The legislative clerk read as follows:

A bill (S. 2991) to suspend temporarily new shipper bonding privileges.

There being no objection, the Senate proceeded to consider the bill.

Mr. FRIST. Mr. President, I ask unanimous consent that the bill be read a third time and passed, the motion to reconsider be laid upon the table, and that any statements relating to the bill be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (S. 2991) was read the third time and passed, as follows:

S. 2991

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

SECTION 1. SHORT TITLE.

This Act may be cited as the ''New Shipper Review Amendment Act of 2004''.

SEC. 2. TEMPORARY SUSPENSION OF NEW SHIPPER BONDING PRIVILEGES.

Clause (iii) of section 751(a)(2)(B) of the Tariff Act of 1930 (19 U.S.C. 1675(a)(2)(B)(iii)) shall not be effective during the 3-year period beginning on the date of the enactment of this Act.

SEC. 3. REPORT TO CONGRESS.

Not later than 2 years after the date of the enactment of this Act, the Secretary of Commerce, in consultation with the Secretary of the Treasury, the United States Trade Representative, and the Commissioner of the Bureau of Customs and Border Protection, shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report containing—

(1) recommendations on whether the suspension of the effectiveness of section 751(a)(2)(B)(iii) of the Tariff Act of 1930 should be extended beyond the date provided in section 2 of this Act; and

(2) assessments of the effectiveness of any administrative measures that have been implemented to address the difficulties giving rise to section 2 of this Act, including—

(A) problems in assuring the collection of antidumping duties on imports from new shippers;

(B) administrative burdens imposed on the Department of Commerce by new shipper reviews; and

(C) the use of the bonding privilege by importers from new shippers to circumvent the effect of antidumping duty orders.

UNANIMOUS CONSENT AGREEMENT—FOREIGN OPERATIONS APPROPRIATIONS CONFEREES

Mr. FRIST. Mr. President, I ask unanimous consent that with respect to the Foreign Operations appropriations bill, Senator COCHRAN be inserted in lieu of Senator SPECTER as a conferee.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROTOCOL AMENDING TAX CONVENTION WITH THE NETHERLANDS—TREATY DOCUMENT NO. 108–25

Mr. FRIST. As in executive session, I ask unanimous consent that the Foreign Relations Committee be discharged from further consideration of Treaty Document No. 108–25, the Protocol Amending the Tax Convention with the Netherlands.

I further ask unanimous consent that the Senate proceed to its consideration and to the accompanying resolution of ratification which is at the desk; that the treaty be considered as having passed through its various parliamentary stages, up to and including the presentation of the resolution of ratification; that any statements be printed in the CONGRESSIONAL RECORD as if read; and that the Senate immediately proceed to a vote on the resolution of ratification; further, that when the resolution of ratification is voted upon, the motion to reconsider be laid upon the table, and that the President be notified of the Senate's action.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. FRIST. Mr. President, I ask for a division vote on the resolution of ratification.

The PRESIDING OFFICER. A division vote is requested. Senators in favor of the resolution of ratification will rise and stand until counted.

Those opposed will rise and stand until counted.

On a division, two-thirds of the Senators present and voting having voted in the affirmative, the resolution of ratification is agreed to.

The resolution of ratification is as follows:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Protocol Amending the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Washington on March 8, 2004 (T. Doc. 108–25).

(At the request of Mr. DASCHLE, the following statement was ordered to be printed in the RECORD.)

● Mr. BIDEN. Mr. President, today the Senate considered a protocol to the current tax convention between the United States and the Kingdom of the Netherlands. There is substantial trade and cross-border investment between our two countries; the tax convention provides an important basis for facilitating this economic relationship. The original convention was concluded in the early 1990s, and there have been several developments in U.S. tax treaty policy in the intervening years that the protocol seeks to address. It contains several significant provisions, including a revised provision designed to ensure that the treaty cannot be used for inappropriate purposes—a so-called antitreaty-shopping provision. I commend Chairman LUGAR for his diligence in bringing the protocol before the Senate.

During the Foreign Relations Committee's review of the protocol, I raised a concern about a provision in the current treaty that is not addressed by the protocol. Article 24(1) of the current treaty permits the United States to tax former citizens for a period of 10 years after they lose their citizenship, if the loss of their citizenship has as one of its principal purposes the avoidance of income tax. With one exception, this provision in the treaty is consistent with U.S. law—specifically, section 877 of the Internal Revenue Code—as it existed at the time the treaty was concluded. The exception is this: the treaty does not allow the United States to tax former citizens who become nationals of the Netherlands. Such an exclusion for nationals of the treaty partner is unique in our tax treaty practice; it is not found in any other treaty, nor is it contained in our model treaty.

