

## **2005 Income and Capital Tax Convention and Final Protocol**

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*This convention has been amended by a protocol signed July 8, 2008. The text as amended is also available.*

### **CONVENTION BETWEEN THE REPUBLIC OF SOUTH AFRICA AND THE KINGDOM OF THE NETHERLANDS FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL**

#### Preamble

The Government of the Republic of South Africa and the Government of the Kingdom of the Netherlands, desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital in order to promote and strengthen the economic relations between the two countries, have agreed as follows:

#### Chapter I

##### Scope of the Convention

#### **Article 1 Persons Covered**

This Convention shall apply to persons who are residents of one or both of the Contracting States.

#### **Article 2 Taxes Covered**

1. This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

3. The existing taxes to which the Convention shall apply are in particular:

a) in the Netherlands:

(i) de inkomstenbelasting (income tax),

(ii) de loonbelasting (wages tax),

(iii) de vennootschapsbelasting (company tax) including the Government share in the net profits of the exploitation of natural resources levied pursuant to the Mijnwet 1810 (the Mining Act of 1810) with respect to concessions issued from 1967, or pursuant to the Mijnwet Continentaal Plat 1965 (the Netherlands Continental Shelf Mining Act of 1965),

(iv) de dividendbelasting (dividend tax), and

(v) de vermogensbelasting (capital tax),

(hereinafter referred to as "Netherlands tax");

b) in South Africa:

(i) the normal tax,

(ii) the secondary tax on companies, and

(iii) the withholding tax on royalties,

(hereinafter referred to as "South African tax").

4. The Convention shall apply also to any identical or substantially similar taxes that are imposed by either Contracting State after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws.

#### Chapter II

##### Definitions

#### **Article 3 General Definitions**

1. For the purposes of this Convention, unless the context otherwise requires:

- a) the terms "a Contracting State" and "the other Contracting State" mean the Kingdom of the Netherlands (the Netherlands) or the Republic of South Africa (South Africa), as the context requires;
- b) the term "the Netherlands" means the part of the Kingdom of the Netherlands that is situated in Europe, including its territorial sea, and any area beyond the territorial sea within which the Netherlands, in accordance with international law, exercises jurisdiction or sovereign rights with respect to the seabed, its subsoil and its superjacent waters, and their natural resources;
- c) the term "South Africa" means the Republic of South Africa and, when used in a geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea, including the continental shelf, which has been or may hereafter be designated, under the laws of South Africa and in accordance with international law, as an area within which South Africa may exercise sovereign rights or jurisdiction;
- d) the term "business" includes the performance of professional services and of other activities of an independent character;
- e) the term "person" includes an individual, a company and any other body of persons;
- f) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
- g) the term "enterprise" applies to the carrying on of any business;
- h) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
- i) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;
- j) the term "national" means:
  - (i) any individual possessing the nationality of a Contracting State;
  - (ii) any legal person, partnership or association deriving its status as such from the laws in force in a Contracting State;
- k) the term "competent authority" means:
  - (i) in the Netherlands, the Minister of Finance or an authorised representative;
  - (ii) in South Africa, the Commissioner for the South African Revenue Service or an authorised representative.

2. As regards the application of the provisions of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

#### **Article 4 Resident**

1. For the purposes of this Convention, the term "resident of a Contracting State" means:
  - a) any person who, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority 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;
  - b) a pension fund that is recognised and controlled according to the statutory provisions of a Contracting State and the income of which is generally exempt from tax in that State.
2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then that individual's status shall be determined as follows:
  - a) the individual shall be deemed to be a resident solely of the State in which a permanent home is available to the individual; if a permanent home is available to the individual in both States, the individual shall be deemed to be a resident solely of the State with which the individual's personal and economic relations are closer (centre of vital interests);
  - b) if sole residence cannot be determined under the provisions of subparagraph a), the individual shall be deemed to be a resident solely of the State in which the individual has an habitual abode;
  - c) if the individual has an habitual abode in both States or in neither of them, the individual shall be deemed to be a resident solely of the State of which the individual is a national;
  - d) if the individual 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 solely of the State in which its place of effective management is situated.

