EXPLANATORY MEMORANDUM

ON THE DOUBLE TAXATION CONVENTION

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

AND

THE SWISS FEDERAL COUNCIL

It is the practice in most countries for income tax to be imposed both on the world-wide income derived by residents of the country and on income derived by non-residents which arises in the country. The effect of such a system is that income derived by a resident of one country from a source in another country is subjected to tax in both countries. As this position clearly discourages foreign investment, it is normal for countries which have trade relations to conclude double taxation conventions. Such conventions commonly provide that income of a particular nature will either be taxable in only one of the countries, or may be taxed in both countries with one of them allowing a credit for the tax imposed by the other.

The Convention concluded with Switzerland closely follows the OECD Model. In the explanation which follows, the general principles of each Article of the Convention are set out.

The entire text has been made gender neutral.

Preamble

The Preamble records that the object of the Convention is to avoid double taxation.

Article 1

Persons Covered

The Convention is made applicable to persons who are residents of one or both of the Contracting States. This means, *inter alia*, that a citizen of one of the States who is resident in a third State will not enjoy the benefits of the Convention, apart from the non-discrimination provisions.

Article 2

Taxes Covered

Paragraphs 1 and 2 of this Article provide that the Convention will apply to all taxes on income imposed by the two States irrespective of the manner in which they are levied.

Paragraph 3 lists the existing taxes imposed by each State and paragraph 4 provides that the Convention will also apply to identical or substantially similar taxes which are subsequently imposed by either State.

Paragraph 5 provides that the provisions of the Convention shall not apply in the case of taxes withheld in Switzerland at source on lottery prizes.

Article 3

General Definitions

This Article defines various expressions which are used in the body of the Convention. Several of these definitions are self-evident and are not further explained.

The definition of "South Africa" includes not only the sovereign territory but also those areas outside its territorial sea over which it may exercise jurisdiction in accordance with international law, for example, in relation to the exploitation of natural resources.

"Person" is defined to include an individual, a company and any other body of persons <u>that is treated as an entity for tax purposes</u>. The underlined words are of particular relevance to partnerships. Partnerships are not regarded as taxable entities in South Africa, rather, the income of a partnership is taxed in the hands of the partners. Accordingly, should a partnership consisting of a Swiss resident and a resident of a third State derive income in South Africa, only the Swiss resident will be entitled to the benefits of the Convention on his/her share of the partnership income.

"International traffic" is defined as any transport by 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 State. Special provisions are contained in Article 8 for the taxation of international traffic. The effect of the exclusion mentioned above is that should a Swiss company operate a purely domestic airline operation within South Africa, that operation will not fall to be dealt with under Article 8, but rather under Article 7 which deals with business profits in general. This provision is intended to place that operation on the same footing as South African domestic airlines.

Paragraph 2 follows the OECD Model in providing that expressions not defined in the Convention bear the meaning that they have under the domestic taxation laws of the States at the time of application of the provisions of the Convention. Any meaning under the taxation laws will take precedence over a meaning under other laws of the State.

Article 4

Resident

The concept of "resident of a Contracting State" is used throughout the Convention and is of importance in three cases:

(a) in determining the Convention's personal scope of application as set out in Article 1;

(b) in solving cases where double taxation arises because of dual residence;

(c) in solving cases where double taxation arises as a consequence of taxation in the State of residence and in the State in which the income arose, the State of source.

This Article defines the meaning of the term and further solves cases of dual residence.

In paragraph 1, the term "resident of a Contracting State" is defined. The definition refers to the concept of residence adopted in the domestic law of each of the Contracting States. As criteria for taxation as a resident, domicile, residence, place of management or any other criterion of a similar nature are used in the definition.

The term "resident" also includes specific reference to the State itself.

Paragraph 2 provides solutions to the cases where individuals are residents of both Contracting States and sets out a step by step method of finally deciding which State has a preferent right in claiming the individual as its resident.

Paragraph 3 deals with companies and other bodies of persons who are not individuals but who are residents of both States and specifies that in these cases the State in which the place of effective management is situated will have the preferent right to claim the company or body of persons as its resident.

Article 5

Permanent Establishment

One of the main goals of the Convention is to determine the right of a Contracting State to tax the profits of an enterprise of the other Contracting State which arise through a permanent establishment situated in the first-mentioned State. The Article defines what is to be regarded as a permanent establishment.

