

with respect to the special reference to third country investors.

The provisions for administrative cooperation are also similar to those I have described. However, there is no article providing for assistance in collection because it would require Poland to establish an administrative mechanism which it felt it could not undertake. The absence of this provision is not believed to create a practical problem, since it is unlikely that persons resident outside Poland could use a Polish address for collecting U.S. investment income.

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[13] TEXTS OF RESOLUTIONS OF
RATIFICATION

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[14] *Resolved, (Two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Convention between the Government of the United States of America and the Government of the Polish People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Income, and a Related Exchange of Notes, signed at Washington on October 8, 1974 (Ex. A, 94-1).*

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Technical Explanation¹ of the Convention Between the Government of the United States of America and the Government of the Polish People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income,

¹ It is the practice of the Treasury Department to prepare for the use of the Senate and other interested persons a Technical Explanation of the tax conventions which are submitted to the Senate for its advice and consent to ratification.

An income Tax Convention with Poland was signed October 8, 1974, and submitted by the President to the Senate on January 23, 1975. On November 7, 1975, the Senate Committee on Foreign Relations held hearings and this Technical Explanation was presented. The Senate voted its advice and consent on November 18, 1975, and instruments of ratification were exchanged on June 22, 1976, the convention thereby entering into force on July 22, 1976.

Signed at Washington on October 8, 1974²

ARTICLE. 1. SCOPE OF CONVENTION

Under this article the Convention will apply generally to persons who are residents of one or both of the Contracting States. However, persons who are residents of one or both of the Contracting States are sometimes not within the scope of the Convention and other persons who are not residents of either of the Contracting States are within the scope of the Convention. For example, Article 19 (Governmental Functions) covers only citizens of a Contracting State and, on the United States side, Article 20 (Relief from Double Taxation) covers citizens of the United States, whether or not these citizens are residents of either Contracting State.

ARTICLE 2. TAXES COVERED BY THE CONVENTION

Paragraph (1) provides that the Convention will apply to taxes on income imposed by each Contracting State.

Paragraph (2) provides that the taxes presently existing to which the Convention applies in the case of Poland are the income tax (Law 339 of December 16, 1972); the tax on salaries and wages (Law 41 of February 4, 1949); and the equalization tax (surtax). In the case of the United States, paragraph (2) provides that the taxes presently existing to which the Convention applies are the Federal income taxes imposed by the Internal Revenue Code ("Code"), other than the taxes imposed by chapters 2 (tax on self-employment income) and 21 (federal insurance contributions act) of the Code. Among the taxes covered are those imposed under sections 531 (accumulated earnings tax) and 541 (personal holding company tax) of the Code.

As in all other United States conventions, the provisions of this Convention, except for Article 21 (Non-

² Page 416; pertinent excerpts from Senate Executive Report No. 94-15, page 425; Senate Executive A is not published.

discrimination), do not apply to taxes imposed by the states of the United States. However, in a Note accompanying the Convention, the United States observes that generally the states of the United States would not tax a resident of Poland in a situation where that resident is entitled to a reduced rate or exemption under the Convention. The Note also states that if necessary the tax authorities of the United States will use their best efforts to secure exemption from any state income taxes that may be imposed on shipping or airline enterprises of Poland.

Pursuant to paragraph (3), the Convention will also apply to identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes.

Pursuant to paragraph (4), for purposes of Article 21 (Nondiscrimination), the Convention applies to taxes imposed at the national, state, or local level, except the Polish Treasury residence fee (opłata skarbową za zameldowanie). For a discussion of the residence fee, see Article 21, *infra*.

Paragraph (5) provides that the competent authority of each Contracting State will notify the competent authority of the other Contracting State of any amendment of the tax laws referred to in paragraph (2), or of the adoption of identical or substantially similar taxes imposed in addition to, or in place of, those taxes. The texts of such amendments or new statutes are to be transmitted between the competent authorities at least once a year.

ARTICLE 3. GENERAL DEFINITIONS

Paragraph (1) sets out definitions of certain basic terms used in the Convention. A number of important terms, however, are defined elsewhere in the Convention.

The term "Poland" means the Polish People's Republic. The term "United States" means the United States of America. When used in a geographical sense, the term "United States" means the states of the United

States and the District of Columbia. Thus, the Convention does not apply to the possessions of the United States or the Commonwealth of Puerto Rico.

When used in a geographical sense, the terms "Poland" and "United States" also include their respective territorial seas and continental shelves, generally in accordance with the principles of section 638 of the Code.

The terms "Contracting State" and "the other Contracting State" are defined to mean the United States or Poland as the context requires.

The term "person" is defined as including an individual, a trustee or administrator, a company or juridical person, and any other body of persons. This definition includes a trust, an estate and a partnership. The term "company" means any corporate body or any entity which is treated as a corporate body for tax purposes.

The term "United States company" is defined as a corporation, or any unincorporated entity treated as a United States corporation for United States tax purposes, which is created or organized under the laws of the United States, any state thereof, or the District of Columbia. A "Polish company" is defined as a corporation, or any unincorporated entity treated as a Polish corporation for purposes of Polish tax, which is created or organized under the laws of Poland.

The term "resident of Poland" is defined as a Polish company or any other person (except a company or any entity treated as a company under Polish law) resident in Poland for purposes of its tax. Similarly, "resident of the United States" means a United States company and any other person (except a company or any entity treated as a corporation for United States tax purposes) resident in the United States for purposes of its tax. Thus, a resident of the United States includes a resident alien individual and a resident citizen but not a foreign corporation. A citizen of the United States or Poland is not automatically a resident of the United States or Poland for purposes of this Conven-

tion. See Article 4 (Fiscal Residence) for rules to determine the residence of an individual who is a resident of both Contracting States under these definitions.

