Australian Government
Australian Taxation Office

SYNTHESISED TEXT OF THE MLI AND THE AGREEMENT BETWEEN AUSTRALIA AND THE KINGDOM OF SPAIN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME, AND PROTOCOL

If you follow the information in this document, and it turns out to be incorrect, or it is misleading and you make a mistake as a result, the ATO will take that into account when determining what action, if any, we should take.

General disclaimer on this synthesised text document

This document presents the synthesised text for the application of the *Agreement between Australia and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol* signed on 24 March 1992 (the "Agreement"), as modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the "MLI") signed by Australia and by Spain on 7 June 2017.

This document was prepared by the Australian Taxation Office and represents its understanding of the modifications made to the Agreement by the MLI.

The document was prepared on the basis of the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018 and of the MLI position of Spain submitted to the Depositary upon ratification on 28 September 2021. These MLI positions are subject to modifications as provided in the MLI. Modifications made to MLI positions could modify the effects of the MLI on the Agreement.

The sole purpose of this document is to facilitate the understanding of the application of the MLI to the Agreement and it does not constitute a source of law. The authentic legal texts of the Agreement and the MLI take precedence and remain the legal texts applicable.

The provisions of the MLI that are applicable with respect to the provisions of the Agreement are included in boxes throughout the text of this document in the context of the relevant provisions of the Agreement. The boxes containing the provisions of the MLI have generally been inserted in accordance with the ordering of the provisions of the 2017 OECD Model Tax Convention.

Changes to the text of the provisions of the MLI have been made to conform the terminology used in the MLI to the terminology used in the Agreement (such as "Covered Tax Agreement" and "Agreement", "Contracting Jurisdictions" and "Contracting States"), to ease the comprehension of the provisions of the MLI. The changes in terminology are intended to increase the readability of the document and are not intended to change the substance of the provisions of the MLI. Similarly, changes have been made to parts of provisions of the MLI that describe existing provisions of the Agreement: descriptive language has been replaced by legal references of the existing provisions to ease the readability.

In all cases, references made to the provisions of the Agreement or to the Agreement must be understood as referring to the Agreement as modified by the provisions of the MLI, provided such provisions of the MLI have taken effect.

References

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting [2019] ATS 1 (provides, in the case of Australia, the authentic legal text of the MLI).

Agreement between Australia and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol [1992] ATS 41 (provides, in the case of Australia, the authentic legal text of the

Agreement, and Protocol, signed on 24 March 1992).

Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (provides the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018 and the MLI position of Spain submitted to the Depositary upon ratification on 28 September 2021).

Entry into Effect of the MLI Provisions

The provisions of the MLI applicable to the Agreement do not take effect on the same dates as the original provisions of the Agreement. Each of the provisions of the MLI could take effect on different dates, depending on the types of taxes involved (taxes withheld at source or other taxes levied) and on the choices made by Australia and Spain in their MLI positions.

Dates of the deposit of instruments of ratification, acceptance or approval:

26 September 2018 for Australia and 28 September 2021 for Spain.

Entry into force of the MLI:

1 January 2019 for Australia and 1 January 2022 for Spain.

In accordance with paragraphs 1 and 7 of Article 35 of the MLI, the provisions of the MLI (other than Article 16 Mutual Agreement Procedure and Part VI Arbitration) have effect with respect to this Agreement:

a) with respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after 1 January 2023; and

b) with respect to all other taxes levied by each Contracting State, for taxes levied with respect to taxable periods beginning on or after 1 January 2023.

In accordance with paragraphs 4 and 7 of Article 35 of the MLI, Article 16 of the MLI (Mutual Agreement Procedure) has effect with respect to this Agreement for a case presented to the competent authority of a Contracting State on or after 1 July 2022, except for cases that were not eligible to be presented as of that date under this Agreement prior to its modification by the MLI, without regard to the taxable period to which the case relates.

In accordance with paragraph 7 of Article 35 and paragraphs 1 and 2 of Article 36 of the MLI, the provisions of Part VI (Arbitration) of the MLI shall have effect with respect to this Agreement:

a) with respect to cases presented to the competent authority of a Contracting State (as described in subparagraph a) of paragraph 1 of Article 19 (Mandatory Binding Arbitration)) on or after 1 July 2022, and

b) with respect to cases presented to the competent authority of a Contracting State prior to 1 July 2022:

(i) only to the extent that the competent authorities of both Contracting States agree that it will apply to that specific case; and

(ii) on the date when both Contracting States have notified the Depositary that they have reached mutual agreement pursuant to paragraph 10 of Article 19 of the MLI, along with information regarding the date or dates on which such cases shall be considered to have been presented to the competent authority of a Contracting

State (as described in subparagraph a) of paragraph 1 of Article 19 of the MLI) according to the terms of that mutual agreement.

AGREEMENT BETWEEN AUSTRALIA AND THE KINGDOM OF SPAIN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

AUSTRALIA AND THE KINGDOM OF SPAIN,

The following paragraph 3 of Article 6 of the MLI is included in the preamble of this Agreement:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TAX AGREEMENT

Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,

[REPLACED by paragraph 1 of Article 6 of the MLI] ***DESIRING*** *to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,*

The following paragraph 1 of Article 6 of the MLI replaces the text referring to an intent to eliminate double taxation in the preamble of this Agreement:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TAX AGREEMENT

Intending to eliminate double taxation with respect to taxes covered by [*the Agreement*] without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in [*the Agreement*] for the indirect benefit of residents of third jurisdictions),

HAVE AGREED as follows:

Article 1

PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

The following paragraphs 1 and 3 of Article 3 of the MLI apply and supersede the provisions of this Agreement:

ARTICLE 3 OF THE MLI – TRANSPARENT ENTITIES

For the purposes of [*the Agreement*], income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either [*Contracting State*] shall be considered to be income of a resident of a [*Contracting State*] but only to the extent that the income is treated, for purposes of taxation by that [*Contracting State*], as the income of a resident of that [*Contracting State*]. In no case shall the provisions of this paragraph be construed to affect a [*Contracting State's*] right to tax the residents of that [*Contracting State*].