Paragraph 1 gives a general definition of a “permanent establishment” as being a fixed place of business through which the business of an enterprise is carried on.

Paragraph 2 contains a list, which is not exhaustive, of what is regarded to be a permanent establishment.

Paragraph 3 provides expressly that a building site or construction, assembly or installation project will not constitute a permanent establishment unless it continues for more than twelve months. Supervisory activities carried on in a Contracting State in connection with such a site or project will also constitute a permanent establishment if they continue for more than twelve months and irrespective of the fact that the enterprise carrying on such activities has no fixed place of business in that State.

A number of preparatory or auxiliary activities which are treated as exceptions to the general definition laid down in paragraph 1 are set out in paragraph 4. The paragraph specifies that the term “permanent establishment” will not include the various activities set out therein and the Contracting State in which these activities take place will consequently not be able to tax any profits which might arise if these are the only activities which occur.

Paragraph 5 sets out the generally accepted principle that an enterprise will be treated as having a permanent establishment in a Contracting State if it carries on business in that State through an agent situated in that State, provided that the agent is not of an independent status and provided that such agent has the power to conclude contracts in the name of the enterprise.

Paragraph 6 deals with the situation where an enterprise carries on business through an independent agent in the other Contracting State and provides that no permanent establishment will be deemed to exist if the activities are carried on through such an agent who is acting in the normal course of business.

Paragraph 7 sets out the principle that the existence of a subsidiary company does not, of itself, constitute that subsidiary company a permanent establishment of its parent company. This follows from the principle that for tax purposes a subsidiary company constitutes an independent legal entity and will be taxed in its State of residence on its own profits.

Article 6

Income from Immovable Property

Paragraph 1 provides that income from immovable property may be taxed in the State in which the property is situated. Income from agriculture and forestry is specifically included in this rule.

Paragraph 2 establishes the general rule that what constitutes fixed property will be decided under the law of the State in which the property is situated. Nevertheless, property accessory to fixed property and livestock and equipment used in agriculture and forestry are specifically included. So too are usufructs and payments for the right to extract minerals and other natural resources.

Paragraph 3 makes it clear that the rule established in paragraph 1 applies irrespective of the manner in which the property is exploited.

Paragraph 4 provides that the provisions of paragraphs 1 and 3 also apply to income derived from fixed property owned by an enterprise or which is used for the performance of independent personal services. In the absence of this provision, it might be argued that this income should be dealt with in terms of the provisions of Article 7 or 14, which establish somewhat different rules for the treatment of business profits and independent personal services income.

Article 7

Business Profits

This Article deals with the taxation of business profits and is to be read together with Article 5 as it uses the test of “permanent establishment” in determining where such profits are to be taxed.

Paragraph 1 specifies that the profits of an enterprise which is a resident of a Contracting State are taxable in that State unless it carries on business in the other Contracting State through a permanent establishment situated in that other State in which case that other State may tax the profits which are attributable to that permanent establishment.

Paragraph 2 deals with the allocation of profits to a permanent establishment and specifies that the profits which are to be attributed to the permanent establishment are those which it would have made if it had been dealing with entirely separate enterprises under arms-length conditions and not with its head office.

Paragraph 3 recognises the fact that in calculating the profits of a permanent establishment, allowance must be made for certain expenses, wherever incurred, which were incurred for the purposes of the permanent establishment. For example, if the head office incurs general administrative expenses it is most likely that a portion of those expenses was in fact incurred on behalf of the permanent establishment and it will therefore be necessary to allocate that portion of the expenses to the permanent establishment in determining its profits. The emphasis here is on the fact that the expenses must have been actually incurred - notional charges are excluded, for example, management fees.

Paragraph 4 provides for profits attributable to a permanent establishment to be determined on the basis of apportionment if this method is customary in a Contracting State. However, the proviso specifies that the result of this method should still be in accordance with the principles of this Article.

Paragraph 5 deals with the situation where a permanent establishment which, although carrying on other business, also carries on purchasing for its head office. The paragraph provides that the profits which are attributed to the permanent establishment cannot be increased by the addition of a notional figure for profits from such purchases which are actually earned by the head office.

Paragraph 6 stipulates that the method of allocation of profits to the permanent establishment should not be changed merely for the reason that a different method may result in more profit becoming taxable in the State of residence of the permanent establishment. This also establishes a degree of certainty regarding the tax treatment to be expected in the State in which the permanent establishment is situated.

