

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 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article 1

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

"(a) the term "Japan", when used in a geographical sense, means all the territory of Japan, including its territorial sea, in which the laws relating to Japanese tax are in force, and all the area beyond its territorial sea, including the seabed and subsoil thereof, over which Japan has sovereign rights in accordance with international law and in which the laws relating to Japanese tax are in force;"

2. 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 operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;"

3. The following new subparagraphs shall be inserted immediately after subparagraph (h) of paragraph 1 of Article 3 of the Convention.

"(i) the term "national" means:

- (i) in the case of Japan, any individual possessing the nationality of Japan, any juridical person created or organised under the laws of Japan and any organisation without juridical personality treated for the purposes of Japanese tax as a juridical person created or organised under the laws of Japan; and
 - (ii) in the case of Switzerland, all Swiss citizens and all legal persons, partnerships and associations deriving their status as such from the laws in force in Switzerland;
- (j) the term "competent authority" means:
 - (i) in the case of Japan, the Minister of Finance or his authorised representative; and
 - (ii) in the case of Switzerland, the Director of the Federal Tax Administration or his authorised representative; and
- (k) the term "pension fund or pension scheme" means any person that:
 - (i) is established under the laws of a Contracting State;
 - (ii) is operated principally to administer or provide pensions, retirement benefits or other similar remuneration or to earn income for the benefit of other pension funds or pension schemes; and
 - (iii) is exempt from tax in that Contracting State with respect to income derived from the activities described in clause (ii)."

Article 2

1. Paragraphs 1 and 2 of Article 4 of the Convention shall be deleted and replaced by the following:

"1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of head or main office, place of management or any other criterion of a similar nature, and also includes:

- (a) that Contracting State and any political subdivision or local authority thereof;
- (b) a pension fund or pension scheme established under the laws of that Contracting State; and
- (c) an organisation established under the laws of that Contracting State and operated exclusively for a religious, charitable, educational, scientific, artistic, sportive, cultural or public purpose (or for more than one of those purposes), only if all or part of its income may be exempt from tax under the laws of that Contracting State.

This term, however, does not include any person who is liable to tax in that Contracting State in respect only of income from sources in that Contracting State.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

- (a) he shall be deemed to be a resident only of the Contracting State in which he has a permanent home available to him; if he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident only of the Contracting State with which his personal and economic relations are closer (centre of vital interests);
- (b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident only of the Contracting State in which he has an habitual abode;

- (c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident only of the Contracting State of which he is a national;
- (d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement."

2. The following new paragraphs shall be inserted immediately after paragraph 3 of Article 4 of the Convention:

"4. Where, pursuant to any provisions of this Convention, a Contracting State reduces the rate of tax on, or exempts from tax, income of a resident of the other Contracting State and under the laws in force in that other Contracting State the resident is subjected to tax by that other Contracting State only on that part of such income which is remitted to or received in that other Contracting State, then the reduction or exemption shall apply only to so much of such income as is remitted to or received in that other Contracting State.

5. For the purposes of applying this Convention:

- (a) an item of income:
 - (i) derived from a Contracting State through an entity that is organised in the other Contracting State, and
 - (ii) treated as the income of the beneficiaries, members or participants of that entity under the tax laws of that other Contracting State,

shall be eligible for the benefits of the Convention that would be granted if it were directly derived by a beneficiary, member or participant of that entity who is a resident of that other Contracting State, to the extent that such beneficiaries, members or participants are residents of that other Contracting State and satisfy any other conditions specified in the Convention, without regard to whether the income is treated as the income of such beneficiaries, members or participants under the tax laws of the first-mentioned Contracting State;

(b) an item of income:

- (i) derived from a Contracting State through an entity that is organised in the other Contracting State, and
- (ii) treated as the income of that entity under the tax laws of that other Contracting State,

shall be eligible for the benefits of the Convention that would be granted to a resident of that other Contracting State, without regard to whether the income is treated as the income of that entity under the tax laws of the first-mentioned Contracting State, if such entity is a resident of that other Contracting State and satisfies any other conditions specified in the Convention;

(c) an item of income:

- (i) derived from a Contracting State through an entity that is organised in that Contracting State, and
- (ii) treated as the income of that entity under the tax laws of the other Contracting State,

shall not be eligible for the benefits of the Convention."