The protocol before the Senate does not close this gap. Consistent with statutory amendments made by Congress in 1996, it does extend the taxation authority of the United States to former long-term residents who leave the United States to avoid taxation. But the exclusion for nationals of the Netherlands remains.

Maintaining this exclusion for nationals of the Netherlands is unwarranted, and raises two concerns. First, I wanted to be sure that retaining the exclusion would not serve as a precedent in future tax treaty negotiations. The Treasury Department has noted that such an exclusion for nationals of the treaty partner has not been included in over two dozen tax treaties negotiated since the treaty with the Netherlands entered into force. More important, the Treasury has committed in writing that it does not intend the provision in the Netherlands treaty to serve as a precedent in the future.

Second, I was concerned that maintaining the exclusion might subvert the purpose of section 877 of the Internal Revenue Code. Based on the information we have received from the Treasury, and after consultation with the staff of the Joint Committee on Taxation, it seems unlikely that the provision in the treaty will, in practice, undermine the operation of section 877. The reasons for this are set forth in detail in the materials that I will seek to include in the RECORD.

Finally, it is worth noting that Congress amended section 877 in section 804 of The American Jobs Creation Act of 2004, also known as the FSC/ETI bill, which was enacted last month. The primary purpose of the provision remains: to continue to tax people who expatriate in order to avoid tax. But the test under the revised section 877 is a more objective test—one based on income levels—than had been applied under the prior law. A question therefore arises about the relationship between the revised language in section 877 and the provision in the U.S.-Netherlands treaty, which uses a more subjective test of whether a ''principal purpose'' of the expatriating act is to avoid taxation. In a letter that I will insert in the RECORD, the Treasury has set forth information about its intentions for applying the treaty provision in light of the revisions to section 877.

The committee on Foreign Relations held a hearing on the protocol on September 24, 2004. The committee did not vote on the protocol, however, and therefore there is no committee report. So that may colleagues and the public will have a better understanding of the issues I have described, I will ask consent to include two sets of documents in the RECORD. The first is a series of questions for the record that I submitted after the hearing, and the responses from the Treasury witness at the hearing, Barbara Angus, who serves as the international tax counsel at the Department. It should be noted that these questions and answers for the record were written before enactment of the revisions to section 877 of the Internal Revenue Code in the FSC/ETI bill. The second set of documents is an exchange of letters between myself and Ms. Angus on November 15, 2004, which elaborates on the issues that I have discussed, including the Department's intentions for interpreting the revisions to section 877.

Accordingly, I ask unanimous consent to have printed in the RECORD the materials I have described.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

TREASURY DEPARTMENT RESPONSE TO QUESTION FOR THE RECORD FROM SENATOR BIDEN TO BARBARA ANGUS, WITH RESPECT TO THE PROPOSED PROTOCOL TO THE INCOME TAX CONVENTION BETWEEN THE UNITED STATES AND THE KINGDOM OF THE NETHERLANDS—OCTOBER 6, 2004

QUESTION

Section 877 of the Internal Revenue Code provides for continued taxation of former citizens and long-term residents of the United States if one of the principal purposes of the loss of U.S. citizenship or change of residence status is the avoidance of taxes.

When Congress amended Section 877 in 1996 to extend this provision to former long-term residents, the conference report on the legislation stated that ''it is intended that the purpose of the expatriation tax provisions, as amended, not be defeated by any treaty provision. The Treasury Department is expected to review all outstanding treaties to determine whether the expatriation tax provisions, as revised, potentially conflict with treaty provisions and to eliminate any such potential conflicts through renegotiation of the affected treaties as necessary. Beginning on the tenth anniversary of the enactment of the House bill, any conflicting treaty provisions that remain in force would take precedence over the expatriation tax provisions as revised.'' (Conf. Rept. on the Health Insurance Portability and Accountability Act of 1996, H. Rept. 104–736, at 329). The Internal Revenue Service subsequently issued guidance stating that it ''will interpret section 877 as consistent with U.S. income tax treaties. To the extent that there is a conflict, however, all provisions of section 877, as amended, prevail over treaty provisions in effect on August 21, 1996.'' (Internal Revenue Bulletin 1997–10, Mar. 10, 1997, at 48.) Presumably, however, the effect of this guidance expires in 2006, as set forth in the above-quoted conference report.