### **Article 5 Permanent Establishment**

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

- a) a place of management;
- b) a branch;
- c) an office;
- d) a factory;
- e) a workshop, and
- f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, constitutes a permanent establishment only if such site, project or activity lasts more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; and
- 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.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - 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 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 4 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.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

### **Chapter III**

#### **Taxation of Income**

### **Article 6 Income From Immovable Property**

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 State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to

work, mineral deposits, sources and other natural resources. Ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.

### **Article 7 Business Profits**

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary. The method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

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

### **Article 8 Shipping and Air Transport**

1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is a resident.

3. For the purposes of this Convention, profits derived by an enterprise of one of the States from the operation of ships or aircraft in international traffic shall include profits from:

- a) the rental of ships or aircraft operated in international traffic;
- b) the use or rental of containers (including trailers and related equipment for the transport of containers) used in international traffic; and
- c) the rental of ships, aircraft or containers (including trailers and related equipment for the transport of containers or the maintenance thereof) provided that such profits are incidental to profits referred to in paragraph 1, or subparagraphs a) or b) of this paragraph.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

### **Article 9 Associated Enterprises**

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 the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

### **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, the Contracting State of which the company is a resident shall not levy a tax on dividends paid by that company, if the beneficial owner of the dividends is a company the capital of which is wholly or partly divided into shares and which is a resident of the other Contracting State and holds directly at least 10 per cent of the capital of the company paying the dividends.

4. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of paragraphs 2 and 3.

5. 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.

6. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights participating in profits, as well as income from debt-claims participating in profits and 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.

7. 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 and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

8. 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 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.

9. The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the shares or other rights in respect of which the dividend is paid to take advantage of this Article by means of that creation or assignment.

### **Article 11 Interest**

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

2. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of paragraph 1.

3. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, but 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 purpose of this Article.

4. The provisions of paragraph 1 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 and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. 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 that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.

6. 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 12 Royalties**

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 State.

2. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of paragraph 1.

3. 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, tapes or discs for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

4. 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 and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

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 that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment with which the right or property in respect of which the royalties are paid is effectively connected, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the State in which the permanent establishment is situated.

6. 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.

### **Article 13 Capital Gains**

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 State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated. For the purposes of this paragraph the provisions of paragraph 2 of Article 8 shall apply.

4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident.

5. Notwithstanding the provisions of paragraph 4, a Contracting State may, in accordance with its own laws, including the interpretation of the term "alienation", levy tax on gains derived by an individual who is a resident of the other Contracting State from the alienation of shares in, "jouissance" rights of or debt-claims on a company whose capital is divided into shares and which, under the laws of the first-mentioned Contracting State, is a resident of that State, and from the alienation of part of the rights attached to the said shares, "jouissance" shares or debt-claims, if that individual – either alone or with his or her spouse – or one of their relations by blood or marriage in the direct line directly or indirectly holds at least 5 per cent of the issued capital of a particular class of shares in that company. This provision shall apply only if the individual who derives the gains was a resident of the first-mentioned State at any time during the ten years preceding the year in which the gains are derived and provided that, at the time the individual became a resident of the other Contracting State, the above-mentioned conditions regarding share ownership in the said company were satisfied. In cases where, under the domestic laws of the first-mentioned Contracting State, an assessment has been issued to the individual in respect of the alienation of the aforesaid shares which is deemed to have taken place at the time of the individual's emigration from the first-mentioned Contracting State, the above shall apply only as long as part of the assessment is still due.

#### **Article 14 Income From Employment**

1. Subject to the provisions of Articles 15, 17, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
- c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised aboard a ship or aircraft operated in international traffic, shall be taxable only in that State.

#### **Article 15 Directors' Fees**

Directors' fees or other remuneration derived by a resident of a Contracting State in that person's capacity as a member of the board of directors, a "bestuurder" or a "commissaris" of a company which is a resident of the other Contracting State may be taxed in that other State.

#### **Article 16 Entertainers and Sportspersons**

1. Notwithstanding the provisions of Articles 7 and 14, 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 sportsperson, from that person's personal activities as such exercised in the other Contracting State, may be taxed in that other State.

