the United States to continue to tax as U.S. citizens former citizens whose loss of citizenship had as one of its principal purposes the avoidance of tax. To reflect 1996 amendments to U.S. tax law in this area, the Protocol extends this treatment to

former long-term residents whose loss of such status had as one of its principal purposes the avoidance of tax.

Section 877 of the Internal Revenue Code of 1986 (the "Code") applies to former citizens and long-term residents of the United States whose loss of citizenship or long-term resident status had as one of its principal purposes the avoidance of tax. Under section 877, the United States generally treats an individual as having a principal purpose to avoid tax if either of the following criteria exceed established thresholds: (a) the average annual net income tax of such individual for the period of 5 taxable years ending before the date of the loss of status, or (b) the net worth of such individual as of the date of the loss of status. The thresholds are adjusted annually for inflation. Section 877(c) provides certain exceptions to these presumptions of tax avoidance. 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 8 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 II

Article II of the Protocol replaces Article 22 (Limitation on Benefits) of the Convention.

Structure of the Article

Article 22 follows the form used in other recent U.S. income tax treaties. Paragraph 1 states the general rule that a resident of a Contracting State is entitled to benefits otherwise accorded to residents only to the extent that the resident satisfies the requirements of the Article and any other specified conditions for the obtaining of such benefits and lists a series of attributes of a resident of a Contracting State, any one of which suffices to make such resident entitled to all the benefits of the Convention. Paragraph 2 sets forth the active trade or business test, under which a person not entitled to benefits under paragraph 1 may nonetheless be granted benefits with regard to certain types of income. Paragraph 3 provides that benefits also may be granted if the competent authority of the State from which the income arises determines that it is appropriate to grant benefits in that case. Paragraph 4 defines what constitutes a recognized stock exchange for purposes of paragraph 1. Paragraph 5 authorizes the competent authorities to develop agreed applications of the Article and to exchange information necessary for carrying out the provisions of the Article. Paragraph 6 excludes certain persons that are residents and that otherwise would qualify for the benefits of the Convention under paragraphs 1 or 2 of this Article from the benefits of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties).

Article 22 and the anti-abuse provisions of domestic law complement each other, as Article 22 effectively determines whether an entity has a sufficient nexus to the

Contracting State to be treated as a resident for treaty purposes, while domestic anti-abuse provisions (*e.g.*, business purpose, substance-over-form, step transaction or conduit principles) determine whether a particular transaction should be recast in accordance with its substance. Thus, internal law principles of the source Contracting State may be applied to identify the beneficial owner of an item of income, and Article 22 then will be applied to the beneficial owner to determine if that person is entitled to the benefits of the Convention with respect to such income.

Paragraph 1

Paragraph 1 provides that, except as otherwise provided, a resident of a Contracting State will be entitled to all the benefits of the Convention otherwise accorded to residents of a Contracting State only if the resident is described in one of the subparagraphs of that paragraph 1.

The benefits otherwise accorded to residents under the Convention include all limitations on source-based taxation under Articles 6 through 21, the treaty-based relief from double taxation provided by Article 23 (Relief from Double Taxation), and the protection afforded to residents of a Contracting State under Article 24 (Non-Discrimination). Some provisions do not require that a person be a resident in order to enjoy the benefits of those provisions. Article 25 (Mutual Agreement Procedure) is not limited to residents of the Contracting States, and Article 27 (Diplomatic Agents and Consular Officers) applies to diplomatic agents or consular officials regardless of residence. Article 22 accordingly does not limit the availability of treaty benefits under these provisions.

Paragraph 1 has six subparagraphs, each of which describes a category of residents that are entitled to all benefits of the Convention. It is intended that the provisions of paragraph 1 will be self-executing. Claiming benefits under paragraph 1 does not require advance competent authority ruling or approval. The tax authorities may, of course, on review, determine that the taxpayer has improperly interpreted the paragraph and is not entitled to the benefits claimed.

Individuals -- Subparagraph 1(a)

Subparagraph (a) provides that individual residents of a Contracting State will be entitled to all the benefits of the Convention. If such an individual receives income as a nominee on behalf of a third country resident, benefits may be denied under the applicable articles of the Convention by the requirement that the beneficial owner of the income be a resident of a Contracting State.

