

PROTOCOL

AMENDING THE CONVENTION

BETWEEN

SWITZERLAND

AND

JAPAN

FOR THE AVOIDANCE OF DOUBLE TAXATION

WITH RESPECT TO TAXES ON INCOME

*The Swiss Federal Council
and
the Government of Japan,*

Desiring to amend the Convention between Switzerland and Japan for the Avoidance of Double Taxation with respect to Taxes on Income signed at Tokyo on 19 January 1971, as amended by the Protocol signed at Berne on 21 May 2010 (hereinafter referred to as “the Convention”), and the Protocol, which forms an integral part of the Convention, signed at Berne on 21 May 2010 (hereinafter referred to as “the Protocol to the Convention”),

Have agreed as follows:

ARTICLE 1

The preamble of the Convention shall be amended by deleting the words “Desiring to conclude a convention for the avoidance of double taxation with respect to taxes on income,” and replacing them with the following:

“Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income 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 Convention for the indirect benefit of residents of third States),”

ARTICLE 2

Subparagraph (a) of paragraph 1 of Article 2 of the Convention shall be deleted and replaced by the following:

“(a) in the case of Japan:

- (i) the income tax;
 - (ii) the corporation tax;
 - (iii) the special income tax for reconstruction;
 - (iv) the local corporation tax; and
 - (v) the local inhabitant taxes
- (hereinafter referred to as “Japanese tax”);”

ARTICLE 3

1. Subparagraph (h) of paragraph 1 of Article 3 of the Convention shall be deleted and replaced by the following:

“(h) the term “international traffic” means any transport by a ship or aircraft except when the ship or aircraft is operated solely between places in a Contracting State and the enterprise that operates the ship or aircraft is not an enterprise of that Contracting State;”

2. Clause (ii) of subparagraph (j) of paragraph 1 of Article 3 of the Convention shall be deleted and replaced by the following:

“(ii) in the case of Switzerland, the Head of the Federal Department of Finance or his authorised representative; and”

ARTICLE 4

1. Paragraph 2 of Article 5 of the Convention shall be amended by deleting the semicolon at the end of subparagraph (f) and replacing it with a period and by deleting subparagraph (g).

2. A new paragraph shall be added immediately after paragraph 2 of Article 5 of the Convention as follows:

“3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.”

3. Paragraph 4 of Article 5 of the Convention shall be amended by deleting the words “paragraph 5” and replacing them with the words “paragraph 6”, and deleting the words “paragraph 3” and replacing them with the words “paragraph 4”.

4. Paragraphs 3, 4, 5 and 6 of Article 5 of the Convention shall be renumbered as paragraphs 4, 5, 6 and 7 respectively.

ARTICLE 5

Article 7 of the Convention shall be deleted and replaced by the following:

“Article 7

1. Profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other Contracting State.

2. For the purposes of this Article and Article 23, the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.

3. Where, in accordance with paragraph 2, a Contracting State adjusts the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States and taxes accordingly profits of the enterprise that have been charged to tax in the other Contracting State, that other Contracting State shall, to the extent necessary to eliminate double taxation on these profits, make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, the competent authorities of the Contracting States shall if necessary consult each other.

4. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.”

ARTICLE 6

Paragraph 2 of Article 9 of the Convention shall be deleted and replaced by the following:

“2. Where a Contracting State includes in the profits of an enterprise of that Contracting State - and taxes accordingly - profits on which an enterprise of the other Contracting State has been charged to tax in that other Contracting State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Contracting State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Contracting 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.”

ARTICLE 7

Paragraphs 2 and 3 of Article 10 of the Convention shall be deleted and replaced by the following:

“2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that Contracting State according to the laws of that Contracting State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.

