

PROTOCOL  
BETWEEN THE SWISS CONFEDERATION AND ROMANIA  
AMENDING THE CONVENTION BETWEEN  
THE SWISS CONFEDERATION AND ROMANIA  
FOR THE AVOIDANCE OF  
DOUBLE TAXATION WITH RESPECT TO TAXES  
ON INCOME AND ON CAPITAL AND THE  
PROTOCOL, SIGNED AT BUCHAREST  
ON 25<sup>TH</sup> OCTOBER 1993

The Swiss Confederation and Romania,

Desiring to conclude a Protocol to amend the Convention between the Swiss Confederation and Romania for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed at Bucharest on 25<sup>th</sup> October 1993 (hereinafter referred to as “the Convention”) and the Protocol signed at Bucharest on 25<sup>th</sup> October 1993 (hereinafter referred to as “the Protocol to the Convention”),

Have agreed as follows:

ARTICLE I

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

“a) in Romania:

- (i) the income tax;
  - (ii) the profit tax;
- (hereinafter referred to as “Romanian tax”);”

ARTICLE II

1. Subparagraph h) of paragraph 1 of Article 3 (General definitions) of the Convention shall be replaced by the following subparagraph:

“h) the term “competent authority” means:

- (i) in Romania, the Minister of Public Finance or his authorized representative;
- (ii) in Switzerland, the Director of the Federal Tax Administration or his authorized representative.”

2. The following new subparagraph shall be added to paragraph 1 of Article 3 (General definitions) of the Convention:

- “i) the term “pension fund or other similar institution providing pension schemes” means any plan, scheme, fund, trust, foundation or other pension arrangement established in a Contracting State in which individuals may participate in order to secure retirement, disability and survivors’ benefits, where such pension fund or other similar institution is established, recognized for tax purposes and controlled in accordance with the laws of that State.”

### ARTICLE III

Article 4 (Resident) of the Convention shall be replaced by the following Article:

#### “Article 4 Resident

1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision, local authority or administrative-territorial unit thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

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 State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
- b) if the 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 State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
- d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.”

#### ARTICLE IV

Article 10 (Dividends) of the Convention shall be replaced by the following Article:

"Article 10  
Dividends

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 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 State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.
3. Notwithstanding the provisions of paragraph 2, such dividends shall be exempt from tax in the Contracting State in which the company paying the dividends is a resident if the dividends are beneficially owned by a resident of the other Contracting State that is:
  - a) a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends; or
  - b) a pension fund or other similar institution providing pension schemes; or
  - c) the Government of that other State, a political subdivision, local authority or administrative-territorial unit thereof or the central bank of that other State.
4. 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, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the 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 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 Article 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 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 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 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 State.”

## ARTICLE V

Article 11 (Interest) of the Convention shall be replaced by the following Article:

### “Article 11 Interest

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

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

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State to the extent that such interest is paid:

- a) in respect of a loan, debt-claim or credit that is owed to, or made, provided, guaranteed or insured by, that State or a political subdivision, local authority, administrative-territorial unit or export financing institution thereof; or
- b) by a company to a company of the other Contracting State where such company is affiliated with the company paying the interest by a direct minimum holding of 25 per cent in the capital or where both companies are held by a third company which has directly a minimum holding of 25 per cent, both in the capital of the first company and in the capital of the second company.

4. 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. Penalty charges for late payment shall not be regarded as interest for the purposes of this Article.

5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of the 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 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 Article 14, as the case may be, shall apply.

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

Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the interest was incurred, and such interest are borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

7. 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.”

## ARTICLE VI

1. In paragraph 2 of Article 12 (Royalties) of the Convention, the sentence “The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.” shall be deleted.

2. Paragraph 5 of Article 12 (Royalties) of the Convention shall be replaced by the following paragraph:

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

## ARTICLE VII

1. The current wording of Article 18 (Pensions) of the Convention shall become paragraph 1.

2. The following paragraph 2 shall be added to Article 18 (Pensions) of the Convention:

“2. Contributions to a pension fund or other similar institution providing pension schemes of a Contracting State that are made by or on behalf of an individual who renders independent or dependent personal services in the other Contracting State shall, for the purposes of determining the individual's tax payable and the profits of an enterprise which may be taxed in that other State, be treated in that other State in the same way and subject to the same conditions and limitations as contributions made to a pension fund or other similar institution providing pension schemes of that other State, provided that:

- a) the individual was not a resident of that other State, and was participating in the pension scheme, immediately before beginning to provide services in that other State, and
- b) the pension scheme is accepted by the competent authority of that other State as generally corresponding to a pension scheme recognised as such for tax purposes by that other State.”

