

PROTOCOL

AMENDING THE CONVENTION BETWEEN THE SWISS FEDERAL COUNCIL AND THE GOVERNMENT OF CANADA FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL, DONE AT BERNE ON 5 MAY 1997

THE SWISS FEDERAL COUNCIL

AND

THE GOVERNMENT OF CANADA

Desiring to conclude a Protocol amending the *Convention between the Swiss Federal Council and the Government of Canada for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital*, done at Berne on 5 May 1997 (the “Convention”),

Have agreed as follows:

Article I

Paragraph 2 of Article 3 (General Definitions) of the Convention shall be deleted and replaced by the following:

“2. As regards the application of the Convention by a Contracting State, at any time, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has at that time under the law of that State concerning the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.”

Article II

Paragraph 1 of Article 4 (Resident) of the Convention shall be amended by adding the following sentence at the end of the paragraph:

“This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.”

The amended paragraph shall therefore read as follows:

“For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his

domicile, residence, place of management or any other criterion of a similar nature, and in the case of Switzerland it includes a partnership created or organized under Swiss law. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.”

Article III

Paragraph 3 of Article 9 (Associated Enterprises) of the Convention shall be amended by deleting the word “five” and replacing it with the word “six”.

The amended paragraph shall therefore read as follows:

“A Contracting State shall not change the income of an enterprise in the circumstances referred to in paragraph 1 after the expiry of the time limits provided in its domestic law and, in any case, after six years from the end of the year in which the income which would be subject to such change would have accrued to that enterprise. This paragraph shall not apply in the case of fraud or wilful default.”

Article IV

1. Subparagraph (b) of paragraph 2 of Article 10 (Dividends) of the Convention shall be deleted and subparagraph (c) shall be renumbered as subparagraph (b).

2. The following new paragraph 3 shall be added to Article 10 of the Convention:

“3. Notwithstanding paragraph 2, dividends paid by a company which is a resident of a Contracting State shall be exempt from tax in that State if the dividends are paid to:

(a) the Bank of Canada or the Swiss National Bank; or

(b) a resident of the other Contracting State:

(i) that was constituted and is operated exclusively to administer or provide benefits under one or more pension or retirement plans; or

(ii) that is operated exclusively to earn income for the benefit of one or more residents of that other Contracting State each of which satisfy clause (i),

provided that:

(iii) each pension or retirement plan provides benefits primarily to individuals who are residents of that other Contracting State;

(iv) the dividends are not derived from carrying on a trade or a business or from a related person; and

(v) the competent authorities of the Contracting States agree that each pension or retirement plan generally corresponds to a pension or retirement plan recognized for tax purposes in the first-mentioned State.”

3. Paragraph 3 of Article 10 shall be renumbered as paragraph 4.
4. Paragraph 4 of Article 10 shall be renumbered as paragraph 5 and the reference to “paragraphs 1 and 2” shall be replaced by “paragraphs 1, 2 and 3”.
5. Paragraphs 5 and 6 of Article 10 shall be renumbered as paragraphs 6 and 7 respectively.
6. Paragraph 7 of Article 10 shall be renumbered as paragraph 8 and the reference to “paragraphs 1, 2(c) and 4” shall be replaced by “paragraphs 1, 2(b) and 5”.

The amended Article 10 shall therefore read as follows:

“1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:

- (a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company that owns at least 10 per cent of the voting stock and of the capital of the company paying the dividends;
- (b) 15 per cent of the gross amount of the dividends in all other cases.

The provisions of this paragraph shall not affect the taxation of the company on the profits out of which the dividends are paid.