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

- (a) a company which has owned directly or indirectly, throughout a 365 day period that includes the date on which entitlement to the dividends is determined (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a merger or divisive reorganisation, or from a change of legal form, of the company that is the beneficial owner of the dividends or that pays the dividends), at least 10 per cent of:
 - (i) in the case where the company paying the dividends is a resident of Japan, the voting power of that company;
 - (ii) in the case where the company paying the dividends is a resident of Switzerland, the capital or voting power of that company; or
- (b) a pension fund or pension scheme, provided that such dividends are derived from the activities described in clause (ii) of subparagraph (k) of paragraph 1 of Article 3.”

ARTICLE 8

1. Paragraphs 1 to 4 of Article 11 of the Convention shall be deleted and replaced by the following:

“1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other Contracting State.

2. Notwithstanding the provisions of paragraph 1, interest arising in a Contracting State that is determined by reference to receipts, sales, income, profits or other cash flow of the debtor or a related person, to any change in the value of any property of the debtor or a related person or to any dividend, partnership distribution or similar payment made by the debtor or a related person, or any other interest similar to such interest arising in a Contracting State, may be taxed in that Contracting State according to the laws of that Contracting State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest.”

2. Paragraph 6 of Article 11 of the Convention shall be amended by deleting the words “paragraphs 1, 2 and 3” and replacing them with the words “paragraphs 1 and 2”.

3. Paragraphs 5, 6, 7, 8 and 9 of Article 11 of the Convention shall be renumbered as paragraphs 3, 4, 5, 6 and 7 respectively.

ARTICLE 9

1. Subparagraph (a) of paragraph 2 of Article 15 of the Convention shall be deleted and replaced by the following:

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

2. Paragraph 3 of Article 15 of the Convention shall be deleted and replaced by the following:

“3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship or aircraft, that is exercised aboard a ship or aircraft operated in international traffic shall be taxable only in that Contracting State. Where, however, the ship or aircraft is operated by an enterprise of the other Contracting State, such remuneration may also be taxed in that other Contracting State.”

ARTICLE 10

Article 16 of the Convention shall be deleted and replaced by the following:

“Article 16

Directors’ fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors, or of a similar

organ, of a company which is a resident of the other Contracting State may be taxed in that other Contracting State.”

ARTICLE 11

Article 21 of the Convention shall be deleted and replaced by the following:

“Article 21

Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned Contracting State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that Contracting State, provided that such payments arise from sources outside that Contracting State. In the case of a business apprentice, the exemption provided by this Article shall apply only for a period not exceeding four years from the date on which he first begins his training in that Contracting State.”

ARTICLE 12

Article 21A of the Convention shall be deleted and replaced by the following:

“Article 21A

Notwithstanding any other provisions of this Convention, any income derived by a silent partner who is a resident of a Contracting State in respect of a silent partnership (in the case of Japan, Tokumei Kumiai) contract or another similar contract may be taxed in the other Contracting State according to the laws of that other Contracting State, provided that such income arises in that other Contracting State and is deductible in computing the taxable income of the payer in that other Contracting State.”

ARTICLE 13

1. Paragraph 1, paragraph 3, subparagraph (a) of paragraph 5, subparagraph (a) of paragraph 6 and paragraph 7 of Article 22A of the Convention shall be amended by deleting the words “subparagraph (c), (d) or (e) of paragraph 3 of Article 11” and replacing them with the words “paragraph 1 of Article 11” and by deleting the words “subparagraphs,”.
2. Subclause (cc) of clause (i) of subparagraph (d) of paragraph 8 of Article 22A of the Convention shall be amended by deleting the words “subparagraph (c), (d) or (e) of paragraph 3 of Article 11” and replacing them with the words “paragraph 1 of Article 11”.

ARTICLE 14

A new paragraph shall be added after paragraph 6 of Article 23 of the Convention as follows:

“7. The provisions of paragraph 3 shall not apply to income derived by a resident of Switzerland where Japan applies the provisions of this Convention to exempt such income from tax or applies the provisions of paragraph 2 of Article 10 or paragraph 2 of Article 11 to such income.”