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

3. Paragraphs 1 and 2 shall not apply to income derived by a resident of a Contracting State from activities exercised in the other Contracting State if the visit to that other State is supported wholly or mainly by public funds of the first-mentioned State, a political subdivision or a local authority thereof, or takes place under a cultural agreement or arrangement between the Governments of the Contracting States. In such case, the income shall be taxable only in the Contracting State of which the entertainer or sportsperson is a resident.

#### **Article 17 Pensions, Annuities and Social Security Payments**

1. Pensions and other similar remuneration, and annuities, arising in a Contracting State and paid to a resident of the other Contracting State, may be taxed in the first-mentioned State.

2. Any pension and other payment paid out under the provisions of a social security system of a Contracting State to a resident of the other Contracting State may be taxed in the first-mentioned State.

3. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

4. A pension or other similar remuneration or annuity is deemed to be derived from a Contracting State if and insofar as the contributions or payments associated with the pension or similar remuneration or annuity, or the entitlements received from it qualified for tax relief in that State. The transfer of a pension from a pension fund or an insurance company in a Contracting State to a pension fund or an insurance company in another State will not restrict in any way the taxing rights of the first-mentioned State under this Article.

### **Article 18 Government Service**

1. a) Salaries, wages and other similar remuneration, other than a pension, paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority may be taxed in that State.

b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

(i) is a national of that State; or

(ii) did not become a resident of that State solely for the purpose of rendering the services.

2. The provisions of Articles 14, 15 and 17 shall apply to salaries, wages and other similar remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

### **Article 19 Professors and Teachers**

1. An individual who visits one of the Contracting States for a period not exceeding two years for the purpose of teaching or engaging in research at a university, college or other recognised educational institution in that State, and who was immediately before that visit a resident of the other Contracting State shall be taxable only in that other State on any remuneration for such teaching or research for a period not exceeding two years from the first date the individual first visits the first-mentioned State for such purpose.

2. This Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

### **Article 20 Students**

Students or business apprentices who are present in a Contracting State solely for the purpose of their education or training and who are, or immediately before being so present were residents of the other Contracting State, shall be exempt from tax in the first-mentioned State on payments received from outside that first-mentioned State for the purpose of their maintenance, education or training.

### **Article 21 Other Income**

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.

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

Chapter IV

Taxation of Capital

### **Article 22 Capital**

1. Capital represented by immovable property referred to in Article 6, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.

2. Capital represented by movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State may be taxed in that other State.

3. Capital represented by ships and aircraft operated in international traffic and by movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in

which the place of effective management of the enterprise is situated. For the purposes of this paragraph the provisions of paragraph 2 of Article 8 shall apply.

4. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

#### Chapter V

#### Elimination of Double Taxation

### **Article 23 Elimination of Double Taxation**

1. The Netherlands, when imposing tax on its residents, may include in the basis upon which such taxes are imposed the items of income or capital which, according to the provisions of this Convention, may be taxed in South Africa.

2. However, where a resident of the Netherlands derives items of income or owns items of capital which according to Article 6, Article 7, paragraph 7 of Article 10, paragraph 4 of Article 11, paragraph 4 of Article 12, paragraphs 1 and 2 of Article 13, paragraph 1 of Article 14, paragraphs 1 and 2 of Article 17, paragraph 1 (subparagraph a) of Article 18, paragraph 2 of Article 21 and paragraphs 1 and 2 of Article 22 of this Convention may be taxed in South Africa and are included in the basis referred to in paragraph 1, the Netherlands shall exempt such items of income or capital by allowing a reduction of its tax. This reduction shall be computed in conformity with the provisions of the Netherlands law for the avoidance of double taxation. For that purpose the said items of income or capital shall be deemed to be included in the total amount of the items of income or capital which are exempt from Netherlands tax under those provisions.

3. Further, the Netherlands shall allow a deduction from the Netherlands tax so computed for the items of income which according to paragraph 2 of Article 10, paragraph 5 of Article 13, Article 15 and Article 16 of this Convention may be taxed in South Africa to the extent that these items are included in the basis referred to in paragraph 1. The amount of this deduction shall be equal to the tax paid in South Africa on these items of income, but shall not exceed the amount of the deduction which would be allowed if the items of income so included were the sole items of income which are exempt from Netherlands tax under the provisions of the Netherlands law for the avoidance of double taxation.