3. Notwithstanding paragraph 2, dividends paid by a company which is a resident of a Contracting State shall be exempt from tax in that State if the dividends are paid to:

- (a) the Bank of Canada or the Swiss National Bank; or
- (b) a resident of the other Contracting State
 - (i) constituted and operated exclusively to administer or provide benefits under one or more pension or retirement plans; or
 - (ii) operated exclusively to earn income for the benefit of one or more residents of that other Contracting State each of which satisfy clause (i),
provided that:
 - (iii) each pension or retirement plan provides benefits primarily to individuals who are residents of that other Contracting State;
 - (iv) the dividends are not derived from carrying on a trade or a business or from a related person; and

- (v) the competent authorities of the Contracting States agree that each pension or retirement plan generally corresponds to a pension or retirement plan recognized for tax purposes in the first-mentioned State.

4. The term “dividends” as used in this Article means income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares or other rights, not being debt-claims, participating in profits, as well as income which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, 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 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 undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

7. Notwithstanding any provision in this Convention, Canada may impose on the earnings of a company attributable to permanent establishments in Canada, tax in addition to the tax which would be chargeable on the earnings of a company incorporated in Canada, provided that the rate of such additional tax so imposed shall not exceed 5 per cent. For the purpose of this provision, the term “earnings” means the profits attributable to such permanent establishments in Canada (including gains from the alienation of property forming part of the business property, referred to in paragraph 2 of Article 13, of such permanent establishments) in accordance with Article 7 in a year and previous years after deducting therefrom:

- (a) business losses attributable to such permanent establishments (including losses from the alienation of property forming part of the business property of such permanent establishments) in such year and previous years;
- (b) all taxes chargeable in Canada on such profits, other than the additional tax referred to herein;
- (c) the profits reinvested in Canada, provided that the amount of such deduction shall be determined in accordance with the existing provisions of the law of Canada

regarding the computation of the allowance in respect of investment in property in Canada, and any subsequent modification of those provisions which shall not affect the general principle hereof; and

- (d) five hundred thousand Canadian dollars (\$500,000) less any amount deducted:
 - (i) by the company, or
 - (ii) by a person related thereto from the same or a similar business as that carried on by the company,

under this sub-paragraph (d); for the purposes of this sub-paragraph (d), a company is related to another company if one company directly or indirectly controls the other, or both companies are directly controlled by the same person or persons, or if the two companies deal with each other not at arm's length.

The provisions of this paragraph shall also apply with respect to earnings from the alienation of immovable property in Canada by a company carrying on a trade in immovable property without a permanent establishment in Canada but only insofar as these earnings may be taxed in Canada in accordance with the provisions of Article 6 or paragraph 1 of Article 13.

8. The provisions of paragraphs 1, 2(b) and 5 shall also apply to income derived by a resident of Switzerland from an estate or a trust which is a resident of Canada. For the purposes of paragraph 2(b) of Article 22, the term "dividend" shall include such income."

Article V

1. Paragraphs 3 and 4 of Article 11 (Interest) of the Convention shall be deleted and replaced by the following:

- "3. Notwithstanding the provisions of paragraph 2,
 - (a) interest arising in Switzerland and paid to a resident of Canada shall be taxable only in Canada if it is paid in respect of a loan made, guaranteed or insured, or a credit extended, guaranteed or insured by Export Development Canada;
 - (b) interest arising in Canada and paid to a resident of Switzerland shall be taxable only in Switzerland if it is paid in respect of a loan made, guaranteed or insured, or a credit extended, guaranteed or insured by the Swiss Export Risk Insurance; and
 - (c) interest arising in a Contracting State and paid to a resident of the other Contracting State shall not be taxable in the first-mentioned State if the beneficial owner of the interest is a resident of the other Contracting State and is not related to the payer.

4. For the purposes of this Article, a person shall be deemed to be related to another person if either person participates directly or indirectly in the management or control of the other, or if any third person or persons participate directly or indirectly in the management or control of both.”
2. Paragraph 6 of Article 11 shall be amended by deleting the reference “The provisions of paragraph 1, 2, 3 and 4” and replacing it with “The provisions of paragraph 1, 2 and 3”.

