

PROTOCOL

BETWEEN THE SWISS CONFEDERATION AND THE KINGDOM OF SPAIN AMENDING THE CONVENTION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL SIGNED AT BERN ON 26 APRIL 1966, AND ITS PROTOCOL, AS AMENDED BY THE PROTOCOL SIGNED AT MADRID ON 29 JUNE 2006 (HEREINAFTER REFERRED TO AS “THE AMENDING PROTOCOL”)

*The Swiss Federal Council
and
The Government of the Kingdom of Spain*

desiring to amend the Convention for the avoidance of double taxation with respect to taxes on income and on capital signed at Bern on 26 April 1966, and its Protocol, (hereinafter referred to as “the Convention” and “the Protocol”, respectively), as amended by the Protocol signed at Madrid on 29 June 2006,

have agreed as follows:

ARTICLE 1

Subparagraph a) of paragraph 3 of Article 2 (Taxes Covered) of the Convention shall be deleted and replaced by the following subparagraph a) of paragraph 3 of Article 2:

“a) in Spain:

- (i) the income tax on individuals;
- (ii) the corporation tax;
- (iii) the income tax on non residents;
- (iv) the capital tax; and
- (v) local taxes on income and on capital;

(hereinafter referred to as “Spanish Tax”).”

ARTICLE 2

Subparagraph a) of Paragraph 1 of Article 3 (General Definitions) of the Convention shall be deleted and replaced by the following subparagraph a) of Paragraph 1 of Article 3:

“a) the term “Spain” means the Kingdom of Spain and, when used in a geographical sense, means the territory of the Kingdom of Spain, including inland waters, the air space, the territorial sea and any area outside the territorial sea upon which, in accordance with international law and on application of its domestic legislation, the Kingdom of Spain exercises or may exercise in the future jurisdiction or sovereign rights with respect to the seabed, its subsoil and superjacent waters, and their natural resources;”

ARTICLE 3

1. The following subparagraph f) shall be added into Paragraph 3 of Article 5 (Permanent establishment) of the Convention:

“f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.”

2. Paragraph 4 of Article 5 (Permanent establishment) of the Convention shall be deleted and replaced by the following Paragraph 4 of Article 5:

“4. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 5 applies - is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.”

ARTICLE 4

The existing Paragraph of Article 9 (Associated enterprises) of the Convention shall become Paragraph 1, and the following new Paragraphs 2 and 3 shall be added to Article 9:

“2. Where a Contracting State includes in the profits of an enterprise of that State - and taxes accordingly - profits on which an enterprise of the other State has been charged to tax in that other Contracting State and that other State agrees that the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

3. The provisions of paragraph 2 shall not apply in the case of fraud or wilful default.”

ARTICLE 5

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

“b) Notwithstanding the provisions of the subparagraph above, the Contracting State of which the company paying the dividends is a resident shall exempt from tax the dividends paid by that company to a company the capital of which is wholly or partly divided into shares and which is a resident of the other Contracting State, as long as it holds directly at least 10 per cent of the capital of the company paying the dividends for, at least, one year, and, the paying company is subject to and not exempt from the taxes covered by Article 2 of

the Convention and under any double tax agreements with any third State, none of the companies is resident in that third State. Both companies must adopt the form of a limited company.”

2. The following subparagraph c) shall be added in paragraph 2 of Article 10 (Dividends) of the Convention:

“c) Notwithstanding subparagraph a), dividends paid to a recognized pension fund or pension scheme resident of a Contracting State shall be taxable only in that Contracting State.”

ARTICLE 6

1. The following paragraph 3 shall replace the present paragraph 3 in Article 13 (Capital gains) of the Convention:

“3. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests 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. The provisions of the preceding sentence shall not apply to:

- a) the alienation of shares quoted on a Swiss or Spanish Stock Exchange or any other Stock Exchange as may be agreed between the competent authorities; or
- b) the alienation of shares of a company if the immovable property is used by this company for its own industrial activity.”

2. Paragraph 3 of Article 13 shall be replaced by the following paragraph which becomes paragraph 4:

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

ARTICLE 7

Article 23 (Method for the elimination of double taxation) of the Convention shall be deleted and replaced by the following provisions:

“1. In Spain, double taxation shall be avoided following either the provisions of its internal legislation or the following provisions in accordance with the internal legislation of Spain:

- a) Where a resident of Spain derives income or owns elements of capital which, in accordance with the provisions of this Convention, may be taxed in Switzerland, Spain shall allow:
 - (i) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in Switzerland;
 - (ii) as a deduction from the tax on the capital of that resident, an amount equal to the tax paid in Switzerland on the same elements of capital;

- (iii) the deduction of the underlying corporation tax shall be given in accordance with the internal legislation of Spain.

Such deduction shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the same elements of capital which may be taxed in Switzerland.

- b) Where in accordance with any provision of the Convention income derived or capital owned 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 capital of such resident, take into account the exempted income or capital.

2. In Switzerland, double taxation shall be avoided as follows:

- a) Where a resident of Switzerland derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in Spain, Switzerland shall, subject to the provisions of subparagraph 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 3 of Article 13 only if actual taxation of such gains in Spain is demonstrated.
- b) Where a resident of Switzerland derives dividends or royalties which, in accordance with the provisions of Articles 10 or 12, may be taxed in Spain, Switzerland shall allow, upon request, a relief to such resident. The relief may consist of:
 - (i) a deduction from the tax on the income of that resident of an amount equal to the tax levied in Spain in accordance with the provisions of Article 10 or Article 12; such deduction shall not, however, exceed that part of the Swiss tax, as computed before the deduction is given, which is appropriate to the income which may be taxed in Spain;
 - (ii) a lump sum reduction of the Swiss tax; or
 - (iii) a partial exemption of such dividends or royalties from Swiss tax, in any case consisting at least of the deduction of the tax levied in Spain from the gross amount of the dividends or of the royalties.