ARTICLE 15

Paragraph 3 of Article 24 of the Convention shall be amended by deleting the words “paragraph 8” and replacing them with the words “paragraph 6”.

ARTICLE 16

1. Paragraph 1 of Article 25 of the Convention shall be deleted and replaced by the following:

“1. Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with the provisions of this Convention, that person may, irrespective of the remedies provided by the domestic law of those Contracting States, present the case to the competent authority of either Contracting State. 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. New paragraphs shall be added after paragraph 4 of Article 25 of the Convention as follows:

“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 date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. 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 Contracting 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 Contracting States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

- 6. (a) Where the competent authority of a Contracting State has suspended the procedure for resolving a case by mutual agreement pursuant to paragraphs 1 and 2 (hereinafter in this Article referred to as the “mutual agreement procedure”) because a case with respect to one or more of the same issues is pending before a court or administrative tribunal, the period provided in subparagraph (b) of paragraph 5 shall stop running until the case has been suspended or withdrawn.

- (b) Where a person who presented a case and the competent authority of a Contracting State have agreed to suspend the mutual agreement procedure, the period provided in subparagraph (b) of paragraph 5 shall stop running until the suspension has been lifted.
 - (c) Where the competent authorities of the Contracting States 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, that period 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.
7. (a) The following rules shall govern the appointment of arbitrators:
- (i) An arbitration panel shall consist of three individual arbitrators with expertise or experience in international tax matters.
 - (ii) Each of the competent authorities of the Contracting States shall appoint one arbitrator. The two arbitrators so appointed shall appoint the third arbitrator who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either Contracting State.
 - (iii) Each arbitrator 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 arbitration 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 arbitration proceedings.
- (b) The competent authorities of the Contracting States shall ensure that arbitrators and their staff agree in writing, prior to their acting in the arbitration proceedings, to treat any information relating to the arbitration proceedings consistently with the confidentiality and non-disclosure obligations provided for in paragraph 2 of Article 25A and the applicable laws of the Contracting States.
 - (c) Solely for the purposes of the application of the provisions of this Article and Article 25A and 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 of the Contracting States receive from the arbitration panel shall be considered information that is exchanged under the provisions of paragraph 1 of Article 25A.

8. (a) An arbitration decision shall be final.
- (b) The arbitration decision shall not be binding on both Contracting States, 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 proceedings shall be considered not to have taken place (except for the purposes of subparagraphs (b) and (c) of paragraph 7, and paragraph 11). In such a case, a new request for arbitration may be made unless the competent authorities of the Contracting States agree that such a new request should not be permitted.
- (c) An arbitration decision shall have no precedential value.
9. (a) If a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, the case shall not be eligible for any further consideration by the competent authorities of the Contracting States.
- (b) 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.
10. For the purposes of this Article, the arbitration proceedings, as well as, in the case of subparagraphs (a) and (b), the mutual agreement procedure, with respect to a case shall terminate if, at any time after the 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 pursuant to paragraph 2;
 - (b) the person who presented the case withdraws the request for arbitration or the request for the mutual agreement procedure; or
 - (c) a decision concerning the unresolved issues arising from the case is rendered by a court or administrative tribunal of one of the Contracting States.
11. Each of the competent authorities of the Contracting States shall bear its own expenses and those of its appointed arbitrator. Unless otherwise agreed by the competent authorities of the Contracting States, 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 competent authorities of the Contracting States in equal shares.
12. The provisions of paragraphs 5 to 11 shall not apply to the following cases:
 - (a) cases falling within paragraph 3 of Article 4; and

- (b) cases concerning a change of profits in the circumstances referred to in paragraph 1 of Article 9 relating to hard-to-value intangibles, provided that such change is made with respect to a taxable year for which profits may be subject to such change under the provisions regarding time limits of the laws of the Contracting State making such change and the provisions of paragraph 3 of Article 9 but concerns any transaction involving hard-to-value intangibles carried out in another taxable year for which profits shall not be subject to such change under those provisions.”