The amended paragraph shall therefore read as follows:

“The provisions of paragraphs 1, 2, and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, 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 debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.”

Article VI

In subparagraph (c) of paragraph 3 of Article 12 (Royalties) of the Convention, the words “where the payer and the beneficial owner of the royalties are not related persons,” shall be deleted.

The amended subparagraph shall therefore read as follows:

“royalties for the use of, or the right to use, any patent or any information concerning industrial, commercial or scientific experience (but not including any such information provided in connection with a rental or franchise agreement),”

Article VII

1. Paragraph 7 of Article 13 (Capital Gains) of the Convention shall be amended by adding the words “other than property to which the provisions of paragraph 8 apply,” after the words “from the alienation of any property,”.
2. The following paragraph 8 shall be added to Article 13 of the Convention:

“8. Where an individual who ceases to be a resident of a Contracting State, and immediately thereafter becomes a resident of the other Contracting State, is treated for the purposes of taxation in the first-mentioned State as having alienated a property (in this paragraph referred to as the “deemed alienation”) and is taxed in that State by reason thereof, the individual may elect to be treated for purposes of taxation in the other State as if the individual had, immediately before becoming a resident of that State, sold and repurchased the property for an amount equal to the lesser of its fair market value at the

time of the deemed alienation and the amount the individual elects, at the time of the actual alienation of the property, to be the proceeds of disposition in the first-mentioned State in respect of the deemed alienation. However, this provision shall not apply to property any gain from which, arising immediately before the individual became a resident of that other State, may be taxed in that other State nor to immovable property situated in a third State.”

Article VIII

Paragraph 1 of Article 18 (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

“1. Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State, including payments under the social security legislation in a Contracting State, may be taxed in the State in which they arise, and according to the law of that State. However, in the case of periodic pension or annuity payments (except lump-sum payments arising under the surrender, cancellation, redemption, sale or other alienation of an annuity, and payments of any kind under an annuity contract the cost of which was deductible, in whole or in part, in computing the income of any person who acquired the contract), the tax so charged shall not exceed 15 per cent of the gross amount of the payment.”

Article IX

Subparagraph (c) of paragraph 1 of Article 22 (Elimination of Double Taxation) of the Convention shall be deleted and subparagraph (d) shall be renumbered as subparagraph (c).

Article X

1. Paragraph 1 of Article 24 (Mutual Agreement Procedure) of the Convention shall be amended by deleting the word “two” and replacing it with the word “three”.

The amended paragraph shall therefore read as follows:

“Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, address to the competent authority of the Contracting State of which he is a resident an application in writing stating the grounds for claiming the revision of such taxation. To be admissible, the said application must be submitted within three years from the first notification of the action which gives rise to taxation not in accordance with the Convention.”

2. Paragraph 2 of Article 24 of the Convention shall be amended by adding the following sentence at the end of the paragraph:

“Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States”.

The amended paragraph shall therefore read as follows:

“The competent authority referred to in paragraph 1 shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.”

3. Paragraph 3 of Article 24 of the Convention shall be amended by deleting the word “five” and replacing it with the word “six”.

The amended paragraph shall therefore read as follows:

“A Contracting State shall not, after the expiry of the time limits provided in its domestic law and, in any case, after six years from the end of the taxable period in which the income concerned has accrued, increase the tax base of a resident of either of the Contracting States by including therein items of income which have also been charged to tax in the other Contracting State. This paragraph shall not apply in the case of fraud or wilful default.”

4. The following paragraphs 6 and 7 shall be added to Article 24 of the Convention:

“6. Where,

- (a) under paragraph 1, a person has submitted 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 this Convention, and
- (b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the date upon which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities or on another date as agreed by both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration. The arbitration shall be conducted in a manner prescribed by the rules and procedures agreed upon by the Contracting States in an exchange of notes through diplomatic channels. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either

State. Unless a person whose taxation is directly affected by the arbitration decision does not accept that decision, it shall be binding on both Contracting States and shall constitute a resolution by mutual agreement under this Article.