Article 2

TAXES COVERED

1. The existing taxes to which this Agreement shall apply are:

   a) in the case of Australia:

      the income tax, and the resource rent tax in respect of offshore projects relating to exploration for or exploitation of petroleum resources, imposed under the federal law of the Commonwealth of Australia;

   b) in the case of Spain:

      (i) the Income Tax on Individuals (*el Impuesto sobre la renta de las Personas Fisicas*); and

      (ii) the Corporation Tax (*el Impuesto sobre sociedades*).

2. This Agreement shall also apply to any identical or substantially similar taxes which are imposed under the federal law of the Commonwealth of Australia or the law of Spain after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any substantial changes which have been made in the laws of the respective States relating to the taxes to which this Agreement applies within a reasonable time after such changes.

Article 3

GENERAL DEFINITIONS

1. In this Agreement, unless the context otherwise requires:

   a) the term "Australia", when used in a geographical sense, excludes all external territories other than:

      (i) the Territory of Norfolk Island;

      (ii) the Territory of Christmas Island;

      (iii) the Territory of Cocos (Keeling) Islands;

      (iv) the Territory of Ashmore and Cartier Islands;

      (v) the Territory of Heard Island and McDonald Islands; and

      (vi) the Coral Sea Islands Territory,

   and includes any area adjacent to the territorial limits of Australia (including the Territories specified in subparagraphs (i) to (vi) inclusive) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploitation of any of the natural resources of the seabed and subsoil of the continental shelf and superjacent waters;

   b) the term "Spain" means the Spanish State and, when used geographically, means the territory of the Spanish State including any area outside the territorial sea in which, in accordance with international law and domestic legislation, the Spanish State may exercise jurisdiction or sovereign rights with respect to the seabed, its subsoil and superjacent waters and their natural resources;

   c) the terms "Contracting State", "one of the Contracting States" and "other Contracting State" mean Australia or Spain, as the context requires;

   d) the term "person" includes an individual, a company and any other body of persons;

e) the term "company" means any body corporate or any entity which is treated as a company or body corporate for tax purposes;

f) the terms "enterprise of one of the Contracting States" and "enterprise of the other Contracting State" mean an enterprise carried on by a resident of Australia or an enterprise carried on by a resident of Spain, as the context requires;

g) the term "tax" means Australian tax or Spanish tax, as the context requires;

h) the term "Australian tax" means tax imposed by Australia, being tax to which this Agreement applies by virtue of Article 2;

i) the term "Spanish tax" means tax imposed by Spain, being tax to which this Agreement applies by virtue of Article 2;

j) the term "competent authority" means:

(i) in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner; and

(ii) in the case of Spain, the Minister of Economy and Finance or an authorised representative of the Minister.

2. In this Agreement, the terms "Australian tax" and "Spanish tax" do not include any penalty or interest imposed under the law of either Contracting State relating to the taxes to which this Agreement applies by virtue of Article 2.

3. In the application of this Agreement by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that State in force relating to the taxes to which this Agreement applies, at the time of the application.

Article 4

RESIDENCE

1. For the purposes of this Agreement, a person is a resident of one of the Contracting States:

a) in the case of Australia, if the person is a resident of Australia for the purposes of Australian tax; and

b) in the case of Spain, if the person is a resident of Spain for the purposes of the law of Spain relating to Spanish taxes.

2. A person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State.

3. Where by reason of the preceding provisions of this Article an individual is a resident of both Contracting States, then the status of the person shall be determined in accordance with the following rules:

a) the person shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the person;

b) if a permanent home is available to the person in both Contracting States, or if in neither of them, the person shall be deemed to be a resident solely of the Contracting State with which the person's economic and personal relations are the closer.

For the purposes of the preceding subparagraphs, an individual's citizenship or nationality of one of the Contracting States shall be a factor in determining the degree of the individual's personal and economic relations with that Contracting State.

4. Where by reason of the provisions of paragraph (1) a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated.

Article 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment", in relation to an enterprise, means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop;

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

g) an agricultural, pastoral or forestry property;

h) a building site or construction, installation or assembly project which exists for more than twelve months.

3. **[MODIFIED by paragraph 2 of Article 13 of the MLI]** *An enterprise shall not be deemed to have a permanent establishment merely by reason of:*

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

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

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

e) the maintenance of a fixed place of business solely for the purpose of activities which have a preparatory or auxiliary character for the enterprise, such as advertising or scientific research.

The following paragraph 2 of Article 13 of the MLI modifies paragraph 3 of Article 5 of this Agreement:

ARTICLE 13 OF THE MLI – ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS THROUGH THE SPECIFIC ACTIVITY EXEMPTIONS (*Option A*)

Notwithstanding [*Article 5 of the Agreement*], the term “permanent establishment” shall

be deemed not to include:

a) the activities specifically listed in [*paragraph 3 of Article 5 of the Agreement*] as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;

b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a);

c) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b),

provided that such activity or, in the case of subparagraph c), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

The following paragraph 4 of Article 13 of the MLI applies to paragraph 3 of Article 5 of this Agreement as modified by paragraph 2 of Article 13 of the MLI:

[*Paragraph 3 of Article 5 of the Agreement, as modified by paragraph 2 of Article 13 of the MLI*] shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same [*Contracting State*] and:

a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of [*Article 5 of the Agreement*]; or

b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

4. An enterprise shall be deemed to have a permanent establishment in one of the Contracting States and to carry on business through that permanent establishment if:

a) it carries on supervisory activities in that State for more than twelve months in connection with a building site, or a construction, installation or assembly project which is being undertaken in that State; or

b) a structure, installation, drilling rig, ship or other like substantial equipment is used:

(i) for the exploration for, or exploitation of, natural resources; or

(ii) in activities connected with that exploration or exploitation,

in either case if used continuously or those activities continue for a period of more than twelve months.