Governments -- Subparagraph 1(b)

Subparagraph (b) provides that the Contracting States and any political subdivision or local authority thereof will be entitled to all the benefits of the Convention.

Publicly-Traded Corporations -- Subparagraph 1(c)

Subparagraph (c) applies to two categories of companies: publicly traded companies and subsidiaries of publicly traded companies. A company resident in a Contracting State is entitled to all the benefits of the Convention under clause (i) of subparagraph (c) if its principal class of shares is: (a) listed on a recognized stock exchange located in the Contracting State of which the company is a resident; (b) primarily traded on a recognized stock exchange located in the Contracting State of which the company is a resident; and (c) regularly traded on one or more recognized stock exchanges. In the case of a company that is resident in Barbados, the company alternatively may satisfy the second requirement if it is primarily traded on either the Jamaica Stock Exchange or the Trinidad Stock Exchange, each of which is a recognized stock exchange, as discussed below.

The term "recognized stock exchange" is defined in paragraph 4. It 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, as well as the Barbados Stock Exchange, the Jamaica Stock Exchange and the Trinidad Stock Exchange. The term also includes any other stock exchange agreed upon by the competent authorities of the Contracting States.

The term "principal class of shares" is not defined in the Convention. In accordance with paragraph 2 of Article 3 (General Definitions), this term will have the meaning it has under the laws of the State concerning the taxes to which the Convention applies, generally the source State. Generally, under U.S. tax law, the "principal class of shares" is defined as 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 a class of ordinary or common shares representing the majority of the aggregate voting power and value of the company, then the "principal class of shares" is that class or any combination of classes of shares that represents, in the aggregate, a majority of the voting power and value of the company. "Shares" include depository receipts for shares or trust certificates for shares.

The term "primarily traded" is not defined in the Convention. In accordance with paragraph 2 of Article 3 (General Definitions), this term will have the meaning it has under the laws of the State concerning the taxes to which the Convention applies, generally the source State. In the case of the United States, this 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. Accordingly, stock of a corporation is "primarily traded" on a recognized stock exchange in the Contracting State of which the company is a resident 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 that Contracting State 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 foreign country.

The term "regularly traded" is not defined in the Convention. In accordance with paragraph 2 of Article 3 (General Definitions), this term will have the meaning it has under the laws of the State concerning the taxes to which the Convention applies, generally the source State. In the case of the United States, this 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 two requirements are met: trades in the class of shares are made in more than de minimis quantities on at least 60 days during the taxable year, and 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. Treas. Reg. section 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 Convention.

The regular trading requirement can be met by trading on any recognized exchange or exchanges. Trading on one or more recognized stock exchanges may be aggregated for purposes of this requirement. Authorized but unissued shares are not considered for purposes of this test.

A company resident in a Contracting State is entitled to all the benefits of the Convention under clause (ii) of subparagraph (c) of paragraph 1 if: (a) at least 50 percent of the company's principal class of shares is owned directly or indirectly by companies that are publicly traded as provided above; and (b) the company satisfies the requirements of the base erosion clause of paragraph 1(d) of this Article. Furthermore, in the case of indirect ownership, each intermediate owner must be a person entitled to benefits of the Convention under this clause (ii). Thus, for example, a Barbados company, all the shares of which are owned by another Barbados company, would qualify for benefits under the Convention if the principal class of shares of the Barbados parent company were listed on the Barbados Stock Exchange, primarily traded on the Barbados Stock Exchange and regularly traded on the Barbados Stock Exchange and the New York Stock Exchange.

<u>Ownership/Base Erosion -- Subparagraph 1(d)</u>

Subparagraph 1(d) provides an additional test that applies to any form of legal entity that is a resident of a Contracting State. The test provided in subparagraph (d), the so-called ownership and base erosion test, is a two-part test. Both prongs of the test must be satisfied for the resident to be entitled to benefits under subparagraph 1(d).