7. The issues to which the provisions of paragraph 6 apply are issues of fact covered by Articles 5, 7 and 9, and any provisions subsequently agreed by the competent authorities.”

Article XI

Article 25 (Exchange of Information) of the Convention shall be deleted and replaced by the following provisions:

“Article 25 Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes covered by the Convention, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by 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) involved in the administration, assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to income or capital taxes. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the requested State authorizes such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to supply information which is 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 information, the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State, if necessary to comply with its obligations under this paragraph, shall have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws.”

Article XII

An Interpretative Protocol shall be added to the Convention with the following provisions:

“INTERPRETATIVE PROTOCOL

The Swiss Federal Council

and

The Government of Canada

Have agreed at the signing of the Protocol amending the *Convention between the Government of Canada and the Swiss Federal Council for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital*, done at Berne on 5 May 1997 (the “Convention”), on the following provisions, which shall form an integral part of the Convention:

1. Regarding Article 11:

Subparagraph 3(c) shall not apply where all or any portion of the interest paid or payable on an obligation that is contingent or dependent on the use of or production from property is computed by reference to revenue, profit, cash flow, commodity price or any other similar criterion or by reference to dividends paid or payable to shareholders of any class of shares of the capital stock of a corporation.

2. Regarding Article 25:
- (a) It is understood that an exchange of information will only be requested once the requesting Contracting State has pursued all reasonable means available under its internal taxation procedure to obtain the information.
 - (b) It is understood that the competent authority of the requesting State shall provide the following information to the competent authority of the requested State when making a request for information under Article 25 of the Convention:
 - (i) name and, to the extent known, other information, such as address, account number or date of birth, in order to identify the person(s) under examination or investigation;
 - (ii) the period of time for which the information is requested;
 - (iii) a statement of the information sought including its nature and the form in which the requesting State wishes to receive the information from the requested State;
 - (iv) the tax purpose for which the information is sought;
 - (v) the name and, to the extent known, the address of any person believed to be in possession of the requested information.
 - (c) It is understood that the standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While subparagraph 2(b) contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, clauses (i) through (v) of subparagraph 2(b) nevertheless are to be interpreted in order not to frustrate effective exchange of information.
 - (d) Although Article 25 of the Convention does not restrict the possible methods for exchanging information, it shall not commit the Contracting States to exchange information on an automatic or a spontaneous basis.
 - (e) It is understood that in the case of an exchange of information, the administrative procedural rules regarding taxpayers’ rights provided for in the requested Contracting State remain applicable before the information is exchanged with the requesting Contracting State. It is further understood that this provision intends to provide the taxpayer a fair procedure and not to prevent or unduly delay the exchange of information process.”

Article XIII

1. The Contracting States shall notify each other in writing through diplomatic channels once they have satisfied their domestic requirements for the entry into force of this Protocol.

This Protocol shall enter into force on the date of the later of these notifications and its provisions shall have effect:

- (a) in respect of taxes withheld at source, on amounts paid or credited on or after the first day of January of the year following the entry into force of this Protocol;
 - (b) in respect of other taxes, for taxation years beginning on or after the first day of January of the year following the entry into force of this Protocol.
2. Notwithstanding the provisions of paragraph 1,
- (a) paragraph 2 of Article X of this Protocol shall have effect with respect to cases that are under consideration by the competent authorities as of the date on which this Protocol enters into force and cases that come under such consideration after that date;
 - (b) paragraph 4 of Article X of this Protocol shall have effect as of the date specified in the exchange of the diplomatic notes referred to therein.

In witness whereof, the undersigned, duly authorized to that effect, have signed this Protocol.

Done in duplicate at, this day of, in the French and English languages, each version being equally authentic.

FOR THE
SWISS FEDERAL COUNCIL:

FOR THE
GOVERNMENT OF CANADA: