

TREATY USA - GERMANY

*CONVENTION BETWEEN
THE FEDERAL REPUBLIC OF GERMANY AND
THE UNITED STATES OF AMERICA
FOR THE AVOIDANCE OF DOUBLE TAXATION AND
THE PREVENTION OF FISCAL EVASION
WITH RESPECT TO TAXES ON INCOME AND CAPITAL AND
TO CERTAIN OTHER TAXES, TOGETHER WITH A RELATED PROTOCOL, SIGNED AT
BONN ON AUGUST 29, 1989*

GENERAL EFFECTIVE DATE UNDER ARTICLE 32: 1 JANUARY 1990

ARTICLE 28 Limitation on Benefits

1. Except as otherwise provided in this Article, a resident of one of the Contracting States that derives income from the other Contracting State shall be entitled, in that other Contracting State, to all the benefits of this Convention otherwise accorded to residents of a Contracting State only if such resident is a "qualified person" as defined in paragraph 2 of this Article and satisfies any other conditions specified in the Convention for the obtaining of such benefits.

2. A resident of one of the Contracting States is a qualified person for a taxable year only if such resident is either:
 - a) an individual;
 - b) a Contracting State, political subdivision or local authority thereof;
 - c) a company, if
 - aa) its principal class of shares (and any disproportionate class of shares) is regularly traded on one or more recognized stock exchanges, and either
 - A) its principal class of shares is primarily traded on a recognized stock exchange located in the Contracting State of which the company is a resident; or
 - B) the company's primary place of management and control is in the Contracting State of which it is a resident; or
 - bb) shares representing at least 50 percent of the aggregate voting power and value (and at least 50 percent of any disproportionate class of shares) of the company are owned directly or indirectly by five or fewer companies entitled to benefits under clause aa) of this subparagraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;
 - d) an entity organized under the laws of one of the Contracting States and established and maintained in that Contracting State exclusively for a religious, charitable, educational, scientific, or other similar purpose;
 - e) an entity organized under the laws of one of the Contracting States and established and maintained in that Contracting State to provide, pursuant to a plan, pensions or other similar benefits to employed and self-employed persons, provided that:

- aa) more than 50 percent of the entity's beneficiaries, members or participants are individuals resident in either Contracting State; or
 - bb) the organization sponsoring such person is entitled to the benefits of the Convention pursuant to this paragraph; or
- f) a person other than an individual, if:
- aa) on at least half the days of the taxable year at least 50 percent of each class of shares or other beneficial interests in the person is owned, directly or indirectly, by residents of that Contracting State that are entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of this paragraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State; and
 - bb) less than 50 percent of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of this paragraph in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence.

3. Notwithstanding that a company that is a resident of a Contracting State may not be a qualified person, it shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State with respect to an item of income if it satisfies any other specified conditions for the obtaining of such benefits and:

- a) shares representing at least 95 percent of the aggregate voting power and value (and at least 50 percent of any disproportionate class of shares) of the company are owned, directly or indirectly, by seven or fewer persons who are equivalent beneficiaries; and
- b) less than 50 percent of the company's gross income for the taxable year in which the item of income arises is paid or accrued, directly or indirectly, to persons who are not equivalent beneficiaries, in the form of payments that are deductible for the purposes of the taxes covered by this Convention in the Contracting State of which the company is a resident.

4. a) Notwithstanding that a resident of a Contracting State may not be a qualified person, it shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State with respect to an item of income derived from the other Contracting State, if the resident is engaged in the active conduct of a trade or business in the first-mentioned Contracting State (other than the activities of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities dealing carried on by a bank, insurance company or registered securities dealer), the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business and that resident satisfies any other specified conditions for the obtaining of such benefits.

- b) If a resident of one of the Contracting States or any of its associated enterprises carries on a trade or business activity in the other Contracting State which gives rise to an item of income, subparagraph a) of this paragraph shall apply to such item only if the trade or business activity in the first-mentioned Contracting State is substantial in

relation to the trade or business activity in the other Contracting State.

- c) In determining whether a person is engaged in the active conduct of a trade or business in a Contracting State under subparagraph a) of this paragraph, activities conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, shares representing at least 50 percent of the aggregate voting power and value of the company or of the beneficial equity interest in the company) or another person possesses, directly or indirectly, at least 50 percent of the beneficial interest (or, in the case of a company, shares representing at least 50 percent of the aggregate voting power and value of the company or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if, on the basis of all the facts and circumstances, one has control of the other or both are under the control of the same person or persons.

5. Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State derives income from the other Contracting State, and that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction, the tax benefits that would otherwise apply under the other provisions of the Convention will not apply to that income if the combined tax that is actually paid with respect to such income in the first-mentioned Contracting State and in the third jurisdiction is less than 60 percent of the tax that would have been payable in the first-mentioned State if the income were earned in that Contracting State by the enterprise and were not attributable to the permanent establishment in the third jurisdiction. Any dividends, interest or royalties to which the provisions of this paragraph apply shall be subject to tax at a rate that shall not exceed 15 percent of the gross amount thereof. Any other income to which the provisions of this paragraph apply will be subject to tax under the provisions of the domestic law of the other Contracting State, notwithstanding any other provision of the Convention. The provisions of this paragraph shall not apply if:

- a) in the case of royalties, the royalties are received as compensation for the use of, or the right to use, intangible property produced or developed by the permanent establishment itself; or
- b) in the case of any other income, the income derived from the other Contracting State is derived in connection with, or is incidental to, the active conduct of a trade or business carried on by the permanent establishment in the third jurisdiction (other than the business of making, managing or simply holding investments for the person's own account, unless these activities are banking or securities activities carried on by a bank or registered securities dealer).

6. Notwithstanding the preceding provisions of this Article, a German Investment Fund or German *Investmentaktiengesellschaft* (collectively referred to as *Investmentvermögen*) may only be granted the benefits of this Convention if at least 90 percent of the shares or other beneficial interests in the German *Investmentvermögen* are owned, directly or indirectly, by residents of the Federal Republic of Germany that are entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article or by persons that are equivalent beneficiaries with respect to the income derived by the German *Investmentvermögen* for which benefits are being claimed. For the purposes of this paragraph, beneficiaries of entities that are subject to numbers 3 and 5 of paragraph 1 of section 1 of the German Corporate Tax Act shall be treated as indirectly owning shares of a German

Investmentvermögen. Foundations referred to in number 5 of paragraph 1 of section 1 of the German Corporate Tax Act, other than those referred to in subparagraph d) of paragraph 2 of this Article, shall not be taken into account in determining whether a German Investmentvermögen meets the 90 percent minimum ownership threshold.

7. A person resident of one of the Contracting States, who is not entitled to some or all of the benefits of this Convention because of the foregoing paragraphs, may, nevertheless, be granted benefits of this Convention if the competent authority of the Contracting State in which the income in question arises so determines. In making such determination, the competent authority shall take into account as its guidelines whether the establishment, acquisition or maintenance of such person or the conduct of its operations has or had as one of its principal purposes the obtaining of benefits under this Convention. The competent authority of the Contracting State in which the income arises will consult with the competent authority of the other Contracting State before denying the benefits of the Convention under this paragraph.

8. For the purposes of this Article the following rules and definitions shall apply:

- a) the term "recognized stock exchange" means:
 - aa) the NASDAQ System and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
 - bb) any German stock exchange on which registered dealings in shares take place;
 - cc) any other stock exchange which the competent authorities agree to recognize for the purposes of this Article;
- b)
 - aa) the term "principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the "principal class of shares" is that class or those classes that in the aggregate represent a majority of the aggregate voting power and value of the company;
 - bb) the term "shares" shall include depository receipts thereof or trust certificates thereof;
- c) the term "disproportionate class of shares" means any class of shares of a company resident in one of the Contracting States that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments or otherwise, in the earnings generated in the other Contracting State by particular assets or activities of the company;
- d) the company's primary place of management and control will be in the Contracting State of which it is a resident only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company (including its direct and indirect subsidiaries) in that Contracting State than in any other state and the staffs conduct more of the day-to-day activities necessary for preparing and making those decisions in that Contracting State than in any other state.
- e) an equivalent beneficiary is a resident of a member state of the European Union or of a European Economic Area state or of a party to the North American Free Trade Agreement but only if that resident:

- aa)
 - A) would be entitled to all the benefits of a comprehensive convention for the avoidance of double taxation between any member state of the European Union or a European Economic Area state or any party to the North American Free Trade Agreement and the State from which the benefits of this Convention are claimed under provisions analogous to subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article provided that if such convention does not contain a comprehensive limitation on benefits article, the person would be a qualified person under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article if such person were a resident of one of the States under Article 4 (Resident) of this Convention; and
 - B) with respect to insurance premiums and to income referred to in Article 10 (Dividends), 11 (Interest) or 12 (Royalties) of this Convention, would be entitled under such convention to a rate of tax with respect to the particular class of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or
- bb) is a resident of a Contracting State that is a qualified person by reason of subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article.

For the purposes of applying paragraph 3 of Article 10 (Dividends) in order to determine whether a person, owning shares, directly or indirectly, in the company claiming the benefits of this Convention, is an equivalent beneficiary, such person shall be deemed to hold the same voting power in the company paying the dividend as the company claiming the benefits holds in such company;

- f) with respect to dividends, interest or royalties arising in the Federal Republic of Germany and beneficially owned by a company that is a resident of the United States, a company that is a resident of a member state of the European Union will be treated as satisfying the requirements of clause aa) B) of subparagraph e) for purposes of determining whether such United States resident is entitled to benefits under this paragraph if a payment of dividends, interest or royalties arising in the Federal Republic of Germany and paid directly to such resident of a member state of the European Union would have been exempt from tax pursuant to any directive of the European Union, notwithstanding that the income tax convention between the Federal Republic of Germany and that other member state of the European Union would provide for a higher rate of tax with respect to such payment than the rate of tax applicable to such United States company under Article 10 (Dividends), 11 (Interest), or 12 (Royalties) of this Convention.