Article 6 of the protocol pending before the Committee extends Article 24(1) and its authority over residents and nationals to former long-term residents, but retains an exclusion for nationals of the Netherlands, whether or not they are former citizens or former long-term residents. Thus, rather than follow the 1996 directive urging the elimination of any potential conflicts between a tax treaty and Section 877, the protocol appears to preserve an existing conflict (for former citizens who are Dutch nationals) and create a new one (for former long-term residents who are Dutch nationals). This exclusion of the treaty partner's nationals also departs from the U.S. model tax treaty.

Please answer the following questions:

a. Is the exclusion in Article 24(1) for nationals of the Netherlands found in any other U.S. tax treaty? If not, why is it contained in the U.S.-Netherlands treaty?

b. Was the exclusion for nationals of the Netherlands in Article 24(1) of the underlying treaty discussed in the negotiations of the Protocol? Did the United States propose amending this provision? Please elaborate.

c. Why was the exclusion for nationals of the Netherlands in Article 24(1) extended to former long-term residents?

d. What is the estimated fiscal effect of (1) retaining the exclusion for nationals of the Netherlands who were formerly U.S. citizens; and (2) extending the exclusion to nationals of the Netherlands who were formerly long-term residents?

RESPONSE

Section 877 of the Internal Revenue Code, which has been part of the U.S. tax law since 1966, provides for special tax treatment of former U.S. citizens who gave up their citizenship to avoid U.S. tax. Amendments enacted in 1996 strengthened these tax rules and extended the special tax treatment to apply also to certain former long-term U.S. permanent residents who gave up such status to avoid U.S. tax.

Under section 877, former U.S. citizens and certain former long-term U.S. residents are subject to special rules that impose U.S. tax on certain categories of income that have a connection to the United States; these special tax rules are applicable for the 10-year period following the individual's relinquishment of U.S. citizenship or long-term resident status. The special tax rules apply only to individuals who relinquish U.S. citizenship or long-term resident status for a principal purpose of avoiding U.S. income or estate and gift taxes. For this purpose, a presumption of tax avoidance motive applies in the case of certain individuals whose net worth or average annual net income tax liability exceeds specified thresholds; this presumption does not apply, however, to individuals who meet specified criteria.

Section 877 provides that the presumption of tax-avoidance motive (which otherwise would apply if the individual's net worth or average tax liability exceeds the specified thresholds) does not apply to former U.S. citizens who fall into one of the following classes and who submit a ruling request to the Internal Revenue Service:

(i) former U.S. citizens who were dual citizens at birth and who have remained citizens of the other country;

(ii) former U.S. citizens who become citizens of their country of birth, their spouse's country of birth, or one of their parents' countries of birth;

(iii) former U.S. citizens who for the 10 years prior to expatriation were present in the United States for no more than 30 days in any year; and

(iv) former U.S. citizens who gave up their U.S. citizenship before age 18½. Analogous exceptions apply in the case of former long-term U.S. residents.

The special tax rules of section 877 apply only when there is a tax-avoidance purpose for an individual's relinquishment of U.S. citizenship or U.S. long-term resident status. These exceptions to the presumption of tax-avoidance motive recognize that individuals who have close personal ties to another country are likely to have non-tax reasons for a decision to give up U.S. citizenship or long-term resident status.

The U.S.-Netherlands treaty sets forth specific guidance regarding how each country is to tax individuals who are resident in the other country. Although the treaty, like all other U.S. tax treaties, generally limits each country's ability to tax residents of the other country, the treaty contains specific rules that permit the United States to apply its domestic tax rules to U.S. citizens who are resident in the Netherlands. The treaty further provides a rule under which the United States may apply its domestic tax rules to former U.S. citizens who are resident in the Netherlands and who are not Netherlands nationals. The proposed protocol would add to the treaty a rule that extends this same treatment to former U.S. long-term residents who are resident in the Netherlands and who are not Netherlands nationals.

The provision in Article 24(1) of the U.S.-Netherlands income tax treaty that limits the imposition of the special U.S. tax rules under section 877 when applied to Netherlands nationals is unique among U.S. tax treaties. However, this exception for Netherlands nationals is not qualitatively different from the underlying approach reflected in section 877 as amended in 1996. As described above, section 877 provides several exceptions to the tax-avoidance presumption, including exceptions for individuals who are (or become) citizens of the country in which they (or certain family members) were born or who have very limited links to the United States. These exceptions in section 877 are in several cases broader than the exception for Netherlands nationals in the U.S.-Netherlands treaty.