The Convention provides that a partnership, trustee, or administrator is a resident of a Contracting State only to the extent that the income derived by such person in that capacity is subject to tax in such Contracting State as the income of a resident. For example, under United States laws, a partnership is never, and an estate or trust (acting through its fiduciary) is often not, taxed as such. Under the Convention, income received by a partnership, estate, or trust will not be treated for purposes of the Convention as income received by a resident of the United States unless such income is subject to tax by the United States as the income of a resident. Thus, the treatment of income received by a partnership will be determined by the residence and taxation of its partners with respect to that income. To the extent the partners are subject to United States tax as residents of the United States, the partnership will be treated as a resident of the United States. Similarly, the treatment of income received by a trust or estate will be determined by the residence and taxation of the person subject to tax on such income, which may be the grantor, the beneficiaries or the trust or estate itself, as the case may be.

The terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean, respectively, an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State.

With respect to the United States, the term "competent authority" means the Secretary of the Treasury or his delegate. With respect to Poland, it means the Minister of Finance. The term "State" means any national State, whether or not a Contracting State. The term "tax" means those taxes imposed by the United States or Poland to which the Convention ap-

plies by virtue of Article 2 (Taxes Covered by the Convention).

The term "international traffic" is defined to mean any voyage of a ship or aircraft operated by a resident of a Contracting State except where such voyage is confined solely to places within that Contracting State. Coastal shipping along the Atlantic coast of the United States is not a voyage in international traffic. However, if a ship operated by a resident of Poland transports goods from Canada to the United States, leaving some of the goods in New York and the remainder in Norfolk, the portion of the voyage between New York and Norfolk is international traffic.

Paragraph (2) provides that any term used in the Convention which is not defined therein will, unless the context otherwise requires, have the meaning which it has under the laws of the Contracting State whose tax is being determined. However, where a term has a different meaning under the laws of Poland and the United States or where the meaning under the laws of one of the Contracting States is not readily determinable, the competent authorities may for purposes of the Convention establish a common definition in order to prevent double taxation or to further any other purpose of the Convention.

ARTICLE 4. FISCAL RESIDENCE

This article sets forth rules for determining the residence of individuals who are residents of both Contracting States under the definitions of paragraphs (1)(g) and (1)(h) of Article 3 (General Definitions).

Under this article, an individual who is a resident of both Contracting States under their domestic laws will, for purposes of the Convention, be deemed to be a resident of the Contracting State in which he has his permanent home, his center of vital interests (closest economic and personal relations), a habitual abode, or his citizenship, in the order listed. If the issue is not settled by these tests, the competent authorities may decide by mutual agreement under Article 22 (Mu-

tual Agreement Procedure) the one Contracting State of which he will be considered to be a resident.

ARTICLE 5. GENERAL RULES OF TAXATION

Under paragraph (1), a resident of one Contracting State may be taxed by the other Contracting State on any income from sources within that other Contracting State and only on such income, subject to any limitations set forth in the Convention. For this purpose, the source rules contained in various articles throughout the Convention are to be applied. However, if the resident is a citizen of the other Contracting State, that Contracting State may tax the resident without regard to this paragraph because of the saving clause of paragraph (3) of this article.

Paragraph (2) contains the customary rule that the Convention will not restrict in any manner any exclusion, exemption, deduction, credit, or other allowance now or hereafter accorded by the laws of a Contracting State in the determination of the tax imposed by it, or by any other agreement between the Contracting States. This rule reflects the principle that a convention should not increase the tax burden on residents of the Contracting States.

Paragraph (3) contains the traditional saving clause under which the United States reserves the right to tax its citizens and residents (as defined in Article 3 (General Definitions) and as determined under Article 4 (Fiscal Residence)) as if the Convention had not come into effect. However, the saving clause does not apply in several cases in which its application would contravene policies reflected in the Convention. Thus, the saving clause does not affect the provisions with respect to relief from double taxation, nondiscrimination, or the mutual agreement procedure. Moreover, the saving clause does not affect the benefits of the Convention to teachers, students, trainees, individuals performing governmental functions and diplomatic and consular officers who are

neither citizens of nor have immigrant status in the Contracting State imposing the tax. In the case of the United States, "immigrant status" means the individual has been admitted to the United States for permanent residence. The saving clause is reciprocal.

Paragraph (5) authorizes the competent authorities of the Contracting States to prescribe regulations necessary to carry out the provisions of the Convention. On the United States side, this authority is also provided by section 7805 of the Code.

ARTICLE 6. PERMANENT ESTABLISHMENT

This article defines the term "permanent establishment." The existence of a permanent establishment is relevant under Article 8 (Business Profits) to the taxation of business profits and in determining the applicability of other provisions of the Convention, such as Articles 11 (Dividends), 12 (Interest), 13 (Royalties), and 14 (Capital Gains).

Under paragraph (1), the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Illustrations in paragraph (2) of a permanent establishment include a branch; an office; a factory; a workshop; a mine, quarry or other place of extraction of natural resources; and a building site or construction or assembly project which exists for more than eighteen months. As a general rule, any fixed facility or premises through which an enterprise conducts its business, for an indefinite or substantial period of time will be treated as a permanent establishment unless it is used for one or more of the activities described in paragraph (3).

Under the building site or construction or assembly project rule the eighteen month period begins only when work physically commences in the other Contracting State. A series of contracts or projects which are interdependent both commercially and geographically is to be treated as a single project for the purpose of applying the eighteen months test.

