Protocol between the Swiss Confederation and the Republic of Finland amending the Agreement for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital and the Protocol, signed at Helsinki on 16 December 1991, as amended by the Protocols signed at Helsinki on 19 April 2006, 22 September 2009 and 18 September 2012

The Swiss Federal Council and the Government of the Republic of Finland;

Desiring to amend the Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and the Protocol signed at Helsinki on 16 December 1991, as amended by the Protocols signed at Helsinki on 19 April 2006, 22 September 2009 and 18 September 2012 (hereinafter "the Agreement" and "the Protocol to the Agreement", respectively);

Have agreed as follows:

ARTICLE I

The following new paragraph shall be added to the preamble of the Agreement:

"INTENDING to eliminate double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement for the indirect benefit of residents of third States),"

ARTICLE II

Subparagraph h) of Paragraph 1 of Article 3 (General definitions) of the Agreement shall be replaced by the following subparagraph:

"h) the term "competent authority" means:

(i) in Finland, the Ministry of Finance, its authorised representative or the authority which, by the Ministry of Finance, is designated as competent authority;

(ii) in Switzerland, the Head of the Federal Department of Finance or his authorised representative."

ARTICLE III

1. The existing paragraph 7 of Article 7 (Business profits) of the Agreement shall be renumbered as paragraph 8.

2. The following new paragraph 7 shall be added to Article 7 (Business profits) of the Agreement:

"7. A Contracting State shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States after 6 years from the end of the taxable year in which the profits would have been attributable to the permanent establishment. The provisions of this paragraph shall not apply in the case of fraud or wilful default."

ARTICLE IV

Paragraph 2 of Article 9 (Associated enterprises) of the Agreement shall be replaced by the following paragraph:

"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 Contracting State has been charged to tax in that other State and 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 Agreement and the competent authorities of the Contracting States shall if necessary consult each other."

ARTICLE V

1. Paragraph 2 of Article 18 (Pensions) of the Agreement shall be replaced by the following paragraph:

"2. Notwithstanding the provisions of paragraph 1, and subject to the provisions of paragraph 2 of article 19, pensions paid and other payments made under the Finnish social security legislation or under any public scheme organised by Finland for social welfare purposes, or any annuity arising in Finland, may be taxed in Finland."

2. The following new paragraph 3 shall be added to Article 18 (Pension) of the Agreement:

“3. The term "annuity" as used in this Article means a stated sum payable periodically to an individual at stated times during his life, or during a specified or ascertainable period of time, under an obligation to make the payments in return for adequate and full consideration in money or money's worth (other than services rendered).”

ARTICLE VI

1. Subparagraph b) of paragraph 2 of Article 23 (Elimination of double taxation) of the Agreement shall be replaced by the following subparagraph:

“b) Where a resident of Switzerland derives dividends which, in accordance with the provisions of Article 10, may be taxed in Finland (except to the extent that these provisions allow taxation by Finland solely because the income is also income derived by a resident of Finland), Switzerland shall, in accordance with the provisions of Swiss law on the crediting of foreign withholding taxes (which shall not affect the general principles of this provision) allow as a deduction from the Swiss tax on the income of that resident an amount equal to the tax paid in Finland. Such deduction shall not, however, exceed that part of the Swiss tax, as computed before the deduction is given, which is attributable to such items of income derived from Finland.”

2. The following new subparagraph e) shall be added to paragraph 2 of Article 23 (Elimination of double taxation) of the Agreement:

“e) The provisions of subparagraph a shall not apply to income derived or capital owned by a resident of a Switzerland where Finland applies the provisions of this Agreement to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10 to such income.”

ARTICLE VII

1. The first sentence of paragraph 1 of Article 25 (Mutual agreement procedure) of the Agreement shall be replaced by the following sentence:

“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 Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State.”

2. The following new paragraphs 5-25 shall be added to Article 25 (Mutual agreement procedure) of the Agreement:

“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 Agreement; and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within a period of three years beginning on the start date referred to in paragraphs 12 or 13 (“arbitration start date”), as the case may be (unless, prior to the expiration of that period the competent authorities of the Contracting States have agreed to a different time period with respect to that case and have notified the person who presented the case of such agreement),

any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Article, according to any rules or procedures agreed upon by the competent authorities of the Contracting States pursuant to the provisions of paragraph 14.

6. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 5 because a case with respect to one or more of the same issues is pending before court or administrative tribunal, the period provided in subparagraph b) of paragraph 5 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In addition, where a person who presented a case and a competent authority have agreed to suspend the mutual agreement procedure, the period provided in subparagraph b) of paragraph 5 will stop running until the suspension has been lifted.

7. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the start of the period provided in subparagraph b) of paragraph 5, the period provided in subparagraph b) of paragraph 5 shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

8.

a) The arbitration decision with respect to the issues submitted to arbitration shall be implemented through a mutual agreement concerning the case referred in paragraph 5. The arbitration decision shall be final.

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

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

   (ii) if a final decision of the courts of one of the Contracting States holds that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 5 shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of paragraphs 16, 17 and 22). In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be permitted.

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

9. The competent authority that received the initial request for a mutual agreement procedure under paragraph 1 shall, within two calendar months of receiving the request:

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

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

10. Within three calendar months after a competent authority receives the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other Contracting State) it shall either:

a) notify the person who has presented the case and the other competent authority that it has received the information necessary to undertake substantive consideration of the case; or
b) request additional information from that person for that purpose.

11. Where pursuant to subparagraph b) of paragraph 10, one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the additional information shall, within three calendar months of receiving the additional information from that person, notify that person and the other competent authority either:

a) that it has received the requested information; or
b) that some of the requested information is still missing.

12. Where neither competent authority has requested additional information pursuant to subparagraph b) of paragraph 10, the arbitration start date referred to in paragraph 5 shall be the date that is three calendar months after the notification to the competent authority of the other Contracting State pursuant to subparagraph b) of paragraph 9.

13. Where additional information has been requested pursuant to subparagraph b) of paragraph 10, the arbitration start date referred to in paragraph 5 shall be the earlier of:

a) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to subparagraph a) of paragraph 11; and
b) the date that is three calendar months after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in subparagraph b) of paragraph 11, such notification shall be treated as a request for additional information under subparagraph b) of paragraph 10.

14. The competent authorities of the Contracting States shall by mutual agreement pursuant to paragraph 3 settle the mode of application of the provisions contained in paragraphs 5 to 25, including the minimum information necessary for each competent authority to undertake substantive consideration of the case. Such an agreement shall be concluded before the date on which unresolved issues in a case are first eligible to be submitted to arbitration and may be modified from time to time thereafter.

15. Except to the extent that the competent authorities of the Contracting States mutually agree on different rules, the following rules shall govern the appointment of the members of an arbitration panel:

a) The arbitration panel shall consist of three individual members with expertise and experience in international tax matters.
b) Each competent authority shall appoint one panel member within 90 days of the date of the request for arbitration under paragraph 5. The two panel members so appointed shall, within 30 days of the latter of their appointments, appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either Contracting State.
c) Each member appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting States and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

16. Solely for the purposes of the application of this Article and of Article 26 and of the provisions of the domestic laws of the Contracting States related to the exchange of information, confidentiality, and administrative assistance, arbitrators and a maximum of three staff per arbitrator (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be considered to be persons or authorities to whom information may be disclosed. Information received by the arbitration panel or prospective arbitrators and information that the competent authorities receive from the arbitration panel shall be considered information that is exchanged under Article 26.

17. The competent authorities of the Contracting States shall ensure that arbitrators and their staff agree in writing, prior to their acting in an arbitration proceeding, to treat any information relating to the arbitration proceeding consistently with the confidentiality and nondisclosure obligations described in paragraph 2 of Article 26 and under the applicable laws of the Contracting States.

18. For the purposes of this Article, the mutual agreement procedure, as well as the arbitration proceeding, with respect to a case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States:

a) the competent authorities of the Contracting States reach a mutual agreement to resolve the case; or
b) the person who presented the case withdraws the request for arbitration or the request for a mutual agreement procedure.