Article 3

1. Paragraph 3 of Article 5 of the Convention shall be amended by replacing the period at the end of subparagraph (e) with a semicolon and by adding the following:

- "(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. Paragraphs 4 and 5 of Article 5 of the Convention shall be deleted and replaced by the following:

"4. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom the provisions of paragraph 5 apply - 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 Contracting 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."

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

Article 4

Paragraph 1 of Article 6 of the Convention shall be deleted and replaced by the following:

"1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other Contracting State."

Article 5

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

"Article 9

1. Where

- (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
- (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting State includes, in accordance with the provisions of paragraph 1, 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 where the competent authorities of the Contracting States agree, upon consultation, that all or part of 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 agreed profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention.

3. Notwithstanding the provisions of paragraph 1, a Contracting State shall not change the profits of an enterprise of that Contracting State in the circumstances referred to in paragraph 1 after the expiry of the time limits provided in its laws and, in any case, after seven years from the end of the taxable year in which the profits which would be subject to such change would have accrued to that enterprise. The provisions of this paragraph shall not apply in the case of fraud or wilful default."

Article 6

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

"Article 10

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

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that 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:

- (a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company that has owned, directly or indirectly, for the period of six months ending on the date on which entitlement to the dividends is determined, either:
 - (i) shares representing at least 10 per cent of the voting power of the company paying the dividends where such company is a resident of Japan; or
 - (ii) shares representing at least 10 per cent of the capital or of the voting power of the company paying the dividends where such company is a resident of Switzerland;
- (b) 10 per cent of the gross amount of the dividends in all other cases.

3. Notwithstanding the provisions of paragraph 2, dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident if the beneficial owner of the dividends is a resident of the other Contracting State and is either:

- (a) a company that has owned, directly or indirectly, for the period of six months ending on the date on which entitlement to the dividends is determined:
 - (i) shares representing at least 50 per cent of the voting power of the company paying the dividends where such company is a resident of Japan; or
 - (ii) shares representing at least 50 per cent of the capital or of the voting power of the company paying the dividends where such company is a resident of Switzerland; 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.

4. The provisions of paragraphs 2 and 3 shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

5. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income which is subjected to the same taxation treatment as income from shares by the tax laws of the Contracting State of which the company making the distribution is a resident.

6. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or 14, as the case may be, shall apply.

7. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other Contracting State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other Contracting State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other Contracting State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other Contracting State.

8. A resident of a Contracting State shall not be considered the beneficial owner of the dividends paid by a resident of the other Contracting State in respect of shares or other similar interests if such shares or other similar interests would not have been established or acquired unless a person:

- (a) that is not entitled to benefits with respect to dividends paid by a resident of that other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and
- (b) that is not a resident of either Contracting State;

owned equivalent shares or other similar interests in the first-mentioned resident."

Article 7

Article 11 of the Convention shall be deleted and replaced by the following:

"Article 11

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

2. However, such interest may also be taxed in the Contracting State in which it arises and 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.

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State shall be taxable only in the other Contracting State if:

- (a) the interest is beneficially owned by the Government of that other Contracting State, a political subdivision or local authority thereof, or the central bank of that other Contracting State or any institution owned by that Government;

- (b) the interest is beneficially owned by a resident of that other Contracting State with respect to debt-claims guaranteed, insured or indirectly financed by the Government of that other Contracting State, a political subdivision or local authority thereof, or the central bank of that other Contracting State or any institution owned by that Government;
- (c) the interest is beneficially owned by a resident of that other Contracting State that is either:
 - (i) a bank;
 - (ii) an insurance company;
 - (iii) a securities dealer; or
 - (iv) any other enterprise, provided that in the three taxable years preceding the taxable year in which the interest is paid, the enterprise derives more than 50 per cent of its liabilities from the issuance of bonds in the financial markets or from taking deposits at interest, and more than 50 per cent of the assets of the enterprise consist of debt-claims against persons that do not have with the enterprise a relationship described in subparagraph (a) or (b) of paragraph 1 of Article 9;
- (d) the interest is beneficially owned by a pension fund or pension scheme that is a resident of that other Contracting State, provided that such interest is derived from the activities described in clause (ii) of subparagraph (k) of paragraph 1 of Article 3; or
- (e) the interest is beneficially owned by a resident of that other Contracting State and paid with respect to indebtedness arising as part of the sale on credit by a resident of that other Contracting State of equipment or merchandise.

4. For the purposes of paragraph 3, the terms "the central bank" and "institution owned by that Government" mean:

(a) in the case of Japan:

- (i) the Bank of Japan;
- (ii) the Japan Finance Corporation;
- (iii) the Japan International Cooperation Agency;
- (iv) the Nippon Export and Investment Insurance; and
- (v) such other similar institution the capital of which is owned by the Government of Japan as may be agreed upon from time to time between the Governments of the Contracting States through an exchange of diplomatic notes;

(b) in the case of Switzerland:

- (i) the Swiss National Bank;
- (ii) the Swiss Insurance for Exports Risks;
- (iii) the Swiss Accident Insurance Fund (SUVA);
- (iv) any institution covered by the Federal Law on old-age and survivors' insurance, of 20 December 1946; and
- (v) such other similar institution the capital of which is owned by the Government of Switzerland as may be agreed upon from time to time between the Governments of the Contracting States through an exchange of diplomatic notes.

5. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures, and all other income that is subjected to the same taxation treatment as income from money lent by the tax laws of the Contracting State in which the income arises. Income dealt with in Article 10 shall not be regarded as interest for the purposes of this Convention.

6. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or 14, as the case may be, shall apply.

7. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that Contracting 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 Contracting State in which the permanent establishment or fixed base is situated.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

9. A resident of a Contracting State shall not be considered the beneficial owner of the interest arising in the other Contracting State in respect of a debt-claim if such debt-claim would not have been established unless a person:

- (a) that is not entitled to benefits with respect to the interest arising in the other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and
- (b) that is not a resident of either Contracting State;

owned an equivalent debt-claim against the first-mentioned resident."

Article 8

Article 12 of the Convention shall be deleted and replaced by the following:

"Article 12

1. Royalties 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. 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 of literary, artistic or scientific work including cinematograph films and films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, or secret formula or process, or for information concerning industrial, commercial or scientific experience.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or 14, as the case may be, shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

5. A resident of a Contracting State shall not be considered the beneficial owner of the royalties arising in the other Contracting State in respect of the use of the right or property if such royalties would not have been paid to the resident unless the resident paid royalties in respect of the use of the same right or property to a person:

- (a) that is not entitled to benefits with respect to royalties arising in that other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and
- (b) that is not a resident of either Contracting State."

Article 9

Article 13 of the Convention shall be deleted and replaced by the following:

"Article 13

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other Contracting State.

2. Gains derived by a resident of a Contracting State from the alienation of shares in a company or of interests in a trust may be taxed in the other Contracting State where the shares or the interests derive at least 50 per cent of their value directly or indirectly from immovable property referred to in Article 6 and situated in that other Contracting State.

3. (a) Where

- (i) a Contracting State (including, for this purpose in the case of Japan, the Deposit Insurance Corporation of Japan) provides, pursuant to the laws concerning failure resolution involving imminent insolvency of financial institutions of that Contracting State, substantial financial assistance to a financial institution that is a resident of that Contracting State, and
- (ii) a resident of the other Contracting State acquires shares in the financial institution from the first-mentioned Contracting State,

the first-mentioned Contracting State may tax gains derived by the resident of the other Contracting State from the alienation of such shares, provided that the alienation is made within five years from the first date on which such financial assistance was provided.

- (b) The provisions of subparagraph (a) shall not apply if the resident of that other Contracting State acquired any shares in the financial institution from the first-mentioned Contracting State before the entry into force of the provisions of this paragraph or pursuant to a binding contract entered into before the entry into force of the provisions of this paragraph.