The ownership prong of the test, under clause (i), requires that more than 50 percent of the beneficial interest in that person (or in the case of a company, more than 50 percent of the number of shares of each class of whose shares) is owned, directly or indirectly, on at least half the days of the taxable year by residents of that State that are entitled to the benefits of this Convention under subparagraphs (a), (b), (c)i), (e) or (f) (other than a person described in paragraph 6 of this Article). Furthermore, in the case of indirect ownership, each intermediate owner must be a resident of that Contracting State.

Trusts may be entitled to benefits under this provision if they are treated as residents under Article 4 (Resident) and they otherwise satisfy the requirements of this subparagraph. For purposes of this subparagraph, the beneficial interests in a trust will be considered to be owned by its beneficiaries in proportion to each beneficiary's actuarial interest in the trust. The interest of a remainder beneficiary will be equal to 100 percent less the aggregate percentages held by income beneficiaries. A beneficiary's interest in a trust will not be considered to be owned by a person entitled to benefits under the other provisions of paragraph 1 if it is not possible to determine the beneficiary's actuarial interest. Consequently, if it is not possible to determine the actuarial interest of any beneficiaries in a trust, the ownership test under clause (i) cannot be satisfied, unless all possible beneficiaries are persons entitled to benefits under the other subparagraphs of paragraph 1.

The base erosion prong of clause (ii) of subparagraph (d) disqualifies a person if 50 percent or more of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of that same Contracting State entitled to the benefits of this Convention under subparagraphs (a), (b), (c)i), (e) or (f) (other than a person described in paragraph 6 of this Article) in the form of payments that are deductible for the purposes of the taxes covered by this Convention in the State of which the person is a resident. The term "gross income" is not defined in the Convention. Thus, in accordance with paragraph (2) of Article 3 (General Definitions), in determining whether a person deriving income from United States sources is entitled to the benefits of the Convention, the United States will ascribe the meaning to the term that it has in the United States. In the case of the United States, the term "gross income" has the same meaning as such term in section 61 of the Code and the regulations thereunder.

To the extent they are deductible from the taxable base, trust distributions are deductible payments. However, depreciation and amortization deductions, which do not represent payments or accruals to other persons, are disregarded for this purpose. Deductible payments also do not include arm's length payments in the ordinary course of business for services or tangible property.

Tax Exempt Organizations -- Subparagraph 1(e)

A tax-exempt organization other than an exempt pension trust is entitled to all the benefits of the Convention, without regard to the residence of its beneficiaries or members. Entities qualifying under this subparagraph are those that are organized and operated exclusively for religious, charitable, scientific, literary or educational purposes and that, by virtue of that status, are generally exempt from income taxation in their Contracting State of residence.

Exempt Employee Benefits Organizations – Subparagraph 1(f)

A plan, scheme, fund, trust, company or other arrangement established in a Contracting State that is operated exclusively to administer or provide employee benefits and that, by reason of its nature as such, is generally exempt from income taxation in that

State is entitled to all the benefits of the Convention if more than half of the beneficiaries, members or participants, if any, in such organization are persons that are entitled, under this Article, to the benefits of this Convention. For purposes of this provision, the term "beneficiaries" should be understood to refer to the persons receiving benefits from the entity.

Paragraph 2

Paragraph 2 sets forth a test under which a resident of a Contracting State that is not entitled to all benefits of the Convention may receive treaty benefits with respect to certain items of income that are connected to an active trade or business conducted in its State of residence.

Subparagraph (a) sets forth the general rule that a resident of a Contracting State engaged in the active conduct of a trade or business in that State may obtain the benefits of the Convention with respect to an item of income derived in the other Contracting State. The item of income, however, must be derived in connection with or incidental to that trade or business.

The term "active trade or business" is defined in clause (iii) of subparagraph 2(d). 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 the activities of a resident of a Contracting State constitute an active trade or business is determined under all the facts and circumstances. A resident of a Contracting State actively conducts a trade or business if it regularly performs active and substantial management and operational functions through its own officers or staff of 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 or insurance activities conducted by a bank or an 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 but not as part of the company's banking or insurance business.