Paragraph (3) specifically provides that a permanent establishment does not include a fixed place of business if it is used only for one or more of the following:

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

"(b) The maintenance of a stock of goods belonging to the enterprise for the purpose of storage, display or delivery;

"(c) The maintenance of a stock of goods or merchandise belonging to the enterprise for the purpose of processing or reprocessing by another enterprise;

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

"(e) The maintenance of a fixed place of business for the purpose of advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character, for the enterprise."

As noted, these exceptions are cumulative and a fixed place of business used solely for one or more of these purposes will not be considered a permanent establishment under the Convention.

Under paragraph (4) a person acting in one Contracting State on behalf of an enterprise of the other Contracting State, other than an agent of an independent status to whom paragraph (5) applies, will be deemed to be a permanent establishment if such person has, and habitually exercises in that first-mentioned Contracting State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.

On the other hand, paragraph (5) provides that an enterprise of one Contracting State will not be deemed to have a permanent establishment in the other Contracting State merely because such enterprise carries on busi-

ness in such other Contracting State through a broker, general commission agent, or any other agent of an independent status, if such agent is acting in the ordinary course of its business, and whether or not such agent acts exclusively for one or more principals.

Paragraph (6) provides that an enterprise of one Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because such enterprise sells at the termination of a trade fair in the other Contracting State goods or merchandise which were displayed by such enterprise at the trade fair. This exception does not appear in existing United States conventions, but a similar exception is contained in the pending conventions with the Soviet Union and Romania.

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

ARTICLE 7. INCOME FROM REAL PROPERTY

Under paragraph (1), income from real property, including royalties and other payments in respect of the exploitation of natural resources, e.g., oil wells, and gains from the sale, exchange or other disposition of such property or of the right giving rise to such royalties or other payments, may be taxed by the Contracting State in which the real property or natural resources are situated. However, income from real property does not include interest on indebtedness secured by real property (e.g., mortgages) or by a right giving rise to royalties or other payments in respect of the exploitation of natural resources. Such interest income is covered by Article 12 (Interest).

Paragraph (1) applies to income derived from the usufruct, direct use,

letting, or use in any other form of real property.

ARTICLE 8. BUSINESS PROFITS

Paragraph (1) sets forth the general rule that profits of an enterprise of one Contracting State will be taxable only by that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. Where there is a permanent establishment, only the profits attributable to the permanent establishment can be taxed by that other Contracting State, unless the enterprise is carried by a resident who is a citizen of the other Contracting State. (See the savings clause in paragraph (3) of Article 5 (General Rules for Taxation).) It is intended that for purposes of the Convention, including paragraph (1) of Article 5 (General Rules of Taxation) and Article 20 (Relief from Double Taxation), profits whether from sources within or without a Contracting State attributable to a permanent establishment which a resident of one Contracting State has in the other Contracting State will be considered to be from sources within that other Contracting State. Thus, items of income described in section 864(c)(4)(B) of the Code attributable to a permanent establishment situated in the United States will be subject to tax by the United States.

In determining the proper attribution of profits under the Convention, paragraph (2) provides that both Contracting States will attribute to the permanent establishment such profits as it would be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment. Under paragraph (3), expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses, whether incurred in the State in which the per-

manent establishment is situated or elsewhere, will be allowed as deductions in determining the profits of the permanent establishment. However, in determining the amount of the deduction under paragraph (3) for expenses incurred by the head office, the deduction may be limited to the expense incurred without including a profit element for the head office.

Paragraph (4) provides that no profits will be attributed to a permanent establishment merely because of the purchase of goods or merchandise by that permanent establishment, or by the enterprise of which it is a permanent establishment, for such enterprise. Paragraph (2) of the article does not override paragraph (4). Thus, where a permanent establishment purchases goods for its head office, the profits attributed under paragraph (2) to the permanent establishment with respect to its other activities will not be increased by adding a notational figure for profits from purchasing.

Although the term "profits of an enterprise" is not defined in the Convention, in general that term includes items of income which are defined in other United States conventions as "business profits" or as "industrial or commercial profits," such as income derived from manufacturing, mercantile, banking, insurance, agricultural, fishing or mining activities, the operation of ships or aircraft, the furnishing of services, and the rental of tangible personal (movable) property. It does not include income from the performance of personal services derived by an individual either as an employee or in an independent capacity. The term also includes income derived from real property and natural resources, dividends, interest, investment income on required reserves from insurance activities, royalties and capital gains, but only if the property or rights giving rise to such income are effectively connected with a permanent establishment. See paragraph (3) of Article 11 (Dividends), paragraph (2) of Article 12 (Interest), paragraph (4) of Article 13 (Royalties),

and paragraph (1)(b) of Article 14 (Capital Gains).

While this Convention does not contain an explicit definition of the term "effectively connected," that term has substantially the same meaning as in section 864(c)(2) of the Code. Therefore, factors to be taken into account include whether the rights or property are used in or held for use in carrying on an activity giving rise to profits through a permanent establishment and whether the activities carried on through such permanent establishment were a material factor in the realization of the income derived from such property or rights. For this purpose, due regard shall be given to whether or not such property or rights or such income were accounted for through such permanent establishment.

Under paragraph (5), where profits include items of income which are dealt with separately in other articles of the Convention, the provisions of those articles will, except as otherwise provided therein, supersede the provisions of this article. Thus, for example, taxation of income from copyrights of motion picture films or for radio or television broadcasting tapes will be controlled by Article 13 (Royalties) and not by this article unless the copyright is effectively connected with a permanent establishment.