4. Gains from the alienation of any property, other than immovable property, forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of any property, other than immovable property, pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such a fixed base, may be taxed in that other Contracting State.

5. Gains derived by an enterprise of a Contracting State from the alienation of ships or aircraft operated by that enterprise in international traffic or any property, other than immovable property, pertaining to the operation of such ships or aircraft shall be taxable only in that Contracting State.

6. Gains from the alienation of any property other than that referred to in the preceding paragraphs of this Article shall be taxable only in the Contracting State of which the alienator is a resident."

Article 10

In paragraph 1 of Article 15 of the Convention, the words "Articles 16, 18, 19 and 20" shall be replaced by the words "Articles 16, 18 and 19".

Article 11

Article 17 of the Convention shall be deleted and replaced by the following:

"Article 17

1. Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other Contracting State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised."

Article 12

Article 20 of the Convention shall be deleted and replaced by the following:

"Article 20 (Deleted)"

Article 13

The following new Article shall be inserted immediately after Article 21 of the Convention:

"Article 21A

Notwithstanding any other provisions of this Convention, any income and gains derived by a sleeping partner in respect of a sleeping partnership (Tokumei Kumiai) contract or other similar contract may be taxed in the Contracting State in which such income and gains arise and according to the laws of that Contracting State."

Article 14

Article 22 of the Convention shall be deleted and replaced by the following:

"Article 22

1. Items of income beneficially owned by a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention (hereinafter referred to as "other income" in this Article) shall be taxable only in that Contracting State.

2. The provisions of paragraph 1 shall not apply to other income, other than income from immovable property as defined in paragraph 2 of Article 6, if the beneficial owner of such other income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the right or property in respect of which the other income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or 14, as the case may be, shall apply.

3. Where, by reason of a special relationship between the resident referred to in paragraph 1 and the payer or between both of them and some other person, the amount of other income exceeds the amount which would have been agreed upon between them in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the other income shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

4. A resident of a Contracting State shall not be considered the beneficial owner of the other income arising in the other Contracting State in respect of the right or property if such other income would not have been paid to the resident unless the resident paid other income in respect of the same right or property to a person:

- (a) that is not entitled to benefits with respect to other income arising in that other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and
- (b) that is not a resident of either Contracting State."

Article 15

The following new Article shall be inserted immediately after Article 22 of the Convention:

"Article 22A

1. Except as otherwise provided in this Article, a resident of a Contracting State that derives income described in paragraph 3 of Article 10, subparagraph (c), (d) or (e) of paragraph 3 of Article 11, Article 12, paragraph 6 of Article 13 or Article 22 from the other Contracting State shall be entitled to the benefits granted for a taxable year by the provisions of those subparagraphs, paragraphs or Articles only if such resident is a qualified person as defined in paragraph 2 and satisfies any other specified conditions in those subparagraphs, paragraphs or Articles for the obtaining of such benefits.

2. A resident of a Contracting State is a qualified person for a taxable year only if such resident is either:

- (a) an individual;
- (b) a qualified governmental entity;
- (c) a company, if its principal class of shares is listed or registered on a recognised stock exchange specified in clause (i) or (ii) of subparagraph (c) of paragraph 8 and is regularly traded on one or more recognised stock exchanges;
- (d) a bank, an insurance company or a securities dealer that is established and regulated as such under the laws of the Contracting State of which it is a resident;
- (e) a person described in subparagraph (b) or (c) of paragraph 1 of Article 4, provided that in the case of a person described in subparagraph (b) of that paragraph as of the end of the prior taxable year more than 50 per cent of the person's beneficiaries, members or participants are individuals who are residents of either Contracting State; or
- (f) a person other than an individual, if residents of either Contracting State that are qualified persons by reason of subparagraph (a), (b), (c), (d) or (e) of this paragraph own, directly or indirectly, shares or other beneficial interests representing at least 50 per cent of the capital or of the voting power of the person.