5. A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom paragraph (6) applies - shall be deemed to be a permanent establishment of that enterprise in the firstmentioned State if:

a) the person has, and habitually exercises in that State, an authority to conclude contracts binding the enterprise, unless the activities of that person are limited to those mentioned in paragraph (3) and are such that, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph; or

b) in so acting, the person manufactures or processes in that State for the enterprise goods or merchandise belonging to the enterprise, provided that this provision shall apply only in relation to the goods or merchandise so manufactured or processed.

6. An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, and is acting in the ordinary course of the person's business as such a broker or agent.

7. The fact that a company which is a resident of one of the Contracting States controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself make either company a permanent establishment of the other.

8. The principles set forth in the preceding paragraphs of this Article shall be applied in determining for the purposes of paragraph (5) of Article 11 and paragraph (5) of Article 12 of this Agreement whether there is a permanent establishment outside both Contracting States, and whether an enterprise, not being an enterprise of one of the Contracting States, has a permanent establishment in one of the Contracting States.

The following paragraph 1 of Article 15 of the MLI applies to provisions of this Agreement:

ARTICLE 15 OF THE MLI – DEFINITION OF A PERSON CLOSELY RELATED TO AN ENTERPRISE

For the purposes of the provisions of [*Article 5 of the Agreement*], a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

Article 6

INCOME FROM REAL PROPERTY

1. Income from real property may be taxed in the Contracting State in which the real property is situated.

2. In this Article, the term "real property":

a) in the case of Australia, has the meaning which it has under the laws of Australia, and shall also include:

(i) a lease of land and any other interest in or over land, whether improved or not;

(ii) a right to receive variable or fixed payments as consideration for the exploitation of or the right to explore for or exploit, or in respect of the proceeds from the exploitation of, mineral deposits, oil or gas wells, quarries or other places of extraction or exploitation of natural resources; and

b) in the case of Spain, means immovable property according to the laws of Spain, and shall also include:

(i) property accessory to immovable property;

(ii) rights to which the provisions of the general law respecting landed property apply;

(iii) usufruct of immovable property; and

(iv) a right to receive variable or fixed payments as consideration for the exploitation of or the right to explore for or exploit, or in respect of the proceeds from the exploitation of, mineral deposits, oil or gas wells, quarries or other places of extraction or exploitation of natural resources.

3. A lease of land, any other interest in or over land and any right referred to in any of the subparagraphs of paragraph (2) shall be regarded as situated where the land, mineral deposits, oil or gas wells, quarries or natural resources, as the case may be, are situated, or where the exploration may take place.

4. The provisions of paragraph (1) shall apply to income derived from the direct use, letting or use in any other form of real property.

5. The provisions of paragraphs (1), (3) and (4) shall also apply to the income from real property of an enterprise and to income from real property used for the performance of independent personal services.

6. Where the ownership of shares or other rights in a company or other entity entitles the owner of such shares or rights to the enjoyment in any manner, direct use, letting or use in any other form of real property held by the company or other entity, the income from such enjoyment, direct use, letting, or use in any other form of such rights may be taxed in the Contracting State in which the real property is situated.

Article 7

BUSINESS PROFITS

1. The profits of an enterprise of one of the Contracting States shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph (3), where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might 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 or with other enterprises with which it deals.

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses of the enterprise, being expenses which are incurred for the purposes of the permanent establishment (including executive and general administrative expenses so incurred) and which would be deductible if the permanent establishment were an independent entity which paid those expenses, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5. Nothing in this Article shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person in cases where the information available to the competent authority of that State is inadequate to determine the profits to be attributed to a permanent establishment, provided that that law shall be applied, so far as the information available to the competent authority permits, consistently with the principles of this Article.

6. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

7. Nothing in this Article shall affect the operation of any law of a Contracting State relating to tax imposed on profits from insurance with non-residents provided that if the relevant law in force in either Contracting State at the date of signature of this Agreement is varied (otherwise than in minor respects so as not to affect its general character) the Contracting States shall consult with each other with a view to agreeing to any amendment of this paragraph that may be appropriate.

8. Where:

a) a resident of one of the Contracting States is beneficially entitled, whether directly or through one or more trusts, to a share of the business profits of an enterprise carried on in the other Contracting State by the trustee of a trust estate other than a trust estate which is treated as a company for tax purposes; and

b) in relation to that enterprise, that trustee has, in accordance with the principles of Article 5, a permanent establishment in that other State,

the enterprise carried on by the trustee shall be deemed to be a business carried on in that other State by that resident through a permanent establishment situated therein and the resident's share of business profits shall be attributed to that permanent establishment.

Article 8

SHIPS AND AIRCRAFT

1. Profits from the operation of ships or aircraft derived by a resident of one of the Contracting States shall be taxable only in that State.

2. Notwithstanding the provisions of paragraph (1), profits of the kind referred to in that paragraph from operations of ships or aircraft confined solely to places in the other Contracting State may be taxed in that other State.

3. The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships or aircraft derived by a resident of one of the Contracting

States through participation in a pool service, in a joint transport operating organization or in an international operating agency.

4. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from operations of ships or aircraft confined solely to places in that State.

Article 9

ASSOCIATED ENTERPRISES

1. Where:

   a) an enterprise of one of the Contracting States participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or

   b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the Contracting States and an enterprise of the other Contracting State,

and in either case conditions operate between the two enterprises in their commercial or financial relations which differ from those which might be expected to operate between independent enterprises dealing wholly independently with one another, then any profits which, but for those conditions, might have been expected to accrue 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 accordingly.

2. Nothing in this Article shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person, including determinations in cases where the information available to the competent authority of that State is inadequate to determine the income to be attributed to an enterprise, provided that that law shall be applied, so far as it is practicable to do so, consistently with the principles of this Article.