For this purpose, a resident will be treated as a bank only if: (a) it is licensed to accept deposits from residents of the Contracting State of which it is a resident and to conduct, in that State, lending or other banking activities; (b) it regularly accepts deposits from customers who are residents of the Contracting State of which it is a resident in the ordinary course of its business and the amount of deposits shown on the company's

balance sheet is substantial; and (c) it regularly makes loans to customers in the ordinary course of its trade or business. Furthermore, a resident will be treated as an insurance company only if: (a) it is licensed to insure risks of residents of the Contracting State of which it is a resident; and (b) it regularly insures (not including reinsurance) risks of customers who are residents of the Contracting State of which it is a resident.

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 for purposes of subparagraph (a).

An item of income is derived in connection with a trade or business if the income-producing activity in the State of source is a line of business that "forms a part of" or is "complementary" to the trade or business conducted in the State of residence by the income recipient. A business activity generally will be considered to form part of a business activity conducted in the State of source if the two activities involve the design, manufacture or sale of the same products or type of products, or the provision of similar services. The notes clarify that the line of business in the State of residence may be upstream, downstream, or parallel to the activity conducted in the State of source. Thus, the line of business may provide inputs for a manufacturing process that occurs in the State of source, may sell the output of that manufacturing process, or simply may sell the same sorts of products that are being sold by the trade or business carried on in the State of source.

For two activities to be considered to be "complementary," the activities need not relate to the same types of products or services, but they should be part of the same overall industry and be related in the sense that the success or failure of one activity will tend to result in success or failure for the other. Where more than one trade or business is conducted in the State of source and only one of the trades or businesses forms a part of or is complementary to a trade or business conducted in the State of residence, it is necessary to identify the trade or business to which an item of income is attributable. Royalties generally will be considered to be derived in connection with the trade or business to which the underlying intangible property is attributable. Dividends will be deemed to be derived first out of earnings and profits of the treaty-benefited trade or business, and then out of other earnings and profits. Interest income may be allocated under any reasonable method consistently applied. A method that conforms to U.S. principles for expense allocation will be considered a reasonable method.

An item of income derived from the State of source is "incidental to" the trade or business carried on in the State of residence if production of the item facilitates the conduct of the trade or business in the State of residence. An example of incidental income is the temporary investment of working capital of a person in the State of residence in securities issued by persons in the State of source.

Subparagraph (b) of paragraph 2 states a further condition to the general rule in subparagraph (a) in cases where 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. Subparagraph (b) states that the trade or business carried on in the State of residence, under these circumstances, must be substantial in relation to the activity in the State of source. The requirement is intended to prevent a narrow case of treaty-shopping abuses in which a company attempts to qualify for benefits by engaging in de minimis connected business activities in the treaty country in which it is resident (*i.e.*, activities that have little economic cost or effect with respect to the company business as a whole).

The determination of substantiality is made based upon all the facts and circumstances and takes into account the comparative sizes of the trades or businesses in each Contracting State (measured by reference to asset values, income and payroll expenses), the nature of the activities performed in each Contracting State, and the relative contributions made to that trade or business in each Contracting State. In any case, in making each determination or comparison, due regard will be given to the relative sizes of the U.S. and Barbados economies.

In addition to this subjective rule, subparagraph (b) provides a safe harbor under which the trade or business of the income recipient may be deemed to be substantial based on three ratios that compare the size of the recipient's activities to those conducted in the other State with respect to the preceding taxable year, or the average of the preceding three years. The three ratios compare: (i) the value of the assets in the recipient's State to the assets used in the other State; (ii) the gross income derived in the recipient's State to the gross income derived in the other State; and (iii) the payroll expense in the recipient's State to the payroll expense in the other State. The average of the three ratios must exceed 10 percent, and each individual ratio must equal at least 7.5 percent. For purposes of this test, if the income recipient owns, directly or indirectly, less than 100 percent of the activity conducted in either State, only its proportionate share of the activity will be taken into account.

The determination in subparagraph (b) also is made separately for each item of income derived from the State of source. It therefore is possible that a person would be entitled to the benefits of the Convention with respect to one item of income but not with respect to another.

If a resident of a Contracting State is entitled to treaty benefits with respect to a particular item of income under paragraph 2, the resident is entitled to all benefits of the Convention insofar as they affect the taxation of that item of income in the State of source.

