

P R O T O C O L

BETWEEN

THE SWISS CONFEDERATION

AND

THE REPUBLIC OF POLAND

**AMENDING THE CONVENTION BETWEEN THE SWISS CONFEDERATION
AND REPUBLIC OF POLAND FOR THE AVOIDANCE OF DOUBLE
TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL
AND THE PROTOCOL, SIGNED AT BERNE ON 2ND SEPTEMBER 1991**

The Swiss Federal Council

and

The Government of the Republic of Poland,

desiring to conclude a Protocol to amend the Convention between the Republic of Poland and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed at Berne on 2nd September 1991 (hereinafter referred to as “the Convention”) and the Protocol signed at Berne on 2nd September 1991 (hereinafter referred to as “the Protocol to the Convention”),

Have agreed as follows:

ARTICLE I

Sub-paragraph a) of paragraph 3 of Article 2 (Taxes covered) shall be deleted and replaced by the following sub-paragraph:

“a) in Poland:

- (i) the corporate income tax;
- (ii) the personal income tax;

(hereinafter referred to as “Polish tax”);”

ARTICLE II

Paragraph 1 of Article 4 (Resident) shall be deleted and replaced by the following paragraph:

“1. 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 also includes that State and any political subdivision or local authority thereof. 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

1. Paragraph 2 of Article 10 (Dividends) of the Convention shall be deleted and replaced by the following paragraph:

“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 beneficial owner of the dividends is a resident of the other Contracting State the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.”.

2. The following paragraphs 2a and 2b shall be added to Article 10 (Dividends) of the Convention:

“2a. Notwithstanding the provisions of paragraph 2, dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State if the beneficial owner is

a) a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends on the date the dividends are paid and has done so or will have done so for an uninterrupted 24-month period in which that date falls; or

b) a pension fund or other similar institution providing pension schemes in which individuals may participate in order to secure retirement benefits, where such pension fund or other similar institution is established, recognized for tax purposes and controlled in accordance with the laws of that other State.

2b. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of the limitations provided for in paragraphs 2 and 2a.

These paragraphs shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.”.

ARTICLE IV

1. Paragraph 2 of Article 11 (Interest) of the Convention shall be deleted and replaced by the following paragraph:

“2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 5 per cent of the gross amount of the interest.”.

2. The following paragraph 2a shall be added to Article 11 (Interest) of the Convention:

“2a. Notwithstanding the provisions of paragraph 2, interest paid by a company which is a resident of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State if the beneficial owner is a company (other than a partnership) associated with the company paying the interest.”.

3. Paragraph 5 of Article 11 (Interest) of the Convention shall be deleted and replaced by the following paragraph:

“5. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a 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.”.

ARTICLE V

1. Paragraph 2 of Article 12 (Royalties) of the Convention shall be deleted and replaced by the following paragraph:

“2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties the tax so charged shall not exceed 5 per cent of the gross amount of the royalties.”.

2. The following paragraph 2a shall be added to Article 12 (Royalties) of the Convention:

“2a. Notwithstanding the provisions of paragraph 2, royalties paid by a company which is a resident of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State if the beneficial owner is a company (other than a partnership) associated with the company paying the royalties.”.

3. Paragraph 3 of Article 12 (Royalties) of the Convention shall be deleted and replaced by the following paragraph:

“3. The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use any copyright including copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use any industrial, commercial, or scientific equipment or for information concerning industrial commercial or scientific experience.”.

4. Paragraph 5 of Article 12 (Royalties) of the Convention shall be deleted and replaced by the following paragraph

“5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.”

ARTICLE VI

1. The following paragraph 3a shall be added to Article 13 (Capital gains) of the Convention:

“3a. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.”.

2. Paragraph 4 of Article 13 shall be deleted and replaced by the following paragraph:

“4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 3a, shall be taxable only in the Contracting State of which the alienator is a resident.”.

ARTICLE VII

Sub-paragraph a of paragraph 2 of Article 15 (Dependent personal services) of the Convention shall be deleted and replaced by the following sub-paragraph:

“a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and”.

ARTICLE VIII

1. Sub-paragraph b of paragraph 1 of Article 23 (Elimination of double taxation) of the Convention shall be deleted and replaced by the following sub-paragraph:

“b) Where a resident of Poland derives income, which in accordance with the provisions of Articles 10, 11, 12 and 13 may be taxed in Switzerland, Poland shall allow as a deduction from the tax on the income of that person, an amount equal to the income tax paid in Switzerland. Such deduction shall not, however, exceed the part of the tax as computed before the deduction is given, which is appropriate to the income which may be taxed in Switzerland.”.

2. Sub-paragraph a) of paragraph 2 of Article 23 (Elimination of double taxation) of the Convention shall be deleted and replaced by the following paragraph:

“a) Where a resident of Switzerland derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in Poland, Switzerland shall, subject to the provisions of sub-paragraph b), exempt such income or capital from tax but may, in calculating tax on the remaining income or capital of that resident, apply the rate of tax which would have been applicable if the exempted income or capital had not been so exempted. However, such exemption shall apply to gains referred to in paragraph 3a of article 13 only if actual taxation of such gains in Poland is demonstrated.”.