3. Notwithstanding that a company that is a resident of a Contracting State may not be a qualified person, that resident shall be entitled to the benefits granted by the provisions of paragraph 3 of Article 10, subparagraph (c), (d) or (e) of paragraph 3 of Article 11, Article 12, paragraph 6 of Article 13 or Article 22 with respect to an item of income described in those subparagraphs, paragraphs or Articles derived from the other Contracting State if that resident satisfies any other specified conditions in those subparagraphs, paragraphs or Articles for the obtaining of such benefits and shares representing at least 75 per cent of the capital or of the voting power of the company are owned, directly or indirectly, by seven or fewer persons who are equivalent beneficiaries.

4. Where the provisions of subparagraph (f) of paragraph 2 or paragraph 3 apply:

- (a) in respect of taxation by withholding at source, a resident of a Contracting State shall be considered to satisfy the conditions described in that subparagraph or paragraph for the taxable year in which the payment of an item of income is made if such resident satisfies those conditions during the twelve month period preceding the date of the payment or, in case of dividends, the date on which entitlement to the dividends is determined;
- (b) in all other cases, a resident of a Contracting State shall be considered to satisfy the conditions described in that subparagraph or paragraph for the taxable year in which the payment is made if such resident satisfies those conditions on at least half the days of the taxable year.

5. (a) Notwithstanding that a resident of a Contracting State may not be a qualified person, that resident shall be entitled to the benefits granted by the provisions of paragraph 3 of Article 10, subparagraph (c), (d) or (e) of paragraph 3 of Article 11, Article 12, paragraph 6 of Article 13 or Article 22 with respect to an item of income described in those subparagraphs, paragraphs or Articles derived from the other Contracting State if:

- (i) that resident functions as a headquarters company for a multinational corporate group;
- (ii) the item of income derived from that other Contracting State is derived in connection with, or is incidental to, the trade or business activity referred to in clause (ii) of subparagraph (b); and
- (iii) that resident satisfies any other specified conditions in those subparagraphs, paragraphs or Articles for the obtaining of such benefits.

- (b) A resident of a Contracting State shall be considered a headquarters company for a multinational corporate group for the purposes of subparagraph (a) only if:
 - (i) that resident provides a substantial portion of the overall supervision and administration of the group or provides financing for the group;
 - (ii) the group consists of companies which are resident in and are engaged in an active trade or business in at least five countries, and the trade or business activities carried on in each of the five countries generate at least 5 per cent of the gross income of the group;
 - (iii) the trade or business activities carried on in any one country other than that Contracting State generate less than 50 per cent of the gross income of the group;
 - (iv) no more than 50 per cent of its gross income is derived from the other Contracting State;
 - (v) that resident has, and exercises, independent discretionary authority to carry out the functions referred to in clause (i); and
 - (vi) that resident is subject to the same income taxation rules in that Contracting State as persons described in paragraph 6.
- (c) For the purposes of subparagraph (b), a resident of a Contracting State shall be deemed to satisfy the gross income requirements described in clause (ii), (iii) or (iv) of that subparagraph for the taxable year in which the item of income is derived if that resident satisfies each of those gross income requirements when averaging the gross income of the three taxable years preceding that taxable year.

6. (a) Notwithstanding that a resident of a Contracting State may not be a qualified person, that resident shall be entitled to the benefits granted by the provisions of paragraph 3 of Article 10, subparagraph (c), (d) or (e) of paragraph 3 of Article 11, Article 12, paragraph 6 of Article 13 or Article 22 with respect to an item of income described in those subparagraphs, paragraphs or Articles derived from the other Contracting State if:
- (i) that resident is carrying on business in the first-mentioned Contracting State (other than the business of making or managing investments for the resident's own account, unless the business is banking, insurance or securities business carried on by a bank, insurance company or securities dealer);
 - (ii) the item of income derived from the other Contracting State is derived in connection with, or is incidental to, that business; and
 - (iii) that resident satisfies any other specified conditions in those subparagraphs, paragraphs or Articles for the obtaining of such benefits.
- (b) If a resident of a Contracting State derives an item of income from a business carried on by that resident in the other Contracting State or derives an item of income arising in the other Contracting State from a person that has with the resident a relationship described in subparagraph (a) or (b) of paragraph 1 of Article 9, the conditions described in subparagraph (a) of this paragraph shall be considered to be satisfied with respect to such item of income only if the business carried on in the first-mentioned Contracting State is substantial in relation to the business carried on in the other Contracting State. Whether such business is substantial for the purposes of this paragraph shall be determined on the basis of all the facts and circumstances.