4. Notwithstanding the provisions of paragraph 2, the Netherlands shall allow a deduction from the Netherlands tax for the tax paid in South Africa on items of income which according to Article 7, paragraph 7 of Article 10, paragraph 4 of Article 11, paragraph 4 of Article 12 and paragraph 2 of Article 21 of this Convention may be taxed in South Africa to the extent that these items are included in the basis referred to in paragraph 1, if and insofar as the Netherlands under the provisions of the Netherlands law for the avoidance of double taxation allows a deduction from the Netherlands tax of the tax levied in another country on such items of income. For the computation of this deduction the provisions of paragraph 3 of this Article shall apply accordingly.

5. In South Africa, subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa, Netherlands tax paid by residents of South Africa in respect of income taxable in the Netherlands, in accordance with the provisions of this Convention, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income.

#### Chapter VI

#### Special Provisions

### **Article 24 Offshore Activities**

1. The provisions of this Article shall apply notwithstanding any other provisions of this Convention. However, this Article shall not apply where offshore activities of a person constitute for that person a permanent establishment under the provisions of Article 5.

2. In this Article the term "offshore activities" means activities which are carried on offshore in connection with the exploration or exploitation of the seabed and its subsoil and their natural resources, situated in a Contracting State.

3. An enterprise of a Contracting State which carries on offshore activities in the other Contracting State shall, subject to paragraph 4 of this Article, be deemed to be carrying on, in respect of those activities, business in that other State through a permanent establishment situated therein, unless the offshore activities in question are carried on in the other State for a period or periods not exceeding in the aggregate 30 days in any period of 12 months.

For the purposes of this paragraph:

a) where an enterprise carrying on offshore activities in the other Contracting State is associated with another enterprise and that other enterprise continues, as part of the same project, the same offshore activities that are or were being carried on by the first-mentioned enterprise, and the aforementioned

activities carried on by both enterprises – when added together – exceed a period of 30 days, then each enterprise shall be deemed to be carrying on its activities for a period exceeding 30 days in a 12 month period;

b) an enterprise shall be regarded as associated with another enterprise if one holds directly or indirectly at least one third of the capital of the other enterprise or if a person holds directly or indirectly at least one third of the capital of both enterprises.

4. However, for the purposes of paragraph 3 of this Article the term “offshore activities” shall be deemed not to include:

a) one or any combination of the activities mentioned in paragraph 4 of Article 5;

b) towing or anchor handling by ships primarily designed for that purpose and any other activities performed by such ships;

c) the transport of supplies or personnel by ships or aircraft in international traffic.

5. A resident of a Contracting State who carries on offshore activities in the other Contracting State, which consist of professional services or other activities of an independent character, shall be deemed to be performing those activities from a permanent establishment in the other Contracting State if the offshore activities in question last for a continuous period of 30 days or more.

6. Salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment connected with offshore activities carried on through a permanent establishment in the other Contracting State may, to the extent that the employment is exercised offshore in that other State, be taxed in that other State.

7. Where documentary evidence is produced that tax has been paid in South Africa on the items of income which may be taxed in South Africa according to Article 7 in connection with respectively paragraph 3 and paragraph 5 of this Article, and to paragraph 6 of this Article, the Netherlands shall allow a reduction of its tax which shall be computed in conformity with the rules laid down in paragraph 2 of Article 23.

## **Article 25 Non-Discrimination**

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

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 State than the taxation levied on enterprises of that other State carrying on the same activities. This provision 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 6 of Article 11, or paragraph 6 of Article 12, 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 State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

4. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

5. Contributions paid by, or on behalf of, an individual who is a resident of a Contracting State to a pension plan that is recognised for tax purposes in the other Contracting State will be treated in the same way for tax purposes in the first-mentioned State as a contribution paid to a pension plan that is recognised for tax purposes in that first-mentioned State, provided that:

a) such individual was contributing to such pension plan for a period ending immediately before the individual became a resident of the first-mentioned State; and

b) the competent authority of the first-mentioned State agrees that the pension plan corresponds to a pension plan recognised for tax purposes by that State.

For the purpose of this paragraph, "pension plan" includes a pension plan created under a public social security system.

6. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

### **Article 26 Mutual Agreement Procedure**

1. Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with this Convention, that person may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of the Contracting State of which the person is a resident or, if the case comes under paragraph 1 of Article 25, to that of the Contracting State of which the person 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.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. If any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities of the Contracting States in a mutual agreement procedure pursuant to the previous paragraphs of this Article within a period of two years after the question was raised, the case may, at the request of either Contracting State, be submitted for arbitration, but only after fully exhausting the procedures available under paragraphs 1 to 4 of this Article and provided the taxpayer or taxpayers involved agree in writing to be bound by the decision of the arbitration board. The decision of the arbitration board in a particular case shall be binding on both Contracting States and the taxpayer or taxpayers involved with respect to that case. The composition of the arbitration board and the arbitration procedures shall be determined by the competent authorities of the Contracting States.

### **Article 27 Exchange of Information**

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or 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. Any information received 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 taxes referred to in the first sentence. 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.

2. The Contracting States may release to the arbitration board, established under the provisions of paragraph 5 of Article 26, such information as is necessary for carrying out the arbitration procedure. Such release of information shall be subject to the provisions of Article 29. The members of the arbitration board shall be subject to the limitations on disclosure described in paragraph 1 of this Article with respect to any information so released.

### **Article 28 Assistance in Recovery**

1. The Contracting States undertake to lend assistance to each other in the collection of taxes owed by a taxpayer to the extent that the amount thereof has been finally determined according to the laws of the Contracting State making the request for assistance.

2. In the case of a request by a Contracting State for the collection of taxes which has been accepted for collection by the other Contracting State, such taxes shall be collected by that other State to the extent permitted by its domestic law.

3. Claims which are the subject of requests for assistance shall not have priority over taxes owing in the Contracting State rendering assistance and the provisions of paragraph 1 of Article 27 shall also apply to any information which, by virtue of this Article, is supplied to the competent authority of a Contracting State.

4. Any request for collection by a Contracting State shall be accompanied by such certificate as is required by the laws of that State to establish that the taxes owed by the taxpayer have been finally determined.

5. Where the tax claim of a Contracting State has not been finally determined by reason of it being subject to appeal or other proceedings, that State may, in order to protect its revenues, request the other Contracting State to take such interim measures for conservancy on its behalf as are available to the other State under the laws of that other State. If such request is accepted by the other State, such interim measures shall be taken by that other State to the extent permitted by its domestic law.

6. A request under paragraphs 4 or 5 shall only be made by a Contracting State to the extent that sufficient property of the taxpayer owing the taxes is not available in that State for recovery of the taxes owed.

7. The Contracting State in which tax is recovered in accordance with the provisions of this Article shall forthwith remit to the Contracting State on behalf of which the tax was collected the amount so recovered minus, where appropriate, the amount of the extraordinary costs referred to in subparagraph b) of paragraph 8. The competent authorities of the Contracting States shall consult together to determine the procedures with regard to the remitting of taxes so recovered.

8. It is understood that unless otherwise agreed by the competent authorities of both Contracting States,

a) ordinary costs incurred by a Contracting State in providing assistance shall be borne by that State,

b) extraordinary costs incurred by a Contracting State in providing assistance shall be borne by the other State and shall be payable regardless of the amount collected on its behalf by the first-mentioned State.

As soon as a Contracting State anticipates that extraordinary costs may be incurred, it shall so advise the other Contracting State and indicate the estimated amount of such costs.

9. In this Article, the term "taxes" means the taxes to which this Convention applies and includes any interest and penalties relating thereto.

10. The competent authorities of the Contracting States may settle the mode of application of this Article.

### **Article 29 Limitation of Articles 27 and 28**

In no case shall the provisions of Articles 27 and 28 be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws or 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*).

### **Article 30 Members of Diplomatic Missions and Consular Posts**

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. For the purposes of the Convention an individual who is a member of a diplomatic mission or consular post of a Contracting State in the other Contracting State or in a third State and who is a national of the sending State shall be deemed to be a resident of the sending State if the individual is liable therein to the same obligations in respect of taxes on income and on capital as are residents of that State.

3. The Convention shall not apply to international organisations, organs and officials thereof and members of a diplomatic mission or consular post of a third State, being present in a Contracting State, if they are not liable therein to the same obligations in respect of taxes on income or on capital as are residents of that State.

### **Article 31 Territorial Extension**

1. This Convention may be extended, either in its entirety or with any necessary modifications, to either or both of the countries of the Netherlands Antilles and Aruba, if the country concerned imposes

taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and be subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed in notes to be exchanged through the diplomatic channel.

2. Unless otherwise agreed the termination of the Convention shall not also terminate any extension of the Convention to any country to which it has been extended under this Article.

#### Chapter VII

#### Final Provisions

### **Article 32 Entry Into Force**

1. This Convention shall enter into force on the thirtieth day after the latter of the dates on which the respective Governments have notified each other in writing through the diplomatic channel that the formalities constitutionally required in their respective States have been complied with, and its provisions shall have effect for taxable years and periods beginning on or after the first day of January in the calendar year following that in which the Convention has entered into force.

2. The Convention between the Government of the Kingdom of the Netherlands and the Government of the Republic of South Africa for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, with Protocol, signed at Cape Town on March 15, 1971, shall be terminated with effect from the date of entry into force of this Convention and shall cease to have effect for any period thereafter for which the provisions of this Convention shall apply.

### **Article 33 Termination**

This Convention shall remain in force until terminated by one of the Contracting States. Either State may terminate the Convention, through the diplomatic channel, by giving notice of termination at least six months before the end of any calendar year after the expiration of a period of five years from the date of its entry into force. In such event the Convention shall cease to have effect for taxable years and periods beginning after the end of the calendar year in which the notice of termination has been given.

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

Done at Pretoria in duplicate, in the English language, this 10th day of October 2005.

**FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS:**

*B. Bot*

**FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA:**

*T.A. Manuel*

### **PROTOCOL**

At the moment of signing the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, this day concluded between the Republic of South Africa and the Kingdom of the Netherlands, the undersigned have agreed that the following provisions shall form an integral part of the Convention.

#### I. Ad Articles 3 and 26

It is understood that if the competent authorities of the Contracting States, by mutual agreement, have reached a solution within the context of the Convention, for cases in which double taxation or double exemption would occur:

a) as a result of the application of paragraph 2 of Article 3 with respect to the interpretation of a term not defined in the Convention; or

b) as a result of differences in qualification (for example of an item of income or of a person), this solution – after publication thereof by both competent authorities – shall also be binding in other similar cases in the application of the provisions of the Convention.

#### II. Ad Article 4

An individual living aboard a ship without any real domicile in either of the Contracting States shall be deemed to be a resident of the Contracting State in which the ship has its home harbour.

#### III. Ad Articles 5, 6, 7, 13 and 24

It is understood that exploration and exploitation rights of natural resources shall be regarded as immovable property situated in the Contracting State the seabed and subsoil of which they are related to, and that these rights shall be deemed to pertain to the property of a permanent establishment in that State. Furthermore, it is understood that the aforementioned rights include rights to interests in, or to the benefits of, assets to be produced by such exploration or exploitation.

#### IV. Ad Article 7

In respect of paragraphs 1 and 2 of Article 7, where an enterprise of a Contracting State sells goods or merchandise or carries on business in the other Contracting State through a permanent establishment

situated therein, the profits of that permanent establishment shall not be determined on the basis of the total amount received by the enterprise, but shall be determined only on the basis of that portion of the income of the enterprise that is attributable to the actual activity of the permanent establishment in respect of such sales or business. Specifically, in the case of contracts for the survey, supply, installation or construction of industrial, commercial or scientific equipment or premises, or of public works, when the enterprise has a permanent establishment, the profits attributable to such permanent establishment shall not be determined on the basis of the total amount of the contract, but shall be determined only on the basis of that part of the contract that is effectively carried out by the permanent establishment in the Contracting State where the permanent establishment is situated. The profits related to that part of the contract which is carried out by the head office of the enterprise shall be taxable only in the Contracting State of which the enterprise is a resident.

V. Ad Article 7

Payments received as a consideration for technical services, including studies or surveys of a scientific, geological or technical nature, or for consultancy or supervisory services shall be deemed to be payments to which the provisions of Article 7 apply.