3. Where profits on which an enterprise of one of the Contracting States has been charged to tax in that State are also included, by virtue of paragraph (1) or (2), in the profits of an enterprise of the other Contracting State and charged to tax in that other State, and the profits so included are profits which might have been expected to have accrued to that enterprise of the other State if the conditions operative between the enterprises had been those which might have been expected to have operated between independent enterprises dealing wholly independently with one another, then the firstmentioned State shall make an appropriate adjustment to the amount of tax charged on those profits in the firstmentioned State. In determining such an adjustment, due regard shall be had to the other provisions of this Agreement and for this purpose the competent authorities of the Contracting States shall if necessary consult each other.

Article 10

DIVIDENDS

1. Dividends paid by a company which is a resident of one of the Contracting States, being dividends to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

2. Such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the law of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.

3. The term "dividends" in this Article means income from shares and other income assimilated to income from shares by the law, relating to tax, of the Contracting State of which the company making the distribution is a resident.

4. In the case of Spain, paragraph (2) of this Article shall not apply to income which under the provisions of the Spanish taxation law relating to transparent companies (*Regimen de Transparencia Fiscal*) is attributable to shareholders of such companies, whether or not distributed to such shareholders. Such income may be taxed by Spain in accordance with its domestic law as long as it is not subject to the Spanish corporation tax (*Impuesto Sobre Sociedades*).

5. The provisions of paragraph (2) shall not apply if the person beneficially entitled to the dividends, being a resident of one of the Contracting States, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In any such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

6. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11

INTEREST

1. Interest arising in one of the Contracting States, being interest to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

2. Such interest may be taxed in the Contracting State in which it arises, and according to the law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

3. The term "interest" in this Article includes interest from Government securities or from bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and interest from any other form of indebtedness as well as all other income assimilated to income from money lent by the law, relating to tax, of the Contracting State in which the income arises.

4. The provisions of paragraph (2) shall not apply if the person beneficially entitled to the interest, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the indebtedness in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

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

permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. A person is a resident of one of the Contracting States for the purpose of paragraph (5) if the person is a resident of that State within the operation of the law of that State relating to its tax, irrespective of the manner in which paragraph (3) or paragraph (4), as the case may be, of Article 4 operates in relation to that person.

7. Where, owing to a special relationship between the payer and the person beneficially entitled to the interest, or between both of them and some other person, the amount of the interest paid, having regard to the indebtedness for which it is paid, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the lastmentioned amount. In that case, the excess part of the amount of the interest paid shall remain taxable according to the law, relating to tax, of each Contracting State, but subject to the other provisions of this Agreement.

Article 12

ROYALTIES

1. Royalties arising in one of the Contracting States, being royalties to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

2. Such royalties may be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

3. The term "royalties" in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:

a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark, or other like property or right;

b) the use of, or the right to use, any industrial, commercial or scientific equipment;

c) the supply of scientific, technical, industrial or commercial knowledge or information;

d) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph (a), any such equipment as is mentioned in subparagraph (b) or any such knowledge or information as is mentioned in subparagraph (c);

e) the use of, or the right to use:

(i) motion picture films;

(ii) films or video tapes for use in connection with television; or

(iii) tapes for use in connection with radio broadcasting; or

f) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.

4. The provisions of paragraph (2) shall not apply if the person beneficially entitled to the royalties, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base

situated therein, and the property or right in respect of which the royalties are paid or credited is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

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

6. A person is a resident of one of the Contracting States for the purposes of paragraph (5) if the person is a resident of that State within the operation of the law of that State relating to its tax, irrespective of the manner in which paragraph (3) or paragraph (4), as the case may be, of Article 4 operates in relation to that person.

7. Where, owing to a special relationship between the payer and the person beneficially entitled to the royalties, or between both of them and some other person, the amount of the royalties paid or credited, having regard to what they are paid or credited for, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the lastmentioned amount. In that case, the excess part of the amount of the royalties paid or credited shall remain taxable according to the law, relating to tax, of each Contracting State, but subject to the other provisions of this Agreement.

Article 13

ALIENATION OF PROPERTY

1. Income or gains derived by a resident of one of the Contracting States from the alienation of real property referred to in Article 6 and, as provided in that Article, situated in the other Contracting State, may be taxed in that other State.

2. Income or gains from the alienation of property, other than real property referred to in Article 6, that forms part of the business property of a permanent establishment which an enterprise of one of the Contracting States has in the other Contracting State or pertains to a fixed base available to a resident of the firstmentioned State in that other State for the purpose of performing independent personal services, including income or gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such a fixed base, may be taxed in that other State.

3. Income or gains from the alienation of ships or aircraft operated in international traffic, or of property other than real property referred to in Article 6 pertaining to the operation of those ships or aircraft, shall be taxable only in the Contracting State of which the enterprise which operated those ships or aircraft is a resident.

4. **[MODIFIED by paragraph 1 of Article 9 of the MLI]** *Income or gains derived by a resident of one of the Contracting States from the alienation of shares or comparable interests in a company, the assets of which consist wholly or principally of real property in the other Contracting State of a kind referred to in Article 6, may be taxed in that other State.*

The following paragraph 1 of Article 9 of the MLI applies to paragraph 4 of Article 13 of this Agreement:

ARTICLE 9 OF THE MLI – CAPITAL GAINS FROM ALIENATION OF SHARES OR INTERESTS OF ENTITIES DERIVING THEIR VALUE PRINCIPALLY FROM

IMMOVABLE PROPERTY

[*Paragraph 4 of Article 13 of the Agreement:*]

a) shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and

b) shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions [*of the Agreement*].

5. Income or gains from the alienation of shares, or comparable interests in a company other than those mentioned in paragraph (4) of this Article which is a resident of one of the Contracting States may be taxed in that Contracting State if the recipient of the income or gains, during a 12 month period preceding such alienation, had a participation, directly or indirectly, of at least 10 per cent in the capital of that company.

6. Nothing in this Agreement affects the application of a law of a Contracting State relating to the taxation of gains of a capital nature derived from the alienation of property other than that to which any of the preceding paragraphs of this Article apply.

Article 14

INDEPENDENT PERSONAL SERVICES

1. Income derived by an individual who is a resident of one of the Contracting States in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless a fixed base is regularly available to the individual in the other Contracting State for the purpose of performing the individual's activities. If such a fixed base is available to the individual, the income may be taxed in the other State but only so much of it as is attributable to activities exercised from that fixed base.