The provision in the U.S.-Netherlands treaty is not expected to produce significantly different results than would be provided under section 877 in practice. As described above, the special tax treatment provided in section 877 applies only in the case of individuals whose relinquishment of U.S. citizenship or long-term resident status had a principal purpose of tax avoidance. Because the Netherlands imposes substantial tax on individuals who are resident there (and only resident individuals who are subject to Netherlands tax are eligible for the benefits of the U.S.-Netherlands tax treaty, including the provision that limits the imposition of U.S. tax), individuals who are trying to avoid tax are unlikely to become residents of the Netherlands. Indeed, pursuant to section 877, the Internal Revenue Service has issued rulings in cases involving Netherlands nationals who relinquished U.S. citizenship or long-term resident status in order to return to the Netherlands, concluding that the individuals did not have a principal motive of tax avoidance and therefore were not subject to the special tax rules provided in section 877. Moreover, because section 877 requires the United States to provide a credit against U.S. tax for tax paid in the country of residence, the application of section 877 to a resident of the Netherlands is unlikely to result in significant U.S. tax (given the substantial tax imposed by the Netherlands on the income of individuals who are resident there).

Although the Netherlands agreed to the application of the special rules of section 877 to residents of the Netherlands who are former U.S. citizens or long-term residents, for a period of 10 years when loss of U.S. citizenship or long-term resident status had as one of its principal purposes the avoidance of U.S. income tax, the exception for Netherlands nationals contained in the 1993 treaty

(and continued in the proposed protocol) was important to the Netherlands. This position reflects the underlying view that the special tax rules applicable in the case of tax-avoidance motivated changes in citizenship or residence should not be applicable in cases where the move is to go home. As noted above, the rules of section 877 and the exceptions contained therein reflect a similar perspective.

In light of the limited potential impact of the exception for Netherlands nationals, it was determined that continuation of the exception in the proposed protocol was not inappropriate, particularly given the narrow scope of the proposed protocol. The focus of the proposed protocol is on the withholding tax treatment of dividends and the limitation on benefits provisions. Both countries were interested in the prompt conclusion of a protocol to address these important issues. For the United States in particular, it was a matter of priority to secure improvements to the limitation on benefits provisions in order to prevent the potential for inappropriate use of the treaty through treaty shopping. It is important that the ground-breaking changes to the limitation on benefits provision reflected in the proposed protocol enter into force as soon as possible. In addition, there also were significant benefits to the United States in having the new limitation on benefits rules contained in the proposed protocol become public as soon as possible in order to establish a precedent in terms of strengthened anti-treaty-shopping provisions for other ongoing treaty negotiations. In order to achieve these goals, at the start of negotiations both countries agreed that this protocol would not address other issues where there were differences between the two countries that could slow the process and jeopardize an important agreement.

While this protocol did not revisit the agreement reached in 1993 regarding the treatment of Netherlands nationals under the special rules applicable to former U.S. citizens, the proposed protocol does include a straightforward extension of these special rules regarding U.S. taxing jurisdiction of Netherlands residents contained in the current treaty to provide for coverage of former U.S. long-term residents to the same extent as former U.S. citizens. The current treaty does not contain special rules providing for U.S. taxing jurisdiction over former long-term residents. In addition, other significant 1996 changes strengthening section 877, such as the inclusion of new categories of income subject to the special tax rules, are applicable under the treaty.

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, November 15, 2004.

Ms. BARBARA ANGUS,
International Tax Counsel, Department of the Treasury, Washington, DC.

DEAR MS. ANGUS: I write regarding the protocol to the U.S.-Netherlands tax treaty now pending before the Senate.

As you know, I have been concerned about the continuation of the exclusion from U.S. taxation authority for nationals of the Netherlands set forth in Article 24(1) of the current U.S.-Netherlands tax treaty. Such an exclusion is unique to the Netherlands treaty, and is not contained in the U.S. model treaty. I am therefore concerned that this provision not serve as a precedent in future tax convention negotiations, and would be grateful for any assurances you can provide in this regard.

Since the Committee's hearing on the protocol, the Congress has approved and the President has signed into law a measure that modifies section 877 of the Internal Revenue Code (Sec. 804 of The American Jobs Creation Act of 2004, Pub. Law 108-357); that provision of law, as you know, provides for special tax treatment of former U.S. citizens and long-term nationals who expatriate. The revised section 877 sets forth an objective test with regard to such individuals, replacing the prior version, which focused on whether the expatriating individual had as a principal purpose the avoidance of U.S. taxation.

In previous exchanges between the Department and the Committee, Department officials have asserted to the Committee that the exclusion in Article 24 for nationals of the Netherlands would not produce a significantly different result in practice than would be provided under section 877. I would appreciate the Department's views on whether that remains the case under the revised section 877.