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

a) After a case is submitted to arbitration, the competent authority of each Contracting State shall submit to the arbitration panel, by a date set by agreement, a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities of the Contracting States). The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax charged pursuant to this Agreement, for each adjustment or similar issue in the case. In a case in which the competent authorities of the Contracting States have been unable to reach agreement on an issue regarding the conditions for application of a provision of this Agreement (hereinafter referred to as a "threshold question"), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.
b) The competent authority of each Contracting State may also submit a supporting position paper for consideration by the arbitration panel. Each competent authority that submits a proposed resolution or supporting position paper shall provide a copy to the other competent authority by the date on which the proposed resolution and supporting position paper were due. Each competent authority may also submit to the arbitration panel, by a date set by agreement, a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. A copy of any reply submission shall be provided to the other competent authority by the date on which the reply submission was due.
c) The arbitration panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the panel members. The arbitration panel shall deliver its decision in writing to the competent authorities of the Contracting States. The arbitration decision shall have no precedential value.

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

21. Notwithstanding paragraph 8, an arbitration decision shall not be binding on the Contracting States and shall not be implemented if the competent authorities of the Contracting States agree on a different resolution of all unresolved issues within three calendar months after the arbitration decision has been delivered to them.

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

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

24. Nothing in this Article shall affect the fulfilment of wider obligations with respect to the arbitration of unresolved issues arising in the context of a mutual agreement procedure resulting from other Agreements to which the Contracting States are or will become parties.

25. The provisions of the paragraphs 5-24 shall not apply to the following cases:

a) cases involving the application of domestic anti-avoidance rules of either Contracting State.

b) cases involving conduct for which the taxpayer or a person acting on the taxpayer's behalf has been found guilty by a court of tax fraud or other tax related criminal offence in either Contracting State.

c) cases concerning items of income where there is no double taxation. Double taxation means that both Contracting States have imposed taxes in respect of the same taxable income giving rise to either additional tax charge, increase in tax liabilities or cancellation or reduction of losses, which could be used to offset taxable profits."

ARTICLE VIII

The following new Article 27A (Entitlement to benefits) shall be added to the Agreement:

"Article 27A
Entitlement to benefits

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

ARTICLE IX

1. The existing paragraph 4 of the Protocol to the Agreement shall be renumbered as paragraph 5.

2 The following new paragraph 4 shall be added to the Protocol to the Agreement:

"4. Regarding paragraph 25 of Article 25

a) For purposes of subparagraph a), Finland's domestic anti-avoidance rules shall include Act on Assessment Procedure (verotusmenettelystä annettu laki (1558/1995)) sections 27 - 30, Act on the Taxation of Business Profits and Income from Professional Activities (elinkeinotulon verottamisesta annettu laki (360/1968)) section 6 a, subsection 9 and section 52 h and Act on the Taxation of Shareholders in Controlled Foreign Companies (ulkomaisten väliyhteisöjen osakkaiden verotuksesta annettu laki (1217/1994)). Any subsequent provisions replacing, amending or updating these anti-avoidance rules would also be included. The competent authority of Finland shall notify the competent authority of Switzerland of any such subsequent provisions.

b) For purposes of subparagraph b), Finland's domestic rules shall include the Criminal Code (rikoslaki (39/1889)) chapter 29 sections 1-4. Any subsequent provisions replacing, amending or updating these rules would also be included. The competent authority of Finland shall notify the competent authority of Switzerland of any such subsequent provisions."

ARTICLE X

1. The Governments of the Contracting States shall notify each other through diplomatic channels that the constitutional requirements for entry into force of this Protocol have been complied with.

2. The Protocol shall enter into force thirty days after the date of the later of the notifications referred to in paragraph 1 and its provisions shall have effect in both States:

(a) in respect of taxes withheld at source, on income derived on or after the first day of January in the calendar year next following the year in which the Protocol enters into force;

(b) in respect of other taxes, for taxes chargeable for any tax year beginning on or after the first day of January in the calendar year next following the year in which the Protocol enters into force.

3. The provisions of paragraph 2 of Article VII regarding paragraphs 5 to 25 of Article 25 of the Agreement shall apply only to cases which concern taxes withheld at source or taxable periods for which this protocol has effect in accordance with paragraph 2 of this Article.

In witness whereof the undersigned, duly authorised thereto, have signed this Protocol.

Done in duplicate at this day of 20….. in the German, Finnish and English languages. In case of any divergence of interpretation, the English text shall prevail.

For the Swiss Federal Council	For the Government of the Republic of Finland