2. The term "professional services" includes services performed in the exercise of independent scientific, literary, artistic, educational or teaching activities as well as in the exercise of the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15

DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State.

2. Notwithstanding the provisions of paragraph (1), remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the firstmentioned State if:

a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in the year of income of that other State;

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and

c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State.

3. Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic by a resident of one of the Contracting States may be taxed in that State.

Article 16

DIRECTORS' FEES

Directors' fees and similar payments derived by a person who is a resident of one of the Contracting States in the person's capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17

ENTERTAINERS

1. Notwithstanding the provisions of Articles 14 and 15, income derived by entertainers (such as theatrical, motion picture, radio or television artistes and musicians and athletes) from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

2. Where income in respect of the personal activities of an entertainer as such accrues not to that entertainer but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer are exercised.

3. Notwithstanding the provisions of paragraphs (1) and (2), income derived by a resident of one of the Contracting States as an entertainer, from activities as an entertainer exercised in the other Contracting State, shall be exempt from tax in the other Contracting State if the visit to that other State is substantially supported by public funds of the firstmentioned State or a political subdivision or local authority thereof, in connection with the performance of such activities.

Article 18

PENSIONS AND ANNUITIES

1. Subject to the provisions of paragraph (2) of Article 19, pensions and annuities paid to a resident of one of the Contracting States shall be taxable only in that State.

2. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

3. Any alimony or other maintenance payment arising in one of the Contracting States and paid to a resident of the other Contracting State shall be taxable only in the firstmentioned State.

Article 19

GOVERNMENT SERVICE

1. Remuneration, other than a pension or annuity, paid by one of the Contracting States or a political subdivision or local authority of that State to any individual in respect of services

rendered in the discharge of governmental functions shall be taxable only in that State. However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that other State and the recipient is a resident of that other State who:

a) is a citizen or national of that State; or

b) did not become a resident of that State solely for the purpose of performing the services.

2. a) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision or local authority of that Contracting State to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a citizen or national of, that State.

3. Notwithstanding the provisions of paragraphs (1) and (2), the provisions of Articles 15, 16 and 18 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

Article 20

STUDENTS

Where a student, who is a resident of one of the Contracting States or who was a resident of that State immediately before visiting the other Contracting State and who is temporarily present in that other State solely for the purpose of the education of the student, receives payments from sources outside that other State for the purpose of maintenance or education of the student, those payments shall be exempt from tax in that other State.

Article 21

INCOME NOT EXPRESSLY MENTIONED

1. Items of income of a resident of one of the Contracting States which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that State.

2. However, any such income derived by a resident of one of the Contracting States from sources in the other Contracting State may also be taxed in that other State.

3. The provisions of paragraph (1) shall not apply to income derived by a resident of one of the Contracting States where that income is effectively connected with a permanent establishment or fixed base situated in the other Contracting State. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

Article 22

SOURCE OF INCOME

Income, profits or gains derived by a resident of one of the Contracting States which, under any one or more of Articles 6 to 8, 10 to 17 and 21, may be taxed in the other Contracting State shall, for the purposes of Article 23 and of the income tax laws of the respective Contracting States, be deemed to be income from sources in that other State.

Article 23

METHODS OF ELIMINATION OF DOUBLE TAXATION

1. Subject to the provisions of the law of Australia from time to time in force which relate to the allowance of a credit or other relief against Australian tax of tax paid in a country outside Australia (which shall not affect the general principle hereof), Spanish tax paid under the law of Spain and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of Australia from sources in Spain shall be allowed as a credit or be relieved against Australian tax payable in respect of that income.

2. Where a company which is a resident of Spain and is not a resident of Australia for the purposes of Australian tax pays a dividend to a company which is a resident of Australia and which controls directly or indirectly not less than 10 per cent of the voting power of the firstmentioned company, the credit referred to in paragraph (1) shall include the Spanish tax paid by that firstmentioned company in respect of that portion of its profits out of which the dividend is paid.

3. In the case of Spain, double taxation will be avoided in the following manner:

a) where a resident of Spain derives income or gains which, in accordance with the provisions of this Agreement, may be taxed in Australia, Spain shall allow:

(i) as a deduction from the tax on the income of that resident, an amount equal to the tax on income or gains paid in Australia; and

(ii) in the case of a dividend paid by a company which is a resident of Australia to a company which is a resident of Spain and which holds directly at least 25 per cent of the capital of the company paying the dividend, the deduction allowable shall include, in addition to the amount deductible under subparagraph (i) of this paragraph, that part of the tax effectively paid by the firstmentioned company on the profits out of which the dividend is paid, which relates to such dividends, provided that such amount of tax is included, for this purpose, in the taxable base of the receiving company;

such deduction in either case shall not, however, exceed that part of the tax on income or gains, as computed before the deduction is given, which is attributable, as the case may be, to the income or gains which may be taxed in Australia; and

b) where in accordance with any provision of this Agreement income or gains derived by a resident of Spain is exempt from tax in Spain, Spain may nevertheless, in calculating the amount of tax on the remaining income or gains of such resident, take into account the exempted income or gains.

The following paragraph 2 of Article 3 of the MLI applies and supersedes the provisions of this Agreement:

ARTICLE 3 OF THE MLI – TRANSPARENT ENTITIES

[*Article 23 of the Agreement*] shall not apply to the extent that [*the*] provisions [*of the Agreement*] allow taxation by that other [*Contracting State*] solely because the income is also income derived by a resident of that other [*Contracting State*].

Article 24

MUTUAL AGREEMENT PROCEDURE

1. Where a person who is a resident of one of the Contracting States considers that the actions of the competent authority of one or both of the Contracting States result or will result

for the person in taxation not in accordance with this Agreement, the person may, notwithstanding the remedies provided by the national laws of those States, present a case to the competent authority of the Contracting State of which the person is a resident. The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with this Agreement.

2. The competent authority shall endeavour, if the claim appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement. The solution so reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.

3. *The competent authorities of the Contracting States shall jointly endeavour to resolve any difficulties or doubts arising as to the application of this Agreement*.

The following paragraph 3 of Article 16 of the MLI applies to this Agreement:

ARTICLE 16 OF THE MLI – MUTUAL AGREEMENT PROCEDURE

The competent authorities of the [*Contracting States*] shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of [*the Agreement*]. They may also consult together for the elimination of double taxation in cases not provided for in [*the Agreement*].

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Agreement.

The following Part VI of the MLI applies to this Agreement:

PART VI OF THE MLI – ARBITRATION

Article 19 (Mandatory Binding Arbitration) of the MLI

1. Where:

   a) under [*paragraph 1 of Article 24 of the Agreement*], a person has presented a case to the competent authority of a [*Contracting State*] on the basis that the actions of one or both of the [*Contracting States*] have resulted for that person in taxation not in accordance with the provisions of [*the Agreement*]; and

   b) the competent authorities are unable to reach an agreement to resolve that case pursuant to [*paragraph 2 of Article 24 of the Agreement*], within a period of two years beginning on the start date referred to in paragraph 8 or 9 [*of Article 19 of the MLI*], as the case may be (unless, prior to the expiration of that period the competent authorities of the [*Contracting States*] have agreed to a different time period with respect to that case and have notified the person who presented the case of such agreement),

any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Part, according to any rules or procedures agreed upon by the competent authorities of the [*Contracting States*] pursuant to the provisions of paragraph 10 [*of Article 19 of the MLI*].

2. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 [*of Article 19 of the MLI*] because a case with respect to one or more of the same issues is pending before a court or administrative tribunal, the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*] will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In addition, where a person who presented a case and a

competent authority have agreed to suspend the mutual agreement procedure, the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*] will stop running until the suspension has been lifted.

3. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the start of the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*], the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*] shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

4. a) The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1 [*of Article 19 of the MLI*]. The arbitration decision shall be final.

b) The arbitration decision shall be binding on both [*Contracting States*] except in the following cases:

(i) if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities. The mutual agreement that implements the arbitration decision on the case shall be considered not to be accepted by a person directly affected by the case if any person directly affected by the case does not, within 60 days after the date on which notification of the mutual agreement is sent to the person, withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such issues in a manner consistent with that mutual agreement.

(ii) if a final decision of the courts of one of the [*Contracting States*] holds that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 1 [*of Article 19 of the MLI*] shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of Articles 21 (Confidentiality of Arbitration Proceedings) and 25 (Costs of Arbitration Proceedings) [*of the MLI*]). In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be permitted.

(iii) if a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal.

5. The competent authority that received the initial request for a mutual agreement procedure as described in subparagraph a) of paragraph 1 [*of Article 19 of the MLI*] shall, within two calendar months of receiving the request:

a) send a notification to the person who presented the case that it has received the request; and

b) send a notification of that request, along with a copy of the request, to the competent authority of the other [*Contracting State*].

6. Within three calendar months after a competent authority receives the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other

[*Contracting State*]) it shall either:

a) notify the person who has presented the case and the other competent authority that it has received the information necessary to undertake substantive consideration of the case; or

b) request additional information from that person for that purpose.

7. Where pursuant to subparagraph b) of paragraph 6 [*of Article 19 of the MLI*], one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the additional information shall, within three calendar months of receiving the additional information from that person, notify that person and the other competent authority either:

a) that it has received the requested information; or

b) that some of the requested information is still missing.

8. Where neither competent authority has requested additional information pursuant to subparagraph b) of paragraph 6 [*of Article 19 of the MLI*], the start date referred to in paragraph 1 [*of Article 19 of the MLI*] shall be the earlier of:

a) the date on which both competent authorities have notified the person who presented the case pursuant to subparagraph a) of paragraph 6 [*of Article 19 of the MLI*]; and

b) the date that is three calendar months after the notification to the competent authority of the other [*Contracting State*] pursuant to subparagraph b) of paragraph 5 [*of Article 19 of the MLI*].

9. Where additional information has been requested pursuant to subparagraph b) of paragraph 6 [*of Article 19 of the MLI*], the start date referred to in paragraph 1 [*of Article 19 of the MLI*] shall be the earlier of:

a) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to subparagraph a) of paragraph 7 [*of Article 19 of the MLI*]; and

b) the date that is three calendar months after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in subparagraph b) of paragraph 7 [*of Article 19 of the MLI*], such notification shall be treated as a request for additional information under subparagraph b) of paragraph 6 [*of Article 19 of the MLI*].

10. The competent authorities of the [*Contracting States*] shall by mutual agreement pursuant to [*Article 24 of the Agreement*] settle the mode of application of the provisions contained in this Part, including the minimum information necessary for each competent authority to undertake substantive consideration of the case. Such an agreement shall be concluded before the date on which unresolved issues in a case are first eligible to be submitted to arbitration and may be modified from time to time thereafter.

11. *Omitted.*

12. a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by [*the MLI*] shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either [*Contracting*

State];

b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the [*Contracting States*], a decision concerning the issue is rendered by a court or administrative tribunal of one of the [*Contracting States*], the arbitration process shall terminate.

Article 20 (Appointment of Arbitrators) of the MLI

1. Except to the extent that the competent authorities of the [*Contracting States*] mutually agree on different rules, paragraphs 2 through 4 [*of Article 20 of the MLI*] shall apply for the purposes of this Part.

2. The following rules shall govern the appointment of the members of an arbitration panel:

a) The arbitration panel shall consist of three individual members with expertise or experience in international tax matters.

b) Each competent authority shall appoint one panel member within 60 days of the date of the request for arbitration under paragraph 1 of Article 19 [*of the MLI*] (Mandatory Binding Arbitration). The two panel members so appointed shall, within 60 days of the latter of their appointments, appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either [*Contracting State*].

c) Each member appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the [*Contracting States*] and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

3. In the event that the competent authority of a [*Contracting State*] fails to appoint a member of the arbitration panel in the manner and within the time periods specified in paragraph 2 [*of Article 20 of the MLI*] or agreed to by the competent authorities of the [*Contracting States*], a member shall be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either [*Contracting State*].