It is possible that the term “profits” could include other items of income which are dealt with in other Articles of the Convention. Paragraph 7 stipulates that the preceding provisions of Article 7 shall not affect the provisions of such other Articles. An example of this is where profits include interest which is dealt with separately under Article 11.

Article 8

Shipping and Air Transport

Paragraph 1 provides that profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic are taxable only in that State. Thus, for example, profits derived by South African Airways from its flights into and out of airports in Switzerland are taxable only in South Africa.

Paragraph 2 specifies that profits derived from the rental on a bare boat basis of ships or aircraft used in international traffic as well as the use or rental of containers which are incidental to the profits mentioned in paragraph 1, are also taxable in accordance with Article 8. It should be noted that where such income is not incidental to international traffic operations, but rather constitutes an independent business in its own right, it will fall to be dealt with under Article 7 as business income.

Paragraph 3 makes the above rules also applicable where the business is conducted through a pool, a joint business venture or an international operating agency.

Article 9

Associated Enterprises

This Article deals with associated enterprises and in paragraph 1 provides that a Contracting State may recalculate the profits of the enterprises if they have created conditions between themselves which would not be created by enterprises dealing at arms-length with each other. This paragraph is effective in dealing with the effects of transfer pricing between associated enterprises. The concept of what is regarded as being an associated enterprise is also set out in this paragraph.

The recalculation of profits envisaged in paragraph 1 may of course result in double taxation if, for example, one of the Contracting States increases the profits of its enterprise, and subjects the increased amount to tax, although such increased amount may already have been subjected to tax in the hands of its associated enterprise in the other Contracting State.

The provisions of paragraph 2 allow that other State to make a corresponding adjustment to the profits of the associated enterprise and, in so doing, avoid double taxation. It should be noted that the paragraph provides for consultation between the States in deciding on such adjustment.

Paragraph 3 specifies that adjustments envisaged in paragraph 1 of this Article may not be made after the expiry of the time limits allowed for such changes in the domestic law of each State and in any event not more than five years after the year in which the relevant profits accrued. Paragraph 3 further provides that the time limits in allowing a corresponding adjustment will not apply in cases of fraud or wilful default.

Article 10

Dividends

Paragraphs 1 and 2 of this Article provide for the common international tax treatment of cross-border dividends, in terms of which the State in which the dividends are declared may impose a limited withholding tax and the State in which the dividends are received may impose full tax.

The limitation on withholding tax rates in the source State imposed by paragraph 2 is as follows:

(a) where the shareholder is a company which holds directly at least 20 per cent of the capital of the company paying the dividend, the tax is limited to 5 per cent of the gross dividend. This limitation is intended to encourage substantial (i.e. at least 20 per cent) investment by companies in one State in subsidiaries in the other State;

(b) where the minimum holding of 20 per cent is not met (i.e. portfolio share investments) the rate of tax is limited to 15 per cent.

Both the above limitations apply only if the registered shareholder is also the beneficial owner, i.e. the limitation does not apply to nominee shareholders.

Paragraph 3 contains the standard definition of what constitutes a dividend.

Paragraph 4 provides that this Article will not apply in cases where a resident of one State carries on business in the other State through a permanent establishment or fixed base and derives dividends from shares the holding of which is effectively connected with the permanent establishment or fixed base. For example, if a South African company carrying on a manufacturing business through a permanent establishment in Switzerland were to purchase the shares of a Swiss company which supplies it with raw materials, the dividends derived by the South African company on those shares could be taxed in Switzerland as part of the business profits of the permanent establishment.

Paragraph 5 deals with the limitation of the right of one of the States to impose tax on dividends declared by, or the undistributed profits of, a company which is a resident of the other State. One situation in which tax may be imposed, is where the shareholding is effectively connected with a permanent establishment, as mentioned in relation to paragraph 4 above.

The second situation can best be explained through an example of a Swiss company which carries on business through a branch in South Africa. The paragraph provides that South Africa may not impose tax on the dividends declared by the Swiss company, even though its profits are partly derived in South Africa, except in so far as the dividends are received by South African resident shareholders.

Article 11

Interest

This Article deals with the taxation of income in the form of interest.

Paragraph 1 specifies that interest which arises in a Contracting State and is paid to a resident of the other Contracting State may be taxed in the State of residence.