VI. Ad Article 9

In respect of paragraph 1 of Article 9, it is understood that the fact that associated enterprises have concluded arrangements, such as cost sharing arrangements or general services agreements, for or based on the allocation of executive, general administrative, technical and commercial expenses, research and development expenses and other similar expenses, is not in itself a condition as meant in that paragraph.

VII. Ad Articles 10, 11 and 12

Where tax has been levied at source in excess of the amount of tax chargeable under the provisions of Articles 10, 11 or 12, applications for the refund of the excess amount of tax have to be lodged with the competent authority of the State having levied the tax, within a period of three years after the expiration of the calendar year in which the tax has been levied.

VIII. Ad Articles 10 and 13

It is understood that income received in connection with the (partial) liquidation of a company or a purchase of own shares by a company is treated as income from shares and not as capital gains.

IX. Ad Article 13

It is understood that if the individual referred to in paragraph 5 of Article 13 is subject to tax on gains in the circumstances envisaged in that paragraph and the shares, "jouissance" rights or debtclaims were acquired before the individual became a resident of the first-mentioned State, that firstmentioned State shall consider that portion of the tax determined in accordance with the following formula to have been paid:

$$A = X \times Z$$

Y

Where:

A = the amount of tax considered as paid;

X = the period of ownership during which the individual was not a resident of the first-mentioned State;

Y = the total period of ownership;

Z = the tax on the assessment.

This provision will only apply if the gain taxed in the first-mentioned State includes accrual of value during a period in which the individual was not a resident of that State.

X. Ad Article 15

It is understood that "bestuurder" or "commissaris" of a Netherlands company means persons who are nominated as such by the general meeting of shareholders or by any other competent body of such company and are charged with the general management of the company and the supervision thereof, respectively.

XI. Ad Article 17

Notwithstanding the provisions of Article 17, where a person who is a resident of South Africa on the date on which the Convention comes into effect, continues after that date to derive a pension or other similar remuneration or an annuity as meant in paragraph 1 of Article 17, or continues after that date to derive a pension or other payment paid as meant in paragraph 2 of Article 17, that income shall be taxable only in South Africa if the total gross amount of that income paid out in any calendar year does not exceed 10.000 Euro. However, if the total gross amount of that income arising in the Netherlands and paid out in any calendar year exceeds 10.000 Euro, then it may also be taxed in the Netherlands, but only to the extent that the total gross exceeds 10.000 Euro. In that case the

Netherlands may include in the basis upon which its tax is imposed on that income that part thereof that is taxable only in South Africa and shall exempt that part by allowing a reduction of its tax in conformity with the provisions of paragraph 2 of Article 23.

XII. Ad Article 23

It is understood that for the computation of the reduction mentioned in paragraph 2 of Article 23, the items of capital referred to in paragraph 1 of Article 22 shall be taken into account for the value thereof reduced by the value of the debts secured by mortgage on that capital and the items of capital referred to in paragraph 2 of Article 22 shall be taken into account for the value thereof reduced by the value of the debts pertaining to the permanent establishment.

XIII. Ad Article 25

1. It is understood that nothing in this Article shall prevent South Africa from imposing on the profits attributable to a permanent establishment in South Africa of a company - which is a resident of the Netherlands - a tax at a rate which does not exceed the rate of normal tax on companies by more than five percentage points.

2. It is further understood that the provision of paragraph 1 shall only apply as long as permanent establishments of companies which are not residents of South Africa are not liable to the secondary tax on companies.

3. It is furthermore understood that the provision of paragraph 1 shall no longer apply if South Africa were to abolish the secondary tax on companies or if it were to levy this tax on residents of South Africa at a rate of less than five percentage points.

XIV. Ad Article 27

With respect to the Netherlands Article 27 shall, for political subdivisions or local authorities, not be applicable to other taxes than those covered by this Convention, until the national legislation of the Netherlands contains a juridical basis therefore in line with the 2000 Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development.

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

Done at Pretoria in duplicate, in the English language, this 10th day of October 2005.

**FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS:**

*B. Bot*

**FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA:**

*T.A. Manuel*