4. If the two initial members of the arbitration panel fail to appoint the Chair in the manner and within the time periods specified in paragraph 2 [*of Article 20 of the MLI*] or agreed to by the competent authorities of the [*Contracting States*], the Chair shall be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either [*Contracting State*].

Article 21 (Confidentiality of Arbitration Proceedings) of the MLI

1. Solely for the purposes of the application of the provisions of this Part and of the provisions of [*the Agreement*] and of the domestic laws of the [*Contracting States*] related to the exchange of information, confidentiality, and administrative assistance, members of the arbitration panel and a maximum of three staff per member (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be considered to be persons or authorities to whom information may be disclosed. Information received by the arbitration panel or prospective arbitrators and information that the competent authorities receive from the arbitration panel shall be considered information

that is exchanged under the provisions of [*the Agreement*] related to the exchange of information and administrative assistance.

2. The competent authorities of the [*Contracting States*] shall ensure that members of the arbitration panel and their staff agree in writing, prior to their acting in an arbitration proceeding, to treat any information relating to the arbitration proceeding consistently with the confidentiality and nondisclosure obligations described in the provisions of [*the Agreement*] related to exchange of information and administrative assistance and under the applicable laws of the [*Contracting States*].

Article 22 (Resolution of a Case Prior to the Conclusion of the Arbitration) of the MLI

For the purposes of this Part and the provisions of [*the Agreement*] that provide for resolution of cases through mutual agreement, the mutual agreement procedure, as well as the arbitration proceeding, with respect to a case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the [*Contracting States*]:

a) the competent authorities of the [*Contracting States*] reach a mutual agreement to resolve the case; or

b) the person who presented the case withdraws the request for arbitration or the request for a mutual agreement procedure.

Article 23 (Type of Arbitration Process) of the MLI

Final offer arbitration

1. Except to the extent that the competent authorities of the [*Contracting States*] mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding pursuant to this Part:

a) After a case is submitted to arbitration, the competent authority of each [*Contracting State*] shall submit to the arbitration panel, by a date set by agreement, a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities of the [*Contracting States*]). The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax charged pursuant to [*the Agreement*], for each adjustment or similar issue in the case. In a case in which the competent authorities of the [*Contracting States*] have been unable to reach agreement on an issue regarding the conditions for application of a provision of [*the Agreement*] (hereinafter referred to as a "threshold question"), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

b) The competent authority of each [*Contracting State*] may also submit a supporting position paper for consideration by the arbitration panel. Each competent authority that submits a proposed resolution or supporting position paper shall provide a copy to the other competent authority by the date on which the proposed resolution and supporting position paper were due. Each competent authority may also submit to the arbitration panel, by a date set by agreement, a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. A copy of any reply submission shall be provided to the other competent authority by the date on which the reply submission was due.

c) The arbitration panel shall select as its decision one of the proposed

resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the panel members. The arbitration panel shall deliver its decision in writing to the competent authorities of the [*Contracting States*]. The arbitration decision shall have no precedential value.

2. *Omitted.*

3. *Omitted.*

4. *Omitted.*

5. Prior to the beginning of arbitration proceedings, the competent authorities of the [*Contracting States*] to [*the Agreement*] shall ensure that each person that presented the case and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel. The mutual agreement procedure under [*the Agreement*], as well as the arbitration proceeding under this Part, with respect to the case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the [*Contracting States*], a person that presented the case or one of that person's advisors materially breaches that agreement.

6. *Omitted.*

7. *Omitted.*

Article 24 (Agreement on a Different Resolution) of the MLI Omitted.

Article 25 (Costs of Arbitration Proceedings) of the MLI

In an arbitration proceeding under this Part, the fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with the arbitration proceedings by the [*Contracting States*], shall be borne by the [*Contracting States*] in a manner to be settled by mutual agreement between the competent authorities of the [*Contracting States*]. In the absence of such agreement, each [*Contracting State*] shall bear its own expenses and those of its appointed panel member. The cost of the chair of the arbitration panel and other expenses associated with the conduct of the arbitration proceedings shall be borne by the [*Contracting States*] in equal shares.

Article 26 (Compatibility) of the MLI

1. *Omitted.*

2. Any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for in this Part shall not be submitted to arbitration if the issue falls within the scope of a case with respect to which an arbitration panel or similar body has previously been set up in accordance with a bilateral or multilateral convention that provides for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case.

3. [*Nothing*] in this Part shall affect the fulfilment of wider obligations with respect to the arbitration of unresolved issues arising in the context of a mutual agreement procedure resulting from other conventions to which the [*Contracting States*] are or will become parties.

4. *Omitted.*

Subparagraph a) of paragraph 2 of Article 28 (Reservations) of the MLI

Pursuant to Subparagraph a) of paragraph 2 of Article 28 of the MLI, Australia formulates the following reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI of the MLI:

Australia reserves the right to exclude from the scope of Part VI [*of the MLI*] any case to the extent that it involves the application of Australia's general anti-avoidance rules contained in Part IVA of the *Income Tax Assessment Act 1936* and section 67 of the *Fringe Benefits Tax Assessment Act 1986*. Australia also reserves the right to extend the scope of the exclusion for Australia's general anti-avoidance rules to any provisions replacing, amending or updating those rules. Australia shall notify the Depositary of any such provisions that involve substantial changes.

Pursuant to Subparagraph a) of paragraph 2 of Article 28 of the MLI, The Kingdom of Spain formulates the following reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI of the MLI:

1. The Kingdom of Spain reserves the right to exclude from the scope of Part VI [*of the MLI*] cases involving the application of anti-abuse rules in a Covered Tax Agreement as modified by [*the MLI*] or domestic law. For this purpose, anti-abuse rules contained in domestic law shall include the cases dealt with in Articles 15 and 16 of the General Tax Law (Law 58 of 17th December 2003). Any subsequent rules replacing, amending or updating these rules would also be comprehended. The Kingdom of Spain shall notify the Depositary of any such subsequent rules.