The application of the substantiality test only to income from related parties focuses only on potential abuse cases, and does not hamper certain other kinds of non-abusive activities, even though the income recipient resident in a Contracting State may be very small in relation to the entity generating income in the other Contracting State. For example, a small Barbados bank that makes a loan to a very large unrelated U.S. business would not have to pass a substantiality test to receive treaty benefits under Paragraph 2.

As discussed above, paragraph 1 of the Understandings provides that the 1991 Understandings continue to apply for purposes of applying Article 22 of the Convention, except to the extent that the 1991 Understandings are inconsistent with the provision of Article 22 (as amended by the Protocol). In this regard, the 1991 Understandings make clear that this provision is self executing; unlike the provisions of paragraph 3, discussed below, it does not require advance competent authority ruling or approval. The 1991 Understandings contain a number of examples illustrating the intention of the negotiators with respect to the interpretation of the active trade or business provisions in the 1991 Protocol.

Subparagraph (c) of paragraph 2 provides special rules for determining whether a resident of a Contracting State is engaged in the active conduct of a trade or business within the meaning of subparagraph (a). Subparagraph (c) attributes the activities of a partnership to each of its partners. Subparagraph (c) also attributes to a person activities conducted by persons "connected" to such person. A person ("X") is connected to another person ("Y") if X possesses 50 percent or more of the beneficial interest in Y (or if Y possesses 50 percent or more of the beneficial interest in X). For this purpose, X is connected to a company if X owns shares representing 50 percent or more of the aggregate voting power and value of the company or fifty percent or more of the beneficial equity interest in the company. X also is connected to Y if a third person possesses 50 percent or more of the beneficial interest in both X and Y. For this purpose, if X or Y 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, X is connected to Y if, based upon all the facts and circumstances, X controls Y, Y controls X, or X and Y are controlled by the same person or persons.

Paragraph 3

Paragraph 3 provides that a person that is not entitled to the benefits of this Convention pursuant to the provisions of paragraph 1 may, nevertheless, be granted the benefits of the Convention at the discretion of the competent authority of the State in which the income in question arises. The paragraph itself provides no guidance to competent authorities or taxpayers as to how the discretionary authority is to be exercised. The 1991 Understandings, which generally continue to apply, as discussed above, provide that, for purposes of implementing paragraph 3, taxpayers will be permitted to present their cases to the competent authority for an advance determination based on the facts, and will not be required to wait until the tax authorities of one of the Contracting States have determined that benefits are denied. In these circumstances, it is also expected that if the competent authority determines that benefits are to be allowed, they will be allowed retroactively to the time of entry into force of the relevant treaty provision or the establishment of the structure in question, whichever is later.

The 1991 Understandings further provide that, in making determinations under paragraph 3, the competent authorities will take into account all relevant facts and circumstances. The factual criteria that the competent authorities are expected to take

into account include the existence of a clear business purpose for the structure and location of the income-earning entity in question; the conduct of an active trade or business (as opposed to a mere investment activity) by such entity; and a valid business nexus between that entity and the activity giving rise to the income.

The 1991 Understandings also note that the discretionary authority granted to the competent authorities is particularly important in view of, and should be exercised with particular cognizance of, the developments in, and objectives of, international economic integration, such as that among the member countries of the CARICOM and under the North American Free Trade Agreement.

In this regard, the Understandings provide specific guidance in the case of an employee benefits organization that fails to satisfy the requirements of subparagraph (f) of paragraph 2 solely because 50 percent or less of its beneficiaries, members or participants are persons entitled to the benefits of the Convention. In such case, the U.S. Competent Authority will favorably consider the following factors: (a) the organization is established in Barbados; (b) the sponsoring employer of the organization is a resident of Barbados entitled to the benefits of the Convention (other than a person described in paragraph 6 of Article 22); (c) more than 30 percent of the beneficiaries, members or participants of the organization are persons entitled to the benefits of this Convention; and (d) more than 70 percent of the beneficiaries, members or participants of the organization are individuals resident in a member of the Caribbean Community.

The competent authority may determine to grant all benefits of the Convention, or it may determine to grant only certain benefits. For instance, it may determine to grant benefits only with respect to a particular item of income in a manner similar to paragraph 2. Further, the competent authority may set time limits on the duration of any relief granted.