Paragraph 2 gives a right of taxation to the source State but limits the amount of tax to 5 per cent of the gross amount of the interest provided that the beneficial owner of the interest is a resident of the other Contracting State.

Paragraph 3 contains the standard definition of what is to be regarded as interest.

Paragraph 4 specifies that if the beneficial owner of interest carries on business in the Contracting State in which the interest arises through a permanent establishment or a fixed base situated in that State, the interest may be taxed in that State if the debt in respect of which the interest is paid is effectively connected to that permanent establishment or fixed base. The provisions of Article 11 will not apply to such interest but rather the provisions in Article 7 in the case of a permanent establishment or Article 14 in the case of a fixed base. This paragraph is similar to paragraph 4 of Article 10 dealing with dividends.

Paragraph 5 lays down the principle that the State of source of the interest is the State of which the payer of the interest is a resident. It also provides for an exception to this rule in the case of interest-bearing loans which have an economic link with a permanent establishment or a fixed base operated in the other Contracting State by the payer of the interest. If the loan was contracted for the requirements of the permanent establishment or fixed base and the interest is borne by such permanent establishment or fixed base, the paragraph specifies that the source of the interest is the Contracting State in which the permanent establishment or fixed base is situated.

The purpose of paragraph 6 is to restrict the operation of the provisions of this Article with regard to the taxation of interest in cases where there is a special relationship between the beneficial owner of the interest and the payer or between both of them and a third party. If, in the presence of this relationship, the interest paid exceeds the interest which would have been paid in the absence of such a relationship, the provisions of this Article will not apply to the amount of the interest which is considered to be excessive and such excessive amount will remain taxable in accordance with the laws of both Contracting States. The limitation placed on the source State under paragraph 2 will in such circumstances be negated in respect of the excessive amount. This is an anti-avoidance provision.

Article 12

Royalties

This Article deals with royalties and paragraph 1 provides that royalties which arise in a Contracting State and are paid to a resident of the other Contracting State shall only be taxed in the State of residence.

Paragraph 2 defines which payments will constitute royalties for purposes of the Article. It includes amounts normally understood as royalties, such as patents, copyrights, trade marks, etc, and also includes payments for the use of, or right to use, industrial, commercial or scientific experience (know-how).

Paragraph 3 provides that the provisions of paragraph 1 will not apply if the beneficial owner of the royalties carries on business or performs independent personal services in the State in which the royalties arise through a permanent establishment or fixed base, and the royalties are effectively connected with that permanent establishment or fixed base. In this case, the royalties are in effect regarded as part of the business profits of the permanent establishment or fixed base, and may be taxed by the source State. This paragraph is similar to paragraph 4 of Article 10 dealing with dividends and paragraph 4 of Article 11 dealing with interest.

An example of where this paragraph would apply would be a Swiss company with a permanent office in South Africa through which it sold franchise rights for the use of its product brand. South Africa would in this case be entitled to tax the franchise payments received by the Swiss company.

Paragraph 4 contains an anti-transfer pricing provision. Where the payer and recipient of a royalty are connected persons and the royalty is excessive, the source State may tax the portion which is excessive according to its laws - in other words the limitation set out in paragraph 1 would only apply to the portion of the royalty which meets the arms-length test.

Article 13

Capital Gains

The Article deals with the taxation of capital gains and covers all kinds of taxes which are imposed on such gains.

Paragraph 1 specifies that the right to tax gains derived from the alienation of immovable property is also given to the Contracting State in which the property is situated although the alienator may be a resident of the other Contracting State.

Paragraph 2 deals with the alienation of movable property which forms part of the business property of a permanent establishment or a fixed base which an enterprise of a Contracting State has in the other Contracting State. It provides that gains from the alienation of such property may also be taxed in the State in which such permanent establishment or fixed base is situated and includes gains from the alienation of the permanent establishment or fixed base as such.

Paragraph 3 provides that gains from the alienation of ships or aircraft operated in international traffic or movable property related to the operation of such ships or aircraft are taxable only in the State in which the enterprise is resident. This follows the principle laid down in Article 8 with regard to the taxation of the business profits of such an enterprise.

Paragraph 4 specifies that gains arising from the alienation of shares in a company deriving more than 50 per cent of their value directly or indirectly from immovable property located in a Contracting State, may be taxed in that State.

Paragraph 5 specifies that gains from the alienation of any property not covered by the preceding paragraphs of this Article may only be taxed in the State of residence of the alienator.