## ARTICLE VIII

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

### “Article 25a Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes covered by the Convention insofar as

the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be

construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State shall, if necessary to comply with its obligations under this paragraph, have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws.”

## ARTICLE IX

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

“2. ad Article 4

With respect to paragraph 1, it is understood that the term “resident of a Contracting State” includes:

- a) a pension fund or other similar institution providing pension schemes exempt from tax under the domestic law of that State; and
- b) an organization that is established and is operated exclusively for religious, charitable, scientific, cultural, artistic, sportive or educational purposes (or for more than one of those purposes) and that is a resident of that State according to its laws, notwithstanding that all or part of its income may be exempt from tax under the domestic law of that State.”

2. Paragraphs 2, 3 and 4 of the Protocol to the Convention shall be renumbered as paragraphs 3, 4 and 5.

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

“6. ad Articles 18 and 19

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

7. ad Article 25

It is understood that, if Romania agrees to an arbitration clause in a double taxation agreement with any third state, the following paragraph 5 shall be added to Article 25 (Mutual agreement procedure) of the Convention and shall become effective between Romania and Switzerland on the date on which the agreement with that third state becomes effective, and it shall apply to cases that have been under consideration by the competent authorities for less than three years at that date or that come under such consideration after that date:

“5. Where,

- a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, or the competent authorities and the

persons directly affected by the case agree on a different solution within six months after the decision has been communicated to them, the arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

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

8. ad Article 25a

- a) It is understood that an exchange of information will only be requested once the requesting Contracting State has exhausted all its normal procedures under domestic law to obtain the information.
- b) It is understood that the standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that the Contracting States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.
- c) It is understood that the tax authorities of the requesting State shall provide the following information to the tax authorities of the requested State when making a request for information under Article 25a of the Convention:
  - (i) the name and address of the person(s) under examination or investigation and, if available, other particulars facilitating that person’s identification, such as date of birth, marital status, tax identification number;
  - (ii) the period of time for which the information is requested;

- (iii) a statement of the information sought including its nature and the form in which the requesting State wishes to receive the information from the requested State;
- (iv) the tax purpose for which the information is sought;
- (v) the name and address of any person believed to be in possession of the requested information.

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

- d) It is understood that Article 25a of the Convention does not require the Contracting States to exchange information on an automatic or a spontaneous basis.
- e) It is understood that in case of an exchange of information, the administrative procedural rules regarding taxpayers' rights provided for in the requested Contracting State remain applicable before the information is transmitted to the requesting Contracting State. It is further understood that these provisions aim at guaranteeing the taxpayer a fair procedure and not at preventing or unduly delaying the exchange of information process.”

## ARTICLE X

1. The Contracting States shall notify each other through diplomatic channels that the constitutional requirements for the entry into force of this Protocol have been complied with.
2. This Protocol shall form an integral part of the Convention and shall enter into force on the date of the latter of the notifications referred to in paragraph 1. This Protocol shall have effect:

- a) in respect of taxes withheld at source, on amounts paid or credited to non-residents either on or after the first day of January of the year next following the entry into force of this Protocol;
- b) in respect of other taxes for fiscal years beginning on or after the first day of January of the year next following the entry into force of this Protocol.

3. Notwithstanding paragraph 2 of this Article, with respect to Article 25a of the Convention, the exchange of information provided for in this Protocol shall be applicable to requests made on or after the date of entry into force to information that relates to taxable years beginning on or after the first day of January of the year next following the entry into force of this Protocol.

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

Done in duplicate at ..... this ..... day of .....  
in the French, Romanian and English languages, each text being equally authentic. In case there is any divergence of interpretation, the English text shall prevail.

For  
the Swiss Confederation

For  
Romania