ARTICLE 17

1. Paragraph 2 of Article 25A of the Convention shall be deleted and replaced by the following:

“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 Contracting 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, 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 Contracting States and the competent authority of the Contracting State supplying the information authorises such use.”

2. The second sentence of paragraph 5 of Article 25A of the Convention shall be deleted.

ARTICLE 18

1. Paragraph 1 of the Protocol to the Convention shall be deleted and replaced by the following:

“1. Notwithstanding any provisions of the Convention, a benefit under the Convention shall not be granted in respect of an item of income 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 the Convention.”

2. A new paragraph shall be added immediately after paragraph 2 of the Protocol to the Convention as follows:

“3. *With reference to paragraph 3 of Article 7 and paragraph 2 of Article 9 of the Convention:*

It is understood that a Contracting State is obliged to make an adjustment pursuant to paragraph 3 of Article 7 or paragraph 2 of Article 9 of the Convention only if that Contracting State agrees that the adjustment made by the other Contracting State is justified both in the principle contained in paragraph 2 of Article 7 or paragraph 1 of Article 9 of the Convention and as regards the amount assessed under such principle.”

3. Paragraph 3 of the Protocol to the Convention shall be amended by deleting the words “subparagraph (a) of paragraph 2 and”.

4. Paragraph 4 of the Protocol to the Convention shall be amended by deleting the words “paragraph 3 of Article 11 and”.

5. Paragraphs 3, 4 and 5 of the Protocol to the Convention shall be renumbered as paragraphs 4, 5 and 6 respectively.

ARTICLE 19

1. Each of the Contracting States shall send in writing and through diplomatic channels to the other Contracting State the notification confirming that its internal procedures necessary for the entry into force of this Protocol have been completed. The Protocol shall enter into force on the thirtieth day after the date of receipt of the later notification.

2. This Protocol shall have effect:

(a) in Japan:

- (i) with respect to taxes levied on the basis of a taxable year, for taxes for any taxable years beginning on or after 1 January in the calendar year next following that in which the Protocol enters into force;
- (ii) with respect to taxes levied not on the basis of a taxable year, for taxes levied on or after 1 January in the calendar year next following that in which the Protocol enters into force;

(b) in Switzerland:

- (i) with respect to taxes withheld at source, on amounts paid or credited on or after 1 January in the calendar year next following that in which the Protocol enters into force;
- (ii) with respect to other taxes, for taxable years beginning on or after 1 January in the calendar year next following that in which the Protocol enters into force.

3. Notwithstanding the provisions of paragraph 2, the provisions of paragraph 1 of Article 25 of the Convention, as amended by paragraph 1 of Article 16 of this Protocol, shall have effect from the date of entry into force of the Protocol without regard to the date on which the taxes are levied or the taxable year to which the taxes relate.

4. Notwithstanding the provisions of paragraph 2, the provisions of paragraphs 5 to 12 of Article 25 of the Convention, as amended by paragraph 2 of Article 16 of this Protocol, shall have effect from the date of entry into force of the Protocol with respect to:

- (a) cases that are under consideration by the competent authorities of the Contracting States on the date on which the Protocol enters into force. For such cases, no unresolved issues arising therefrom shall be submitted to arbitration earlier than three years after the date on which the Protocol enters into force;
- (b) cases that come under consideration by the competent authorities of the Contracting States after the date on which the Protocol enters into force.

5. This Protocol shall remain in effect as long as the Convention remains in force.

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

DONE in duplicate at Berne this 16 of July 2021, in the German, Japanese and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Swiss Federal Council:

For the Government of Japan:

Stefan Flückiger
Ambassador
Deputy State Secretary for
International Finance
of the Swiss Confederation

SHIRAISHI Kojiro
Ambassador Extraordinary
and Plenipotentiary of Japan
to the Swiss Confederation