2. The Kingdom of Spain reserves the right to exclude from the scope of Part VI [*of the MLI*] cases involving conduct for which a person directly affected by the case has been subject, by a final ruling resulting from judicial or administrative proceedings, to a penalty for tax fraud, wilful default or gross negligence. For these purposes, penalties for tax fraud, wilful default or gross negligence shall be understood as those regulated under Articles:

i) 305 and 305 a of the Spanish Criminal Code.

ii) 191, 192 and 193 of the General Tax Law (Law 58 of 17 December 2003), provided that a qualification criterion referred to in Article 184 of said General Tax Law applies;

iii) 18.13.2º of the Corporate Income Tax Law (Law 27 of 27 November 2014), provided that a qualification criterion referred to in Article 184 of the General Tax Law (Law 58 of 17 December 2003) applies. For these purposes, any reference to "tax return" in said Article 184 of the General Tax Law shall be understood as references made to transfer pricing documentation.

Notwithstanding the provisions of subparagraph iii), penalties applied for incomplete provision of transfer pricing documentation, where the quantification or determination of market value is not seriously hampered, shall not be considered as penalty for tax fraud, wilful default or gross negligence.

Any subsequent provisions replacing, amending or updating these provisions would also be comprehended. The Kingdom of Spain shall notify the Depositary of any such subsequent provisions.

3. The Kingdom of Spain reserves the right to exclude from the scope of Part VI [*of the MLI*] transfer pricing cases involving items of income or capital that are not taxed in a Contracting State either because they are not included in the taxable base in that [*Contracting State*] or because they are subject to an exemption or zero tax rate provided only under the domestic tax law of that Contracting State that is specific to that item of income or capital.

4. The Kingdom of Spain reserves the right to exclude from the scope of Part VI [*of the MLI*] cases eligible for arbitration under the Convention on the Elimination of Double Taxation in

Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC), as amended, or any subsequent regulation.

5. The Kingdom of Spain reserves the right to exclude from the scope of Part VI [*of the MLI*] cases which the competent authorities of both [*Contracting States*] agree are not suitable for resolution through arbitration. Such agreement shall be reached before the date on which arbitration proceedings would otherwise have begun and shall be notified to the person who presented the case.

Article 25

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Agreement or of the domestic laws of the Contracting States concerning the taxes to which this Agreement applies insofar as the taxation thereunder is not contrary to this Agreement. The exchange of information is not restricted by Article 1. Any information received by the competent authority of a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which this Agreement applies and shall be used only for such purposes.

2. In no case shall the provisions of paragraph (1) be construed so as to impose on the competent authority of a Contracting State the obligation:

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

b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

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

Article 26

DIPLOMATIC AND CONSULAR OFFICIALS

Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special international agreements.

The following paragraph 1 of Article 7 of the MLI applies and supersedes the provisions of this Agreement:

ARTICLE 7 OF THE MLI – PREVENTION OF TREATY ABUSE

(Principal purposes test provision)

Notwithstanding any provisions of [*the Agreement*], a benefit under [*the Agreement*] shall not be granted in respect of an item of income […] if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of [*the Agreement*].

Article 27

ENTRY INTO FORCE

This Agreement shall enter into force on the date on which the Contracting States exchange notes through the diplomatic channel notifying each other that the last of such things has been done as is necessary to give this Agreement the force of law in Australia and in Spain, as the case may be, and thereupon this Agreement shall have effect:

a) in both Contracting States, in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January in the calendar year next following that in which the Agreement enters into force;

b) in Australia, in respect of other tax, in relation to income of any year of income beginning on or after 1 July in the calendar year next following that in which the Agreement enters into force;

c) in Spain, in respect of other taxes on income, in relation to taxes chargeable for the taxable year beginning on or after 1 January in the calendar year next following that in which the Agreement enters into force.

Article 28

TERMINATION

This Agreement shall continue in effect indefinitely, but either of the Contracting States may, on or before 30 June in any calendar year beginning after the expiration of 3 years from the date of its entry into force, give to the other Contracting State through the diplomatic channel written notice of termination and, in that event, this Agreement shall cease to be effective:

a) in both Contracting States, in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January in the calendar year next following that in which the notice of termination is given;

b) in Australia, in respect of other Australian tax, in relation to income of any year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given;

c) in Spain, in respect of other taxes on income, in relation to taxes chargeable for any taxable year beginning on or after 1 January in the calendar year next following that in which the notice is given.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Agreement.

DONE in duplicate at Canberra this twenty-fourth day of March, One thousand nine hundred and ninety-two in the English and Spanish languages, both texts being equally authentic.

FOR AUSTRALIA:	FOR THE KINGDOM OF SPAIN:
[Signed:]	[Signed:]
JOHN DAWKINS	JOSE LUIS PARDOS

PROTOCOL TO THE AGREEMENT BETWEEN AUSTRALIA AND THE KINGDOM OF SPAIN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

AUSTRALIA AND THE KINGDOM OF SPAIN,

HAVING regard to the Agreement between Australia and the Kingdom of Spain for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed today at Canberra (in this Protocol called "the Agreement"),

HAVE AGREED as follows:

If, in an agreement for the avoidance of double taxation that may subsequently be made between Australia and a third State, there is included a Non-discrimination Article, Australia shall immediately inform the Kingdom of Spain in writing through the diplomatic channel and shall enter into negotiations with the Kingdom of Spain in order to provide the same treatment for the Kingdom of Spain as may be provided for the third State.

This protocol shall form an integral part of the Agreement.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Protocol.

DONE in duplicate at Canberra this twenty-fourth day of March, One thousand nine hundred and ninety-two in the English and Spanish languages, both texts being equally authentic.

FOR AUSTRALIA:	FOR THE KINGDOM OF SPAIN:
[Signed:]	[Signed:]
JOHN DAWKINS	JOSE LUIS PARDOS