ARTICLE 9. SHIPPING AND AIR TRANSPORT

Paragraph (1) provides that, notwithstanding Article 8 (Business Profits) and Article 14 (Capital Gains), income derived by a resident of Poland from the operation in international traffic of ships or aircraft (regardless of where registered) will be exempt from tax by the United States. Under paragraph (2), such income derived by a resident of the United States will be exempt from tax by Poland if the ship or aircraft is registered in the United States.

The term "income" is intended to include gains from the sale, exchange or other disposition of ships or aircraft described in paragraph (1) or (2). This article also applies to income de-

rived from the rental of such ships or aircraft under a full or bareboat charter if the lessor is engaged in the operation of ships or aircraft in international traffic and the rental income is supplementary to such operations. For example, if an airline which is a resident of one Contracting State has excess equipment in the winter months and leases several of its aircraft which are not required by it during that period to an airline which is a resident of the other Contracting State, that rental income of the lessor is not subject to tax by that other Contracting State, whether or not the lessee uses the aircraft in international traffic.

Paragraph (3) makes clear that the article also applies to income derived by a resident of one Contracting State from the use, maintenance, and lease of containers, trailers for the inland transportation of containers, lighters operated in the lighters-aboard-ship system, and other related equipment in connection with the operation in international traffic of ships or aircraft by the resident described in paragraph (1) or (2).

This article is subject to the saving clause of paragraph (3) of Article 5 (General Rules of Taxation). Therefore, a Contracting State may tax income from international traffic derived by a resident of the other Contracting State without regard to this article if such resident is a citizen of the first-mentioned Contracting State.

ARTICLE 10. RELATED PERSONS

This article complements section 482 of the Code and confirms the power of the United States to allocate items of income, deduction, credit or allowance in certain cases. Under paragraph (1), if conditions are made or imposed between related enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accord-

ingly. Where an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, those enterprises are related for purposes of the Convention.

Paragraph (2) sets forth an explicit formulation of the consequence of an adjustment made in accordance with paragraph (1) by a Contracting State to the income of one of its residents. In such event, the other Contracting State must, if it agrees with such redetermination, make a corresponding adjustment to the income of a person in such other Contracting State related to such resident. If the other Contracting State disagrees with the redetermination, the two Contracting States must endeavor to reach agreement in accordance with the mutual agreement procedure in Article 22 (Mutual Agreement Procedure).

ARTICLE 11. DIVIDENDS

Paragraph (1) provides that dividends paid by a company which is a resident of one Contracting State to a resident of the other Contracting State may be taxed by that other Contracting State. However, paragraph (2) limits the rate of tax in the former Contracting State to a rate not in excess of five percent of the gross amount of the dividend if the recipient is a company which holds directly at least ten percent of the outstanding shares of the voting stock of the company paying the dividends, and to a rate not in excess of fifteen percent in all other cases. These rate limitations do not affect the taxation of profits of the company which pays the dividends.

The rate limitations do not apply if the recipient, being a resident of one Contracting State, has a permanent establishment in the other Contracting State, of which the company paying the dividend is a resident, and the shares with respect to which the dividends are paid are effectively con-

nected with such permanent establishment. In such a case, the dividends will be treated as profits subject to Article 8 (Business Profits). If the recipient is a citizen of the Contracting State of which the company paying the dividend is a resident, that Contracting State may tax the recipient without regard to this article because of the saving clause of paragraph (3) of Article 5 (General Rules of Taxation). It is intended that, for purposes of Article 20 (Relief from Double Taxation), dividends paid by a company of a Contracting State are from sources within that Contracting State.

ARTICLE 12. INTEREST

Paragraph (1) provides that interest arising in a Contracting State and paid to a resident of the other Contracting State will be exempt from tax by the first-mentioned Contracting State.

Paragraph (2) provides that the exemption in paragraph (1) does not apply if the recipient of the interest, being a resident of one Contracting State, has a permanent establishment in the other Contracting State and the indebtedness giving rise to the interest is effectively connected with such permanent establishment. In such a case, the interest will be treated as profits subject to Article 8 (Business Profits).

If excessive interest is paid owing to a special relationship between the payor and the recipient or between both of them and some other person, paragraph (3) provides that the article does not apply to the excessive portion of the payment. The excessive portion may be taxed by each Contracting State according to its own laws, including the Convention where applicable. In the case of the United States, the excessive portion may, for example, be taxed as a dividend, in which case the provisions of Article 11 (Dividends) may apply.

Paragraph (4) defines interest for purposes of the Convention as income from bonds, debentures, Government securities, notes or other evidences of indebtedness, whether or not secured and whether or not carrying a right to

participate in profits and debt-claims of every kind, as well as all other income which, under the taxation law of the Contracting State in which the income arises, is assimilated to income from money lent.

Paragraph (5) sets forth the source rules for interest. With two exceptions, interest will be treated as arising in a Contracting State only if paid by that Contracting State, a political subdivision or local authority thereof, or a resident of that Contracting State. Under the first exception, if the person paying the interest (whether or not such person is a resident of one of the Contracting States) has a permanent establishment in one of the Contracting States in connection with which the indebtedness on which the interest is paid was incurred and such interest is borne by the permanent establishment, the interest will be deemed to arise in the Contracting State in which the permanent establishment is situated. For example, if a resident of France has a permanent establishment in Poland which borrows money from a resident of the United States and bears the interest, the interest will be deemed to be from Polish sources. Thus, if paragraph (1) of this article is applicable, the interest will be exempt from Polish tax. The rules of Article 6 (Permanent Establishment) will be applied to determine whether the resident of France has a permanent establishment in Poland.