Paragraph 4

Paragraph 4 defines the term "recognized stock exchange." See the paragraph 1 discussion above.

Paragraph 5

Paragraph 5 of Article 22 authorizes the competent authorities both to develop procedures for the application of the Article, and to exchange information necessary to carry out its provisions. Thus, for example, if a Barbadian resident corporation claims benefits on the basis of having satisfied the ownership/base erosion tests of subparagraph 1(d), the U.S. competent authority may request information from the Barbados competent authority to confirm that these tests have, in fact, been satisfied.

Paragraph 6

Paragraph 6 excludes certain persons that are residents and that otherwise would qualify for the benefits of the Convention under paragraphs 1 or 2 of this Article from the benefits of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties). Paragraph 6 denies these benefits in the case of a person that is entitled to income tax benefits under the provisions of a special tax regime. Paragraph 6 also treats a partnership, estate or trust as a person that is entitled to income tax benefits under the provisions of a special tax regime to the extent that such partnership, estate or trust is treated as a resident of a Contracting State 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 one or more persons described in paragraph 6.

The Understandings identify several regimes in Barbados that are special tax regimes. These regimes are as follows: (1) the Exempt Insurance Act, Cap. 308; (2) the International Financial Services Act, 2002; (3) the International Business Companies Act, Cap. 77; (4) the Societies with Restricted Liability Act, Cap. 318B; or (5) the Insurance (Miscellaneous Provisions) Act, 1998. The Understandings further provide that any legislation or administrative practice enacted or adopted after the signing of this Protocol pursuant to which the income of a person is entitled to the same or substantially similar tax benefits to those granted under the legislation referred to in the previous sentence will constitute a special regime. In determining whether a person in entitled to the same or substantially similar benefits to those tax regimes identified in the understandings, consideration will be given to all facts and circumstances, including, for example, whether a tax regime imposes tax based on an artificially low taxable base.

Article III

Article III of the Protocol amends Article 26 (Exchange of Information) of the Convention to add a new paragraph 4. Paragraph 4 makes clear that information exchanged under Article 26 of the Convention 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 other legal representative, where the client seeks legal advice). 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. Paragraph 4 also makes clear that the Contracting States may obtain and exchange information relating to the ownership of legal persons.

Article IV

Article IV relates to entry into force of the modifications made by the Protocol.

Paragraph 1

Paragraph 1 provides that the Protocol shall be subject to ratification by both Contracting States according to their constitutional and statutory requirements. Instruments of ratification shall be exchanged as soon as possible.

In the United States, the process leading to ratification and entry into force is as follows: once a protocol or treaty has been signed by authorized representatives of the two Contracting States, the Department of State sends the protocol or treaty to the President who formally transmits it to the Senate for its advice and consent to ratification, which requires approval by two-thirds of the Senators present and voting. Prior to this vote, however, it generally has been the practice of the Senate Committee on Foreign Relations to hold hearings on the protocol or treaty and make a recommendation regarding its approval to the full Senate. Both Government and private sector witnesses may testify at these hearings. After receiving the Senate's advice and consent to ratification, the protocol or treaty is returned to the President for his signature on the ratification document. The President's signature on the document completes the process in the United States.

Paragraph 2

Paragraph 2 provides that the Protocol will enter into force upon the exchange of instruments of ratification. The date on which a treaty or protocol enters into force is not necessarily the date on which its provisions take effect. Paragraph 2, therefore, also contains rules that determine when the provisions of the Protocol will have effect.

Under paragraph 2(a), the Protocol will have effect with respect to taxes withheld at source (principally dividends, interest and royalties) for amounts paid or credited on or after the first day of the second month following the date on which the Protocol enters into force. For example, if instruments of ratification are exchanged on April 25 of a given year, the availability of benefits under Article 10 (Dividends) of the Convention will be limited under Article 22, as amended by the Protocol, for any dividends paid or credited on or after June 1 of that year. The delay of one to two months is required to allow sufficient time for withholding agents to be informed about the change in withholding rates.

For all other taxes, subparagraph (b) specifies that the Protocol will have effect for any taxable year beginning on or after January 1 of the year following entry into force.