3. The following sub-paragraph c) shall be added to paragraph 2 of this Article:

“c) A company which is a resident of Switzerland and which derives dividends from a company which is a resident of Poland shall be entitled, for the purposes of Swiss tax with respect to such dividends, to the same relief which would be granted to the company if the company paying the dividends were a resident of Switzerland.”.

ARTICLE IX

The following paragraph 5 shall be added to Article 25 (Mutual agreement procedure) of the Convention:

“5. Where,

- a) under paragraph 1, 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 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 presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. 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 directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

The Contracting States may release to the arbitration board, established under the provisions of this paragraph, such information as is necessary for carrying out the arbitration procedure. The members of the arbitration board shall be subject to the limitations of disclosure described in paragraph 2 of Article 25a with respect to the information so released.”.

ARTICLE X

The following Article 25a shall be added to the Convention:

“Article 25a

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 of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

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) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. 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 supplying State authorises 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 shall, therefore, 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 XI

1. Paragraph 3 of the Protocol to the Convention shall be deleted.

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

“3. Ad Articles 11 and 12

As regards paragraph 2a of Article 11 and paragraph 2a of Article 12, it is understood that the company is “associated with the other company” if:

- (i) the first – mentioned company has a direct minimum holding of 25 % in the capital of the other company, or
- (ii) the other company has a direct minimum holding of 25 % in the capital of the first – mentioned company, or
- (iii) a third company, being a resident of any Member State of the European Union or the European Economic Area, has a direct minimum holding of 25 % both in the capital of the first – mentioned company and in the capital of the other company.”.

3. The following new paragraph 4 shall be added to the Protocol to the Convention:

“4. Ad Article 12

With reference to paragraph 2 of Article 12, should Poland conclude an Agreement of whatever kind and nature or a Double Taxation Agreement, with a Member State of the European Union or of the European Economic Area, including any tax rate lower than the rate of 5% provided in this Article 12, this lower rate will be automatically applicable as soon as it takes effect between Poland and this third Member State of the European Union or of the European Economic Area.”.

4. The following new paragraph 5 shall be added to the Protocol to the Convention:

“5. Ad Articles 18 and 19

It is understood that the term „pensions“ as used in Articles 18 and 19, respectively, do not only cover periodic payments, but also include lump sum payments.”.

5. The following new paragraph 6 shall be added to the Protocol to the Convention:

“6. Ad Article 18 and Article 24

As regards Article 18 and Article 24 contributions to a pension fund or other similar institution providing pension schemes established in and recognised for tax purposes in a Contracting State that are made by or on behalf of an individual who renders services in the other Contracting State shall, for the purposes of determining the individual's tax payable and the profits of an enterprise which may be taxed in that State, be treated in that State in the same way and subject to the same conditions and limitations as contributions made to a pension scheme that is recognised for tax purposes in that State, provided that:

a) the individual was not a resident of that State, and was participating in the pension scheme, immediately before beginning to provide services in that State, and

b) the pension scheme is mutually agreed by the competent authorities of the Contracting States as generally corresponding to a pension scheme recognised as such for tax purposes by these States."

6. The following new paragraph 7 shall be added to the Protocol to the Convention:

"7. Ad Article 25a

a) It is understood that an exchange of information will only be requested once the requesting Contracting State has exhausted all regular sources of information available under the internal taxation procedure.

b) It is understood that the administrative assistance provided for in Article 25a does not include measures aimed only at the simple collection of pieces of evidence ("fishing expeditions").

c) It is understood that the tax authorities of the requesting State shall provide the following information to the tax authorities of the requested State when making a request for information under Article 25a of the Convention:

- (i) the name and address of the person(s) under examination or investigation and, if available, other particulars facilitating that persons identification, such as date of birth, marital status, tax identification number;
- (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, if available, address of any person believed to be in possession of the requested information.

While this paragraph contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs (i) through (v) nevertheless need to be interpreted in order not to frustrate effective exchange of information.

d) Although Article 25a of the Convention does not restrict the possible methods for exchanging information, it shall not commit a Contracting State to exchange information on an automatic or spontaneous basis.

e) It is understood that in 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 transmitted to the requesting Contracting State. It is further understood that this provision aims at guaranteeing the taxpayer a fair procedure and not at preventing or unduly delaying the exchange of information process."

ARTICLE XII

This Protocol shall enter into force upon the exchange of notes confirming that the constitutional formalities which require to be fulfilled in each of the Contracting States before this Protocol can enter into force have been completed and this Protocol shall apply:

- a) with respect to tax withheld at source on amounts due on or after the first day of January of the year next following the entry into force of this Protocol;
- b) with respect to other taxes for fiscal years beginning on or after the first day of January of the year that follows the entry into force of this Protocol;
- c) with respect to paragraphs 1 and 2 of Article IV, paragraphs 1 and 2 of Article V and paragraphs 1 to 3 of Article XI of this Protocol to interest and royalties paid on or after the 1st day of July 2013;
- d) to requests for the exchange of information regarding fiscal years beginning on or after the first day of January of the year that follows the entry into force of this Protocol.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Protocol.

Done in duplicate at Warsaw this 20th day of April 2010 in the Polish, German and English languages, each text being equally authoritative. In case there is any divergence of interpretation between the Polish and the German texts the English text shall prevail.

For the Swiss Confederation:

For the Republic of Poland:

Bénédict de Cerjat

Maciej H. Grabowski