Article 14

Independent Personal Services

Paragraph 1 provides the general rule that independent personal services derived by an individual who is a resident of a State shall be taxable only in that State. The other (source) State is entitled to impose tax only if:

(a) a fixed base is regularly available to the individual in the other State for the performance of the individual's services in that State, and then it may tax only the income attributable to that fixed base;

(b) the individual is present in that State for more than an aggregate of 183 days in the fiscal year of that other State in which case the income attributable to those services in that State may be taxed in that State.

Paragraph 2 defines professional services but the definition is not exhaustive.

Article 15

Dependent Personal Services

Paragraph 1 lays down the principle that remuneration in respect of an employment is taxable in the State of residence of the employee unless the services in respect thereof are rendered in the other Contracting State, in which case the remuneration arising from the services rendered in the other State may also be taxed in that other State.

Paragraph 2 limits the right of taxation of the State in which the services are rendered (the source State) in that remuneration for services rendered in that State is taxable only in the State of residence if the following conditions are met:

(a) the employee is present in the source State for a period or periods not exceeding in the aggregate 183 days in the fiscal year of that other State; and

(b) the employer who pays the remuneration, or on whose behalf the remuneration is paid, is not a resident of the source State; and

(c) the relevant remuneration is not borne by a permanent establishment or a fixed base which the employer has in the source State.

It is important to note that all three requirements must be met before the provisions of the paragraph operate.

Paragraph 3 deals with remuneration derived by employees in respect of employment aboard a ship or aircraft operated in international traffic and specifies that such remuneration may be taxed in the State of residence of the operator of such ship or aircraft.

Article 16

Directors' Fees

The Article provides that directors' fees may be taxed by the State in which the company concerned is resident. It does not, however, prevent the director from also being taxed on those fees in the director's State of residence.

Article 17

Entertainers and Sportspersons

In terms of paragraph 1 the income derived by entertainers and sportspersons may be taxed in the Contracting State in which their activities are exercised.

Paragraph 2 expands the principle laid down in paragraph 1 in that it specifies that in cases where income in respect of the activities of entertainers and sportspersons accrues to some other person rather than the entertainer or sportsperson, such income may still be taxed in the Contracting State in which such activities are exercised. This paragraph covers the frequent situation in which a professional sportsperson forms a company and competes in a sporting event in another country not in a personal capacity, but rather as an employee of that person's company. Because the sportsperson's activities in the country continue for a very short period and do not constitute a permanent establishment, neither the sportsperson nor the company would under the normal provisions of the Convention be taxable in that country.

Paragraph 3 introduces the principle that the deeming provision in paragraph 2 will not apply if the entertainer or sportsman, or related persons, do not participate in the profits of the person referred to in that paragraph.

Article 18

Pensions

The Article provides that pensions and other similar remuneration paid in consideration of past employment, and other retirement benefits for which the contributions were deductible in determining taxable income, may be taxed in the State in which they arise. The State of residence may also tax but must then give a credit for the source State tax.

Article 19

Government Service

Subparagraph 1(a) provides that remuneration (other than a pension) for services rendered, which is paid by a Contracting State, a political subdivision or a local authority thereof to an individual, is taxable only in that State.

However, subparagraph 1(b) provides that such remuneration is taxable only in the other Contracting State if the services are rendered in that other State by a resident who is also a national of that other State and did not become resident of the other State with the express purpose of rendering the services. An example of this is a South African national, normally resident in South Africa, who is employed by the Swiss Embassy. Such person would be taxable in South Africa even though the person's salary is paid by Switzerland.

Paragraph 2 provides that the provisions of paragraph 1 will not apply in respect of remuneration or pensions paid by a Contracting State, a political subdivision or a local authority thereof in respect of services rendered in relation to any business carried on by that Contracting State, political subdivision or local authority thereof. In such circumstances, the provisions of Articles 14, 15, 16, 17 and 18 dealing with remuneration and pensions other than of a public nature will apply.

Article 20

Students

In terms of this Article, students or business apprentices who are residents of one State but who are undergoing education or training in the other State, will not be taxed in the last-mentioned State on payments received for the purposes of their maintenance, education or training, if those payments are received from outside that State.

Article 21

Other Income

This Article deals with the treatment of income which is not dealt with in other Articles of the Convention and specifies in paragraph 1 that such items of income will be taxable only in the State of residence of the recipient thereof.

Paragraph 2 reintroduces the principle established in paragraph 4 of Article 10 dealing with dividends and paragraph 4 of Article 11 dealing with interest that if such income is connected to a permanent establishment or a fixed base which a resident of a Contracting State has in the other Contracting State, then such income may be included in the profits which are attributable to the permanent establishment or fixed base as envisaged in Articles 7 and 14 and taxed in that other Contracting State.

Article 22

Elimination of Double Taxation

The provisions of this Article are designed to allow for the actual mechanisms required for the elimination of double taxation. In paragraph 1 the position with regard to the manner in which South Africa will provide relief in cases of double taxation of its residents is set out while the Swiss position with regard to its residents is set out in paragraph 2. South Africa uses the credit method while Switzerland applies a combination of the exemption method and the credit method.

Article 23

Non-discrimination

Paragraph 1 provides that a State may not impose upon nationals possessing the nationality of the other State any tax or requirements connected therewith which is other or more burdensome than that which it imposes on its own nationals <u>in the same circumstances</u>. The underlined words above are crucial to understanding the effect of this paragraph. By way of example, if Switzerland imposed a withholding tax (NRST) on dividends paid to non-residents, but did not impose a similar tax on residents, NRST would be paid by South African shareholders but not by Swiss shareholders. Nevertheless, this tax does not contravene the provisions of this paragraph, because the shareholders are not in the same circumstances, as they are resident in different States. A Swiss national taking up residence in South Africa would also become liable for NRST and the discrimination is thus on the basis of residence and not nationality. This is permitted.

The paragraph extends the application of the non-discrimination provisions to nationals of one of the States who are resident in a third State and on the basis of nationality to companies, defining the nationality of a company as its place of incorporation.

Paragraph 2 provides that where an enterprise of one State has a permanent establishment in the other State, that permanent establishment shall not be less favourably taxed than enterprises of the home State which carry on similar activities. An exception is made, however, in the case of personal allowances, reliefs and reductions on account of civil status or family responsibilities. An example of such an allowance or relief would be the child rebates previously granted by South Africa. These reliefs may be withheld from non-residents.

Paragraph 3 provides that interest, royalties and other disbursements paid by non-residents deriving income in a State are to be allowed as a deduction by that State in the same manner as that State grants those deductions to residents. It is provided, however, that this paragraph does not override Articles 9(1), 11(6) or 12(4), which allow a State to make adjustments in cases where excessive payments are made because of a special relationship between payer and recipient.

Paragraph 4 prevents a State from giving less favourable taxation treatment to foreign-held enterprises than it gives to locally-held enterprises. The paragraph deals only with the taxation of the enterprise – it is still permissible, as discussed in relation to paragraph 1 above, to impose a different tax regime on the owners of the enterprise.

Paragraph 5 provides that for as long as the exemption from secondary tax on companies which apply in the case of branches of non-resident companies, is in effect in South Africa, nothing in this Article shall prevent South Africa from imposing a tax on the profits attributable to a permanent establishment in South Africa, of a company resident in Switzerland, at a rate which does not exceed the rate of normal tax by more than five percentage points.

The Convention generally applies only to the taxes listed in Article 2 but paragraph 6 provides that the non-discrimination provisions of this Article will apply to all taxes of every kind and description.

Article 24

Mutual Agreement Procedure

This Article institutes a mutual agreement procedure for difficulties arising out of the application of the Convention. In paragraphs 1 and 2 it provides that the competent authorities of the Contracting States shall endeavour by mutual agreement to solve the situation of taxpayers subjected to taxation not in accordance with the provisions of the Convention.

In paragraph 3, the competent authorities of the two States are authorised to resolve by mutual agreement any problems relating to the interpretation or application of the Convention, and, furthermore, to consult together for the elimination of double taxation in cases not provided for in the Convention.

Paragraph 4 authorises the competent authorities to communicate directly for the purpose of reaching mutual agreement in respect of any of these matters.

Paragraph 5 introduces the principle in that in cases where, after having fully exhausted the procedures available under paragraphs 1 to 4 of this Article, the competent authorities have not been able to reach agreement, then they may refer those cases to an arbitration board. The composition and arbitration procedures shall be determined by the competent authorities of the Contracting States. The paragraph further provides that the decision of the arbitration board shall be binding on both Contracting States as well as the taxpayers involved.