- (c) In determining whether a person is carrying on business in a Contracting State under subparagraph (a) of this paragraph, the business conducted by a partnership in which that person is a partner and the business conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if that person owns, directly or indirectly, shares or beneficial interests representing at least 50 per cent of the capital or of the voting power of the other person, or a third person owns, directly or indirectly, shares or beneficial interests representing at least 50 per cent of the capital or of the voting power of each person. In any case, a person shall be considered to be connected to another if, on the basis of all the facts and circumstances, one has control of the other or both are under the control of the same person or persons.

7. A resident of a Contracting State that is neither a qualified person nor entitled under paragraph 3, 5 or 6 to the benefits granted by the provisions of paragraph 3 of Article 10, subparagraph (c), (d) or (e) of paragraph 3 of Article 11, Article 12, paragraph 6 of Article 13 or Article 22 with respect to an item of income described in those subparagraphs, paragraphs or Articles shall, nevertheless, be granted such benefits if the competent authority of the other Contracting State determines, in accordance with the laws or administrative practice of that other Contracting State, that the establishment, acquisition or maintenance of such resident and the conduct of the operations of such resident are considered as not having the obtaining of such benefits as one of the principal purposes.

8. For the purposes of this Article:

- (a) the term "qualified governmental entity" means the Government of a Contracting State, any political subdivision or local authority thereof, the Bank of Japan, the Swiss National Bank or a person a majority of the capital of which is owned, directly or indirectly, by the Government of a Contracting State or a political subdivision or local authority thereof;

(b) the term "principal class of shares" means the class or classes of shares of a company which represent a majority of the capital or of the voting power of the company;

(c) the term "recognised stock exchange" means:

(i) any stock exchange established by a Financial Instruments Exchange or an approved-type financial instruments firms association under the Financial Instruments and Exchange Law (Law No. 25 of 1948) of Japan;

(ii) any Swiss stock exchange on which registered dealings in shares take place;

(iii) the London Stock Exchange, the Irish Stock Exchange and the stock exchanges of Amsterdam, Brussels, Düsseldorf, Frankfurt, Hamburg, Johannesburg, Lisbon, Luxembourg, Madrid, Mexico, Milan, New York, Paris, Seoul, Singapore, Stockholm, Sydney, Toronto and Vienna, and the NASDAQ system;

(iv) any other stock exchange which the competent authorities of the Contracting States agree to recognise for the purposes of this Article;

(d) the term "equivalent beneficiary" means:

(i) a resident of a state that has a convention for the avoidance of double taxation between that state and the Contracting State from which the benefits of this Convention are claimed such that:

(aa) that convention contains provisions for effective exchange of information;

- (bb) that resident is a qualified person under the limitation on benefits provisions in that convention or, where there are no such provisions in that convention, would be a qualified person when that convention is read as including provisions corresponding to paragraph 2; and
- (cc) with respect to an item of income referred to in paragraph 3 of Article 10, subparagraph (c), (d) or (e) of paragraph 3 of Article 11, Article 12, paragraph 6 of Article 13 or Article 22 that resident would be entitled under that convention to a rate of tax with respect to the particular class of income for which the benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or
- (ii) a qualified person by reason of subparagraph (a), (b), (c), (d) or (e) of paragraph 2;
- (e) the term "gross income" means the total revenues derived by an enterprise from its business, less the direct costs of obtaining such revenues."

Article 16

Article 23 of the Convention shall be deleted and replaced by the following:

"Article 23

1. Subject to the provisions of the laws of Japan regarding the allowance as a credit against Japanese tax of tax payable in any country other than Japan, where a resident of Japan derives income from Switzerland which may be taxed in Switzerland in accordance with the provisions of this Convention, the amount of Swiss tax payable in respect of that income shall be allowed as a credit against the Japanese tax imposed on that resident. The amount of credit, however, shall not exceed that part of the Japanese tax which is appropriate to that income.