Under the second exception, if the person paying the interest is a resident of one of the Contracting States and has a permanent establishment in a State other than a Contracting State in connection with which the indebtedness on which the interest is paid was incurred and such interest is paid to a resident of the other Contracting State, and such interest is borne by such permanent establishment, the interest will be deemed to arise in the State in which the permanent establishment is situated. Interest described in the second exception will be exempt from tax in the Contracting State where the payor is a resident because,

under Article 5 (General Rules of Taxation), a resident of one Contracting State not a citizen of the other Contracting State may be taxed by that other Contracting State only on income from sources within that other Contracting State. For example, if a resident of the United States has a permanent establishment in France which borrows money from a resident of Poland and bears the interest, the interest will be deemed to be from French sources. Thus, the United States may not tax such income if the recipient-resident of Poland is not a citizen of the United States. The rules of Article 6 (Permanent Establishment) will be applied to determine whether the resident of the United States has a permanent establishment in France.

This article is subject to the saving clause of paragraph (3) of article 5 (General Rules of Taxation). Therefore, interest derived by a citizen of the Contracting State in which the interest arises may be taxed by that Contracting State without regard to this article.

ARTICLE 13. ROYALTIES

Paragraph (1) provides that royalties arising in a Contracting State and paid to a resident of the other Contracting State will be taxable by that other Contracting State. In addition, under paragraph (2) royalties may be taxed in the Contracting State where they arise at a rate not to exceed ten percent of the gross amount of the royalty.

The term "royalties" is defined as payments of any kind received as consideration for the use of, or the right to use, copyrights of a literary, artistic, or scientific work, including any copyrights of motion picture films or radio or television broadcasting tapes, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial, or scientific experience or skill (know-how). Royalties include gains derived from the sale, exchange, or other disposition of any such property or rights to the extent the

amounts realized on such sale, exchange or other disposition for consideration are contingent on the productivity, use, or disposition of the property or rights. If the amounts realized are not so contingent, the provisions of Article 14 (Capital Gains) may apply.

Under paragraph (4), the tax rate limitation of paragraph (2) will not apply if the recipient of the royalty, being a resident of one Contracting State, has a permanent establishment in the other Contracting State in which the royalty arises and the right or property giving rise to the royalty is effectively connected with the permanent establishment. In such a case, the royalty will be treated as profits subject to Article 8 (Business Profits).

Paragraph (5) provides that royalties (including contingent gains) will be deemed to arise in a Contracting State only to the extent they are payments made as consideration for the use of, or the right to use, property or rights described in paragraph (3) within that Contracting State. This source rule is similar to the source rule in section 861(a)(4) of the Code.

If excessive royalties are paid owing to a special relationship between the payer and the recipient or between both of them and some other person, paragraph (6) provides that the provisions of the article do not apply to the excessive portion of the royalty. The excessive portion may be taxed by each Contracting State according to its own laws, including the Convention where applicable. Thus, the excessive portion may be treated as a dividend or interest, or in whatever other manner is appropriate.

This article is subject to the saving clause of paragraph (3) of Article 5 (General Rules of Taxation). Therefore, royalties derived by a citizen of the Contracting State in which the royalty arises may be taxed by that Contracting State without regard to this article.

ARTICLE 14. CAPITAL GAINS

Under paragraph (1), a resident of one Contracting State will be exempt

from tax by the other Contracting State on gains from the sale, exchange, or other disposition of capital assets, e.g., stock or securities. However, the exemption does not apply if (1) the gain is derived from the sale, exchange or other disposition of property described in Article 7 (Income from Real Property) situated within the other Contracting State; (2) the recipient of the gain, being a resident of one Contracting State, has a permanent establishment in the other Contracting State and the property giving rise to the gain is effectively connected with the permanent establishment; or (3) the recipient of the gain, being an individual resident of one Contracting State, is present in the other Contracting State for a period or periods aggregating 183 days or more during the taxable year. The term "day" for purposes of this article and the other physical presence tests contained in the Convention with regard to an individual means a calendar day during any portion of which the individual is physically present in the relevant Contracting State.

If the recipient of the gain is a citizen of the other Contracting State, that Contracting State may tax the recipient without regard to this article because of the saving clause of paragraph (3) of Article 5 (General Rules of Taxation). Where Articles 9 (Shipping and Air Transport) or 13 (Royalties) apply to gains derived from the sale, exchange, or other disposition of rights or property which are covered by those articles, this article does not apply to such gains.

Under paragraph (2), Article 7 (Income from Real Property) applies to real property gains and Article 8 (Business Profits) applies to gains which are effectively connected with a permanent establishment which the recipient has in the other Contracting State.

ARTICLE 15. INDEPENDENT PERSONAL SERVICES

The Convention generally deals with income from personal services in two articles, distinguishing between in-

dependent and dependent personal services. The Convention does not have separate rules applicable to entertainers, and their personal service income will be treated either under this article or Article 16 (Dependent Personal Services).

Under paragraph (1), income derived by a resident of one Contracting State in respect of professional services or other independent activities may be taxed by that Contracting State. However, under paragraph (2) such income derived by an individual who is a resident of one Contracting State from the performance of personal services in an independent capacity in the other Contracting State may also be taxed by that other Contracting State if the individual is present therein for a period or periods aggregating 183 days or more in the taxable year. Under the saving clause of paragraph (3) of Article 5 (General Rules of Taxation), the other Contracting State may also tax any individual who is a citizen of that Contracting State without regard to this article.

The terms "professional services or other independent activities" and "personal services in an independent capacity" are synonymous in meaning, denoting services performed by an individual in an independent capacity (for his own account) where he receives the income and bears the losses arising from such services. If an individual is an independent contractor he is considered as rendering such services. Under paragraph (3), professional services include especially independent scientific, literary and artistic activities, as well as independent activities of physicians, lawyers, engineers, architects, dentists, journalists and others performing personal services as sole proprietors or partners.