Article 25

Exchange of Information

Paragraph 1 provides that the States shall exchange such information as may be necessary for carrying out the provisions of the Convention and upon request, for applying the domestic taxation laws of the States concerning tax fraud in relation to the taxes which are the subject of the Convention. Information obtained by a State under this provision must be treated with the same degree of secrecy as applies to information obtained under the domestic laws of that State. In addition to this general stipulation on secrecy, it is specifically provided that information obtained under this Article may be disclosed only to persons or authorities involved in the administration of the taxes covered by the Convention, and that those persons and authorities shall use the information only for the purposes of such administration. Paragraph 1 further provides that no information which would disclose any trade, business, industrial or professional secret or any trade process shall be exchanged.

In terms of paragraph 2, the provisions of the Article will not impose on a State the obligation to do anything which is contrary with the regulations and practice of either State or which would be contrary to that State's sovereignty, security or public policy or to supply particulars which are not obtainable under its own legislation or that of the State making the application for information.

Article 26

Members of Diplomatic Missions and Consular Posts

Paragraph 1 sets out the object of this Article which is to ensure that members of diplomatic missions and consular posts are not deprived of any right which is accorded to them under international law or special agreements between the Contracting States. In effect this normally means that the remuneration which they receive from their State of residence while they are stationed in the other Contracting State is not subjected to tax in that other State.

Paragraph 2 expands the principle set out in paragraph 1 and deems members of diplomatic missions or consular posts to be residents of the sending State, provided that they are, in accordance with international law, not liable to tax in the receiving State in respect of income from sources outside that State and are fact subject to the same tax obligations on total income in the sending State as are residents of that State.

Paragraph 3 specifies that the Convention shall not apply to international organizations, organs or officials thereof as well as members of a diplomatic mission or consular post of a third State who are present in one of the Contracting State, if they are not liable to the same tax obligations on income as the residents of that Contracting State.

Article 27

Entry into Force

Paragraph 1 provides that the Contracting States shall notify each other through the diplomatic channel, once the legal procedures required in each country for the bringing into force of the Convention have been completed. The Convention will then enter into force on the date of receipt of the later of these notifications.

Paragraph 2 also specifies the date on which the provisions will begin to operate, in both States on or after the first day of January next following the date of entry into force of the Convention.

Paragraph 3 provides for the termination of the previous double taxation Convention between South Africa and Switzerland.

Article 28

Termination

Paragraph 1 provides that the Convention shall operate for a minimum period of five years after which it may be terminated by either Contracting State by giving written notice of termination not later than 30 June of any calendar year.

The Convention will then cease to operate from 1 January in the calendar year following such notice on the basis set out in paragraph 2.

PROTOCOL

Subparagraph (a) of paragraph 1 of the Protocol provides that the term “other retirement benefits” referred to in Article 18, shall, in the case of South Africa, include any payments made by retirement annuity funds and, in the case of Switzerland, payments from tied individual savings accounts. Subparagraph 1(b) provides that the income referred to in Article 18 covers periodic payments as well as lump sum payments.

Paragraph 2 of the Protocol provides that Switzerland shall, for as long as South Africa levies secondary tax on companies, on request, grant a relief for secondary tax on companies as provided for in paragraph 2(b) of Article 22, but only to the extent that the beneficial owner is a resident of Switzerland, other than a company referred to in paragraph 2(a) of Article 10 (that is, a company which holds directly at least 20 per cent of the capital of the company paying the dividend). Paragraph 2 further provides that the relief granted shall not exceed the lower of the amount of the secondary tax on companies effectively levied in South Africa or 15 per cent of the gross amount of the dividends, respectively.

Paragraph 3 of the Protocol defines the term “tax fraud” as being a fraudulent conduct which constitutes a tax offence and which can, in both States, be punishable with imprisonment. Paragraph 3 further provides that:

(a) if the competent authority of the requesting State can prove a direct link between the fraudulent conduct and the requested measures of administrative assistance, then bank secrecy does not hinder the gathering of documentary evidence from banks or it being forwarded to the competent authority of the requesting State;

(b) the exchange of information is based on the principle of reciprocity and depends on actual facts and circumstances being presented by the requesting State;

(c) the provisions of Article 25 regarding the exchange of information shall apply to tax frauds committed on or after I January of the year following upon the entry into force of the Convention.