Switzerland shall determine the applicable relief and regulate the procedure in accordance with the Swiss provisions relating to the carrying out of international conventions of the Swiss Confederation for the avoidance of double taxation.

- c) A company which is a resident of Switzerland and which derives dividends from a company which is a resident of Spain 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 8

1. Paragraph 1 of Article 25 (Mutual Agreement Procedure) shall be deleted and replaced by the following paragraph:

“1. 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, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.”

2. The following additional sentence shall be inserted at the end of paragraph 2 of Article 25:

“Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States, but in any case not later than seven years after the date of the first notification mentioned in paragraph 1.”

3. The following paragraph 5 shall be added to Article 25:

“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 any person directly affected by the case is still entitled, under the domestic law of either State, to have courts or administrative tribunals of that State decide these issues or if a decision on these issues has already been rendered by such a court or administrative tribunal. 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 25 bis with respect to the information so released.”

ARTICLE 9

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

“Article 25bis 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. 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, 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 10

The following new paragraph I bis shall be inserted into the Protocol after paragraph I:

“I bis. Ad Article 4

With respect to paragraph 1 of Article 4, it is understood that the term “resident of a Contracting State” includes a recognized pension fund or pension scheme established in that State.

The term “recognized pension fund or pension scheme” means any scheme, fund, mutual benefit institution or other entity established in a Contracting State

- (i) which manages the right of its beneficiaries to receive income or capital upon retirement, survivorship, widowhood, orphanhood, or disability; and
- (ii) contributions to which are eligible for tax benefits in the form of reductions in the taxable base of the individuals income tax.”

ARTICLE 11

The following new paragraph III bis shall be inserted into the Protocol after paragraph III:

“It is understood that, according to the first sentence of paragraph 1 of Article 23 of the Convention, a resident of Spain may opt to eliminate double taxation according to the methods and requirements established in the Spanish legislation for income obtained abroad (for example, Articles 21 or 22 of the Legislative Royal Decree 4/2004, of 5 March, passing the Amended Text of the Corporation Tax Law) or according to the methods mentioned in this Article 23.”

ARTICLE 12

Paragraph IV, Ad art. 25 bis, of the Protocol shall be deleted and shall be replaced by the following new paragraph IV:

“1. 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, except those measures which would give rise to disproportionate difficulties.

2. 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 25bis of the Convention:

- a) the identity of the person under examination or investigation;

- b) the period of time for which the information is requested;
- c) 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;
- d) the tax purpose for which the information is sought;
- e) to the extent known, the name and address of any person believed to be in possession of the requested information.

3. 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 the 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 paragraph 2 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs a) through e) nevertheless need to be interpreted with a view not to frustrate effective exchange of information.

4. It is further understood that Article 25 bis of the Convention shall not commit the Contracting States to exchange information on an automatic or a spontaneous basis.

5. 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.

6. The competent authority shall forward the requested information as promptly as possible to the other Contracting State. The time elapsed from the request of information until the receipt of the information by the requesting State will not be considered in computing the applicable time limits established by the Spanish tax legislation concerning fiscal tax administration proceedings.

7. The person involved in a Spanish proceeding may not invoke irregularities in the Swiss procedure for appealing his case before a Spanish Court.

Should the taxpayer appeal the decision of the Swiss Federal Tax Administration concerning the transmission of the information to the Spanish competent authority, any delay derived therefrom will not be considered in computing the applicable time-limits established by the Spanish Tax Legislation concerning fiscal tax administration proceedings.”

ARTICLE 13

1. The Governments of the Contracting States shall notify each other through diplomatic channels that the internal procedures required by each Contracting State for the entry into force of this Amending Protocol have been complied with.

2. The Amending Protocol shall enter into force after the period of three months following the date of receipt of the later of the notifications referred to in paragraph 1 and its provisions shall have effect:

- (i) in respect of taxes withheld at source, on amounts paid or credited, on or after the date on which the Amending Protocol enters into force;

- (ii) in respect of other taxes, for taxation years beginning on or after the date on which the Amending Protocol enters into force;
- (iii) with respect to new Article 25 bis, as regards taxes covered by Article 2 of the Convention, for taxable years beginning or for taxes due on amounts paid or credited, on or after the first day of January 2010;
- (iv) with respect to new Article 25 bis, as regards other taxes, for taxable years beginning or for taxes due on amounts paid or credited, on or after the first day of January of the year next following the entry into force of this Amending Protocol; and
- (v) regarding new paragraph 5 of Article 25 of the Convention, to mutual agreement procedures that are initiated on or after the entry into force of this Amending Protocol.

3. Article 25 bis of the Convention and paragraph IV of the Protocol as amended by the Protocol of 29th June 2006 shall continue to be applicable for cases of tax fraud or the like committed after the 29th June 2006, until this Amending Protocol has effect.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Amending Protocol.

DONE in duplicate at Madrid this 27th day of July 2011 in the French, Spanish and English languages. All texts being equally authentic.

For the
Swiss Federal Council:

For the Government of the
Kingdom of Spain:

Urs Johann Ziswiler
Ambassador to Spain

Juan Cano García
Secretary General for Finance