ARTICLE 16. DEPENDENT PERSONAL SERVICES

Under paragraph (1), salaries, wages, and other similar remuneration derived by a resident of one Contracting State in respect of an employment will be taxable only by that Contracting State unless the employment is ex-

exercised in the other Contracting State. If the employment is exercised in the other Contracting State, the remuneration derived therefrom may also be taxed by that other Contracting State. However, paragraph (2) eliminates the other Contracting State's right to tax if (a) the recipient is present in that other Contracting State for a period or periods aggregating less than 183 days during the taxable year concerned; (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Contracting State; and (c) the remuneration is not borne as such by a permanent establishment which the employer has in the other Contracting State. Such income may nevertheless be taxed by that other Contracting State without regard to this article if the recipient is a citizen of that Contracting State, because of paragraph (3) of Article 5 (General Rules of Taxation).

It is intended that for purposes of the Convention wages, salaries and other similar remuneration include income from services performed by an officer of a corporation or company.

Under paragraph (3), remuneration derived by an individual from the performance of labor or personal services performed as an employee aboard ships or aircraft operated by a resident of one Contracting State in international traffic will, notwithstanding paragraph (2), be exempt from tax by the other Contracting State if such individual (even if a resident of a State other than a Contracting State) is a member of the regular complement of the ship or aircraft

ARTICLE 17. TEACHERS

Paragraph (1) provides that, if a resident of one Contracting State is invited by the other Contracting State, a political subdivision or local authority thereof, or by a university or other recognized educational institution in that other Contracting State to come to that other Contracting State for a period not expected to exceed two years for the purpose of teaching or engaging in research, or both, at a university or other recognized educational

institution, and if such resident comes to that other Contracting State primarily for such purpose, his income from personal services for teaching or research at the university or educational institution will be exempt from tax by that other Contracting State for a period not exceeding two years from the date of his arrival in that other Contracting State.

Since a temporary visit may be of such a duration that an individual may lose his status as a resident of the Contracting State of which he was a resident at the time he became eligible for the benefits of this article, the individual need only be a resident of such Contracting State at the beginning of his visit. However, if the individual becomes a citizen of, or acquires immigrant status in, the other Contracting State, that other Contracting State may tax the individual without regard to this article. See paragraphs (3) and (4) (b) of Article 5 (General Rules of Taxation). If the individual's visit exceeds a period of two years from the date of his arrival, the exemption applies only to the income received by the individual before the expiration of such two year period.

The article does not apply to income from research undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

ARTICLE 18. STUDENTS AND TRAINEES

Paragraph (1) provides that an individual who is a resident of one Contracting State at the time he becomes temporarily present in the other Contracting State and who is temporarily present therein for the primary purpose of studying at a university or other recognized educational institution; securing training required to qualify him to practice a profession or professional specialty; or studying or doing research as a recipient of a grant, allowance, or award from a governmental, religious, charitable, scientific, literary, or educational organization, will be exempt from tax by that other Contracting State for a

period not exceeding five taxable years from the date of his arrival in that other Contracting State on:

(1) Gifts from abroad for the purpose of his maintenance, education, study, research, or training;

(2) The grant, allowance, or award;

(3) Any other payment from the Contracting State of which the individual is a resident, except income from the performance of personal services; and

(4) Income from personal services performed in the other Contracting State not in excess of \$2,000 or its equivalent in Polish zlotys for any taxable year.

Under paragraph (2), an individual who is a resident of one Contracting State at the time he becomes temporarily present in the other Contracting State as an employee of, or under contract with, a resident of the first-mentioned Contracting State, for the primary purpose of acquiring technical, professional, or business experience from a person other than that resident of the first-mentioned Contracting State or other than a person related to such resident, or studying at a university or other recognized educational institution in that other Contracting State, will be exempt from tax by that other Contracting State on income from personal services not in excess of \$5,000 or its equivalent in Polish zlotys for a period not exceeding one year.

Under paragraph (3), an individual who is a resident of one Contracting State at the time he becomes temporarily present in the other Contracting State and who is temporarily present therein for a period not exceeding one year, as a participant in a program sponsored by the other Contracting State, for the primary purpose of training, research, or study, will be exempt from tax by the other Contracting State with respect to his income from personal services in respect of such training, research, or study performed in that other Contracting State in an aggregate amount not in excess of \$10,000 or its equivalent in Polish zlotys.

The first sentence of paragraph (4) provides that the benefits provided in paragraph (1) and the benefits provided under Article 17 (Teachers), when taken together, may extend only for such period of time, not to exceed five taxable years from the date of the individual's arrival, as may reasonably or customarily be required to effectuate the purpose of the visit. The second sentence of paragraph (4) makes it clear that the benefits provided by Article 17 (Teachers) will not be available to an individual if, during the immediately preceding period, the individual enjoyed the benefits provided by paragraph (1).

If an individual qualifies for the benefits of more than one of the provisions of Articles 17 (Teachers) and 18 (Students and Trainees), such individual may choose the most favorable provision but may not claim the benefits of more than one provision in any taxable year as a means of avoiding the limitations provided. Thus, for example, an individual who comes to the other Contracting State for the primary purpose of studying may be able to qualify under either paragraph (2) or (3). However, he cannot combine the maximum exclusion limits in those two paragraphs to exclude \$15,000 during the taxable year. If the individual becomes a citizen of, or acquires immigrant status in, the other Contracting State, that other Contracting State may tax the individual without regard to this article. See paragraphs (3) and (4) (b) of Article 5 (General Rules of Taxation).