Finally, a question arises about the interaction between Article 24 and revised section 877. As noted, the latter now contains an objective test; the former provides for continued taxation for 10 years of former U.S. nationals and long-term U.S. residents—provided they are not nationals of the Netherlands—in cases where the loss of such status ''has as one of its principal purposes the avoidance of income tax.'' I am interested in knowing the Department's views on how it will interpret and apply these provisions, not only under the U.S.-Netherlands treaty but also in the case of similar bilateral tax treaties currently in force.

I appreciate your attention to this matter. I expect that the Senate will consider the protocol to the U.S.-Netherlands treaty during this week's session, and I would therefore be grateful for a prompt response to the issues that I have raised.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Ranking Minority Member.

DEPARTMENT OF THE TREASURY,
Washington, DC, November 15, 2004.

Hon. JOSEPH R. BIDEN, Jr.,
Ranking Member, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR SENATOR BIDEN: I am writing in response to your letter of November 15, 2004, regarding the pending protocol amending the existing tax treaty with the Netherlands. Your letter focuses on the particular provisions in the U.S.-Netherlands treaty and protocol relating to the tax treatment of certain former U.S. citizens and former U.S. long-term residents. You also asked about the interaction of the provisions in this treaty, and in other treaties, with the provisions of section 377 of the Internal Revenue Code as amended by the American Jobs Creation Act enacted last month.

The U.S.-Netherlands treaty includes a provision under which the United States may apply its domestic tax rules to former U.S. citizens who are resident in the Netherlands and who are not Netherlands nationals. The pending protocol would add to the treaty a rule that extends this same treatment to former U.S. long-term residents. The provision in the U.S.-Netherlands treaty that limits the imposition of the special U.S. tax rules under section 877 when applied to individuals who are Netherlands nationals is unique among U.S. tax treaties. This special rule with respect to nationals was incorporated in the U.S.-Netherlands tax treaty in 1993 and has not been included in any other treaties since that time. None of the twenty-seven agreements that have entered into force since the Netherlands treaty entered into force includes such a rule for nationals. This special rule in the U.S.-Netherlands treaty has not served as a precedent for other treaties and we do not intend for it to serve as a precedent going forward.

In my response to your questions for the record, I explained why we believed that the continuation of the special rule for Netherlands nationals in the U.S.-Netherlands treaty would not produce significantly different results than would be produced under U.S. domestic law in practice. We continue to believe that will be the case following the recent amendments to section 877. Although the test in section 377 has been modified to make it more objective, key considerations underlying our view regarding the practical result were the fact that the Netherlands imposes substantial taxes on individuals and the fact that section 877 provides for a credit that reduces the U.S. tax otherwise due by the tax paid in the country of residence. There has been no change with respect to this factual background.

More generally, you asked about our intentions regarding the interpretation of the treaty language which preserves U.S. taxing jurisdiction over former U.S. citizens and former U.S. long-term residents where the individual's relinquishment of citizenship or resident status has ''as one of its principal purposes the avoidance of tax''. The quoted language regarding principal purpose has long been included in the U.S. Model Income Tax Convention and thus appears in many U.S. tax treaties. This treaty language was intended to be read consistently with section 877. Following the modification of section 877 in 1996 to add objective tests, we have taken the position that those objective tests represent the administrative means by which the United States determines whether a taxpayer has a tax avoidance purpose. The recently-enacted changes represent a further step in this direction and are intended to facilitate the administration of the special tax rules of section 877 by making the rules more objective; however, the underlying purpose of section 877 has not changed. Accordingly, we intend to continue to take the position, in interpreting the ''principal purpose'' language in the U.S.-Netherlands treaty and other existing treaties, that the objective tests in section 877 as recently amended represent the means by which the United States detemines tax avoidance purpose.

We appreciate your interest in this issue. The pending protocol to the U.S.-Netherlands tax treaty will substantially improve a long-standing U.S. treaty relationship and we believe it is in the interest of the United States to bring this agreement into force as soon as possible.

Sincerely yours,

BARBARA M. ANGUS,
International Tax Counsel.●

ORDERS FOR THURSDAY, NOVEMBER 18, 2004

Mr. FRIST. I ask unanimous consent that when the Senate completes its business today, it adjourn until 10 a.m. on Thursday, November 18. I further ask that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved, and the Senate then begin a period of morning business with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. FRIST. Mr. President, tomorrow the Senate will be in a period of morning business. Senators are encouraged