2. For the purposes of paragraph 1, income beneficially owned by a resident of Japan which may be taxed in Switzerland in accordance with the provisions of this Convention shall be deemed to arise from sources in Switzerland.

3. Where a resident of Switzerland derives income which, in accordance with the provisions of this Convention, may be taxed in Japan, Switzerland shall, subject to the provisions of paragraph 4 or 6, exempt such income from tax but may, in calculating tax on the remaining income of that resident, apply the rate of tax which would have been applicable if the exempted income had not been so exempted. However, where that resident derives gains referred to in the provisions of paragraph 2 of Article 13, such exemption shall apply to such gains only if the amount of tax levied in Japan in accordance with the provisions of that paragraph is demonstrated.

4. Where a resident of Switzerland derives dividends or interest which, in accordance with the provisions of Article 10 or 11, may be taxed in Japan, Switzerland shall allow, upon request, a relief to such resident. The relief may consist of:

- (a) a deduction from the tax on the income of that resident of an amount equal to the tax levied in Japan in accordance with the provisions of Articles 10 and 11; such deduction shall not, however, exceed that part of the Swiss income tax, as computed before the deduction is given, which is appropriate to the income which may be taxed in Japan, or
- (b) a lump sum reduction of the Swiss tax determined by standardised formulae which have regard to the general principles of the relief referred to in subparagraph (a) above, or
- (c) a partial exemption of such income from Swiss tax, in any case consisting at least of the deduction of the tax levied in Japan from the gross amount of income derived from Japan.

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

5. A company which is a resident of Switzerland and which derives dividends from a company which is a resident of Japan 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.

6. Where a resident of Switzerland derives income covered by subparagraph (a) of paragraph 3 of Article 13, Switzerland shall allow, upon request, a deduction from the Swiss tax on this income of an amount equal to the tax levied in Japan, in accordance with paragraph 3 of Article 13; such deduction shall not, however, exceed that part of the Swiss income tax, as computed before the deduction is given, which is appropriate to the income which may be taxed in Japan."

Article 17

Paragraphs 2 and 3 of Article 24 of the Convention shall be deleted and replaced by the following:

"2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other Contracting State than the taxation levied on enterprises of that other Contracting State carrying on the same activities. The provisions of this paragraph shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

3. Except where the provisions of paragraph 1 of Article 9, paragraph 8 of Article 11, paragraph 4 of Article 12, or paragraph 3 of Article 22 apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Contracting State."

Article 18

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 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 Contracting 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."

Article 19

The following new Article shall be inserted immediately after Article 25 of the Convention:

"Article 25A

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 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, 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.

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 Contracting 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 that 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 the provisions of paragraph 3 or any contrary provisions in its domestic laws."

Article 20

Article 26 of the Convention shall be deleted and replaced by the following:

"Article 26

1. Nothing in this Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

2. Notwithstanding the provisions of Article 4, an individual who is a member of a diplomatic mission, consular post or permanent mission of a Contracting State which is situated in the other Contracting State or in a third State shall be deemed, for the purposes of this Convention, to be a resident of the sending State if:

- (a) in accordance with international law he is not liable to tax in the receiving State in respect of income from sources outside that State, and
- (b) he is liable in the sending State to the same obligations in relation to tax on his total income as are residents of that State.

3. The Convention shall not apply to international organisations, to organs or officials thereof and to persons who are members of a diplomatic mission, consular post or permanent mission of a third State, being present in a Contracting State and not treated in either Contracting State as residents in respect of taxes on income."

Article 21

1. This Protocol amending the Convention (hereinafter referred to as "the Amending Protocol") shall be approved in accordance with the legal procedures of each of the Contracting States and shall enter into force on the thirtieth day after the date of exchange of diplomatic notes indicating such approval.

2. The Amending Protocol shall be applicable:

- (a) with respect to taxes withheld at source, for amounts taxable on or after 1 January in the calendar year next following that in which the Amending Protocol enters into force;

- (b) with respect to taxes on income which are not withheld at source, as regards income for any taxable year beginning on or after 1 January in the calendar year next following that in which the Amending Protocol enters into force; and
- (c) with respect to other taxes, as regards taxes for any taxable year beginning on or after 1 January in the calendar year next following that in which the Amending Protocol enters into force.