ARTICLE 19. GOVERNMENTAL FUNCTIONS

Under this article, wages, salaries, and similar remuneration, including pensions, annuities or similar benefits, paid from public funds of one Contracting State to a citizen of that Contracting State for labor or personal services performed as an employee of the national government of that Contracting State, or any agency thereof, in the discharge of functions of a governmental nature will be exempt

from tax by the other Contracting State.

In order to avoid a potential conflict as to what constitutes governmental functions, paragraph (2) provides that labor or personal services performed by a citizen of one Contracting State shall be treated by the other Contracting State as performed in the discharge of governmental functions if such labor or personal services would be treated under the internal laws of both Contracting States as so performed. Thus, compensation paid in connection with industrial or commercial activity is treated the same as compensation received from a private employer. This article does not include remuneration paid by a political subdivision or a local authority thereof within the exemption.

If the citizen becomes a citizen of, or acquires immigrant status in, the other Contracting State, that other Contracting State may tax the individual without regard to this article. See paragraph (3) and (4) (b) of Article 5 (General Rules of Taxation).

ARTICLE 20. RELIEF FROM DOUBLE TAXATION

In order to avoid double taxation each Contracting State agrees in this article to provide a credit against its taxes for taxes paid to the other Contracting State.

Under paragraph (1) Poland will allow to a resident of Poland as a credit against the Polish tax the appropriate amount of taxes paid to the United States, in accordance with the provisions and subject to the limitations of the law of Poland (as it may be amended from time to time without changing the general principles of paragraph (1)).

Under paragraph (2), in accordance with the provisions and subject to the limitations of United States law (as it may be amended from time to time without changing the general principles of paragraph (2)), the United States will allow to a citizen or resident of the United States as a credit against United States tax the

appropriate amount of taxes paid to Poland and, in the case of a United States company owning at least ten percent of the voting power (i.e., voting stock) of a Polish company from which it receives dividends in any taxable year, will allow credit for the appropriate amount of taxes paid to Poland by the Polish company paying the dividends with respect to the profits out of which the dividends are paid. The appropriate amount shall be based upon the amount of tax paid to Poland, but the credit shall not exceed that portion of the United States tax which such citizen's or resident's net income (i.e., taxable income) from sources within Poland or on income from sources outside of the United States bears to his entire net income for the same taxable year. This provision does not require the United States to maintain a per-country and overall limitation in the future so long as the general principle of a foreign tax credit remains in effect.

For purposes of applying the United States credit in relation to taxes paid to Poland, the taxes referred to in paragraph (2) (a) of Article 2 (Taxes Covered by the Convention) will be considered to be income taxes. It is intended that any income of a resident of the United States which has been subject to tax by Poland in accordance with the Convention will be treated as income from Polish sources.

ARTICLE 21. NONDISCRIMINATION

Paragraph (1) provides that a citizen of one Contracting State who is a resident of the other Contracting State shall not be subjected in that other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of that other Contracting State in the same circumstances are or may be subjected. The determination whether there is a greater burden is to be made by comparing the treatment of individuals who are in comparable positions. Thus, for example,

a citizen of Poland who is a resident of the United States and who otherwise meets the requirements specified in section 911 of the Code would under this article be eligible for the benefits of section 911 even though not a citizen of the United States. On the other hand, just as a United States citizen who becomes a nonresident alien at any time during a taxable year or whose spouse is a nonresident alien at any time during a taxable year cannot file a joint return for that year, a Polish citizen would not be entitled to file a joint return with his spouse if either is a nonresident alien at any time during the taxable year.

Paragraph (2) provides that one Contracting State may not impose more burdensome taxes on permanent establishments of residents of the other Contracting State than it generally imposes on permanent establishments of residents of third States carrying on the same activities.

Paragraph (3) prohibits one Contracting State from subjecting a company of such Contracting State the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State to any taxation or any requirement connected with taxation which is other or more burdensome than those generally applicable to companies of the first-mentioned Contracting State carrying on the same activities, the capital of which is wholly or partly owned or controlled by one or more residents of a third State.

The criterion in paragraphs (2) and (3) is in terms of permanent establishments of and companies owned or controlled by, residents of third States, rather than to citizens or residents of that Contracting State, because the Polish taxation of other foreign businesses is a more relevant comparison than Polish taxation of domestic businesses which are frequently state enterprises.

However, paragraphs (2) and (3) do not require a Contracting State to grant to permanent establishments of

residents of the other Contracting State, or to companies owned or controlled by such residents, tax benefits granted by special agreements, e.g., bilateral income tax conventions, to residents of a third State or companies owned or controlled by such residents.

Paragraph (4) of this article and paragraph (4) of Article 2 (Taxes Covered by the Convention) make clear that for this article the term "taxation" means taxes of every kind and description (whether imposed at the national, state or local level), with the exception of the Polish Treasury residence registration fee (*opłata skarbową za zameldowanie*). This registration fee is a nominal annual fee required of both Polish citizens and aliens. The fee is higher for aliens than for Polish citizens (in 1973, approximately \$1.00 for aliens as compared to approximately ten cents for citizens). However, in light of its nominal nature, the United States consented to its exclusion from the nondiscrimination article. Paragraph (4) specifically states that the contribution for the retirement fund (*składka na cele emerytalne*) made by Polish citizens will be regarded as a tax.

ARTICLE 22. MUTUAL AGREEMENT PROCEDURE

When a resident of one Contracting State considers that actions of one or both Contracting States result or will result for him in taxation not in accordance with the Convention, such resident may, notwithstanding the remedies provided by the national laws of the Contracting States, present his case to the competent authority of the Contracting State of which he is a resident or citizen. A resident of a Contracting State need not, although it is anticipated that in the normal situation he will, exhaust his other administrative or judicial remedies prior to resorting to the use of the mutual agreement procedure. If the objection appears to it to be justified and if it is not able itself to arrive at an appropriate solution, that competent authority must endeavor to

come to an agreement with the competent authority of the other Contracting State with a view to the avoidance of taxation not in accordance with the Convention.

Paragraph (3) requires the competent authorities of the two Contracting States to endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention, and they may consult together for the elimination of double taxation in cases not provided for in the Convention. Thus, for example, the competent authorities may agree to the same attribution of profits to an enterprise of one Contracting State and its permanent establishment situated in the other Contracting State; the same allocation of income, deductions, credits or allowances between an enterprise of one Contracting State and a related person and to the readjustment of taxes imposed by each Contracting State to reflect such allocation; the same determination of the source of particular items of income; and the same characterization of particular items of income.

Under paragraph (4), in implementing the provisions of this article, the competent authorities may communicate with each other directly for the purpose of reaching an agreement in the sense of this article.

Under paragraph (5), in cases in which the competent authorities reach an agreement, taxes will be imposed in accordance with the agreement. This permits the issuance of a refund or credit notwithstanding procedural barriers otherwise existing under a Contracting State's law, such as the statute of limitations.

ARTICLE 23. EXCHANGE OF INFORMATION

Paragraph (1) provides for a system of administrative cooperation between the competent authorities of the two Contracting States by requiring an exchange of information necessary for carrying out the provisions of the Convention or for the prevention of fraud or for the administration of

statutory provisions concerning taxes to which the Convention applies. The competent authorities may exchange information in connection with tax compliance generally, not merely illegal acts or crimes.

Under paragraph (2) information exchanged must be treated as secret except that it may be disclosed to any person concerned with, or made part of a public record with respect to, the assessment, collection, enforcement of, or litigation with respect to, the taxes to which the Convention applies. Thus, disclosure is not prohibited as a part of a public proceeding before a court or administrative body.

The article provides two limitations on what kind of information can be exchanged. Under paragraph (1), the information must be of a class that can be obtained under the laws and administrative practices of each Contracting State with respect to its own taxes. Thus, a Contracting State requested to furnish information will use the standard it uses in the enforcement of its own laws by its administrative and judicial authorities, treating the tax of the Contracting State with respect to which the request relates as if it were a tax of the Contracting State requested to furnish the information and were being imposed by such Contracting State. Under paragraph (3), no information will be exchanged which would be contrary to public policy. However, information which may be furnished in accordance with this article should not be withheld by reason of any doctrine of law under which international judicial assistance is not accorded in tax matters.

Under paragraph (4), depositions of witnesses and copies of unedited original documents (including books, papers, statements, records, accounts, or writings) shall be provided by the competent authority of a Contracting State if specifically requested by the competent authority of the other Contracting State to the same extent that such depositions and documents can be obtained under the laws and administrative practices of each Con-

tracting State with respect to its own taxes. The standard to be used by a Contracting State, when requested to provide such depositions and documents, is the same standard as described above under paragraph (1).

Paragraph (5) provides for the exchange of information on either a routine basis or on request with reference to particular cases. The competent authorities may agree on the list of information to be furnished on a routine basis.

ARTICLE 24. DIPLOMATIC AND CONSULAR OFFICERS

This article provides that nothing in the Convention will affect the fiscal privileges of diplomatic or consular officials under the general rules and norms of international law or under the provisions of special agreements. This is merely a special case of the general rule provided in paragraph (2) of Article 5 (General Rules of Taxation).

ARTICLE 25. ENTRY INTO FORCE

This article provides that the Convention is subject to ratification and for the exchange of instruments of ratification. The Convention will enter into force thirty days after the date of exchange of such instruments of ratification. The provisions of the Convention shall first have effect with respect to income of calendar years or taxable years beginning (or in the case of taxes payable at source, payments made) on or after January 1, 1974. It is intended for purposes of this article and Article 26 (Termination) that the reference to calendar years applies only to cases where the taxable year is the calendar year.

ARTICLE 26. TERMINATION

Paragraph (1) provides that the Convention will continue in effect indefinitely, but that it may be terminated by either Contracting State at any time after five years from the date it enters into force. A Contracting State seeking to terminate the Convention must give at least six months prior notice of termination. Under paragraph (2), if the Convention is

terminated, such termination will be effective with respect to income of calendar years or taxable years beginning (or, in the case of taxes payable at source, payments made) on or after January 1 next following the expiration of the six month period.

Subpart B.—Legislation and Related Committee Reports

Public Law 95-19
95th Congress, H.R. 4800¹
April 12, 1977

An Act to extend the Emergency Unemployment Compensation Act of 1974, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Emergency Unemployment Compensation Extension Act of 1977."

TITLE I — AMENDMENTS TO THE EMERGENCY UNEMPLOYMENT COMPENSATION PROGRAM

SEC. 101. EXTENSION OF PROGRAM.

(a) GENERAL RULE.—Section 102 (f) (2) of the Emergency Unemployment Compensation Act of 1974 is amended to read as follows:

"(2) No emergency compensation shall be payable to any individual under an agreement entered into under this Act—

"(A) for any week ending after October 31, 1977, or

"(B) in the case of an individual who (for a week ending after the beginning of his most recent benefit year and before October 31, 1977) had a week with respect to which emergency compensation was payable under such agreement, for any week ending after January 31, 1978."

¹ This publication of the law is restricted to excerpts involving tax matters; Senate Report No. 95-67, page 441; Conference Report No. 95-158, page 448; House Report No. 95-82 is not published.