3. The exchange of information under the provisions of Article 25A of the Convention as amended by the Amending Protocol shall be granted for taxable years beginning on or after 1 January next following the date on which the Amending Protocol enters into force.

4. The Amending 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 the Amending Protocol.

DONE in duplicate at Berne this twenty-first day of May, 2010, in the German, Japanese and English languages, all texts being equally authoritative and, in the case there is any divergence of interpretation between the German and the Japanese texts, the English text shall prevail.

For the Swiss Federal
Council:

For the Government of
Japan:

Protocol

At the signing of the Protocol amending the Convention between Switzerland and Japan for the Avoidance of Double Taxation with respect to Taxes on Income signed on 19 January 1971, the Swiss Federal Council and the Government of Japan have agreed upon the following provisions, which shall form an integral part of the Convention:

1. With reference to the whole Convention:

No relief shall be available under the Convention if it was the main purpose of any person concerned with the creation or assignment of any right or property in respect of which the income is paid or derived to take advantage of the Convention by means of that creation or assignment.

2. With reference to subparagraph (k) of paragraph 1 of Article 3 of the Convention:

It is understood that a pension fund or pension scheme shall be treated as exempt from tax on income derived with respect to the activities described in clause (ii) of that subparagraph even though it is subjected to the tax stipulated in Article 8 or 10-2 of the Corporation Tax Law (Law No. 34 of 1965) of Japan or paragraph 1 of Article 20 of its supplementary provisions.

3. With reference to Article 10 of the Convention:

The provisions of subparagraph (a) of paragraph 2 and subparagraph (a) of paragraph 3 of that Article shall not apply in the case of dividends paid by a company which is entitled to a deduction for dividends paid to its beneficiaries in computing its taxable income in the Contracting State of which the company paying the dividends is a resident.

4. With reference to paragraph 3 of Article 11 and Article 22A of the Convention:

It is understood that the term "insurance" includes re-insurance.

5. With reference to Article 25A of the Convention:

- (a) In no case shall the provisions of that Article be construed so as to impose on a Contracting State the obligation to supply information if the other Contracting State has not pursued all reasonable measures of obtaining such information available under the laws and administrative practice of that other Contracting State, except those measures that would give rise to disproportionate difficulties.
- (b) It is understood that the exchange of information provided for in that Article does not include measures aimed only at the simple collection of pieces of evidence ("fishing expeditions").
- (c) It is understood that, where information is requested by a Contracting State in accordance with that Article, the competent authority of that Contracting State shall provide the following information to the competent authority of the other Contracting State:
 - (i) information sufficient to identify the person under examination (typically, name and, to the extent known, address, account number or similar identifying information);
 - (ii) the period of time with respect to the requested information;
 - (iii) a statement of the information sought including its nature and the form in which the first-mentioned Contracting State wishes to receive the information from the other Contracting State;
 - (iv) the tax purpose for which the information is sought; and
 - (v) the name and, to the extent known, the address of any person believed to be in possession of the requested information.
- (d) Although Article 25A of the Convention does not restrict the possible methods for exchanging information, it shall not commit the Contracting States to exchange information on an automatic or a spontaneous basis.

- (e) A Contracting State may decline to supply information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under the domestic laws of that Contracting State.
- (f) It is understood that, where information is requested by a Contracting State in accordance with that Article, the administrative procedural rules regarding taxpayers' rights provided for in the other Contracting State remain applicable to the extent that they do not prevent or unduly delay effective exchange of information.

This Protocol enters into force on the same date of the entry into force of the Protocol amending the Convention between Switzerland and Japan for the Avoidance of Double Taxation with respect to Taxes on Income signed on 19 January 1971.

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

DONE in duplicate at Berne this twenty-first day of May, 2010, in the German, Japanese and English languages, all texts being equally authoritative and, in the case there is any divergence of interpretation between the German and the Japanese texts, the English text shall prevail.

For the Swiss Federal
Council:

For the Government of
Japan: