

LEGAL NOTICE No. 111

THE INCOME TAX ACT

(Cap. 470)

THE DOUBLE TAXATION RELIEF (CANADA)  
NOTICE, 1987

IN EXERCISE of the powers conferred by section 41 of the Income Tax Act, the Minister for Finance declares that the arrangements specified in the Schedule hereto, being arrangements made between the Government of the Republic of Kenya and the Government of Canada in articles of agreement signed on the 27th April, 1983, as amended by a protocol signed on the 27th April, 1983, with a view to affording relief from double taxation in relation to income tax under the Act and any taxes of similar character imposed by the laws of Canada shall notwithstanding anything to the contrary in the Act or any other written law, have effect in relation to income tax under the Act.

SCHEDULE

The Government of Kenya and the Government of Canada:

DESIRING to conclude an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital,

HAVE AGREED AS FOLLOWS:

ARTICLE I

*Personal Scope*

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

ARTICLE II

*Taxes Covered*

1. This Agreement shall apply to taxes on income and on capital imposed on behalf of each Contracting State, 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 Agreement shall apply are, in particular—

(a) in the case of Canada the income taxes imposed by the Government of Canada, (hereinafter referred to as "Canadian tax").

(b) in the case of Kenya the income taxes imposed by the Government of Kenya, (hereinafter referred to as "Kenyan tax").

4. This Agreement shall apply also to any identical or substantially similar taxes on income and to taxes on capital which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The Contracting States shall notify each other of significant changes which have been made in their respective taxation laws.

ARTICLE III

*General Definitions*

1. In this Agreement, unless the context otherwise requires—

(a) (i) the term "Canada" used in a geographical sense, means the territory of Canada, including any area beyond the territorial waters of Canada which, under the laws of Canada, is an area within which Canada may exercise rights with respect to the sea-bed and sub-soil and their natural resources;

(ii) the term "Kenya" used in a geographical sense, means the territory of the Republic of Kenya, including any area beyond the territorial waters of Kenya which, under the laws of Kenya, is an area within which Kenya may exercise rights with respect to the sea-bed and sub-soil and their natural resources;

- (b) the terms "a Contracting State" and "the other Contracting State" means, as the context requires, Canada or Kenya;
- (c) the term "person" includes an individual, an estate, a trust, a company and any other body of persons;
- (d) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes; in French, the term "*societe*" also means a "corporation" within the meaning of Canadian law;
- (e) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" means 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;
- (f) the term "competent authority" means—
- (i) in the case of Canada, the Minister for National Revenue or his authorized representative
  - (ii) in the case of Kenya, the Minister for Finance or his authorized representative
- (g) the term "tax" means Canadian tax or Kenyan tax, as the context requires but shall not include any tax which is payable in respect of any default or omission in relation to the taxes to which this Agreement applies or which represents a penalty imposed relating to those taxes;
- (h) 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 law in force in a Contracting State.

2. In the application of the provisions of this Agreement by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Agreement.

#### ARTICLE IV

##### *Fiscal Domicile*

1. For the purposes of this Agreement, the term "resident of a Contracting State" is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then this case shall be determined in accordance with the following rules:

- (a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closest (hereinafter referred to as his "centre of vital interests");
- (b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
- (c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;
- (d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then its case shall be determined in accordance with the following rules:

- (a) it shall be deemed to be a resident of the Contracting State of which it is a national;
- (b) if it is a national of neither of the Contracting States, the competent authorities of the Contracting States shall, by mutual agreement, endeavour to settle the question and to determine the mode of application of the Agreement to such company.

4. Where by reason of the provisions of paragraph 1 a person other than an individual or a company is a resident of both Contracting States, the competent authorities of the Contracting States shall by mutual agreement endeavour to settle the question and to determine the mode of application of the Agreement to such person.

#### ARTICLE V

##### *Permanent Establishment*

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

2. The term "permanent establishment" shall include especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;

- (f) a sales outlet;
- (g) a mine, quarry, oil well or other place of extraction of natural resources;
- (h) a building site or construction or assembly project which exists for more than six months;
- (i) the provision of supervisory activities for more than six months on a building site or construction or assembly project;
- (j) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on.

3. The term "permanent establishment" shall not be deemed 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 for collecting information, for the enterprises;
- (e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character, for the enterprise.

4. A person—other than an agent of an independent status to whom paragraph 5 applies—acting in a Contracting State on behalf of an enterprise of the other Contracting State shall be deemed to be a permanent establishment in the first-mentioned State if:

- (a) he has, and habitually exercises in the State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or
- (b) he maintains in that State a stock of goods or merchandise from which he regularly fulfils orders on behalf of the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However where the activities of such an agent are devoted wholly or mainly to that enterprise he shall not be considered an agent of an independent status within the meaning of this paragraph.

6. 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.

7. An insurance enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it collects premiums or insures risks in that other State through an employee or through a representative who is not an agent of an independent status within the meaning of paragraph 5.

#### ARTICLE VI

##### *Income from Immovable Property*

1. Income from immovable property including income from agriculture or forestry may be taxed in the Contracting State in which such property is situated.

2. For the purposes of this Agreement, the term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The terms 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 and to profits from the alienation of such property.

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

#### ARTICLE VII

##### *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 or has carried 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. If an enterprise of a Contracting State which has a permanent establishment in the other Contracting State sells goods or merchandise of the same or similar kind as those sold by the permanent establishment, or renders services of the same or similar kind as those

rendered by the permanent establishment, the profits of such sales or services may be attributed to the permanent establishment unless they are unrelated to the activities of the permanent establishment.

3. Subject to the provisions of paragraph 4, 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.

4. In the determination of the profits of a permanent establishment, there shall be allowed those deductible expenses which are incurred for the purposes of the permanent establishment including executive and general administrative expenses, whether incurred in the State in which the permanent establishment is situated or elsewhere.

5. Insofar as it has been customary in a Contracting State according to its law, 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 3 shall preclude that 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 of this Article.

6. 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.

7. For the purpose 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.

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

#### ARTICLE VIII

##### *Shipping and Air Transport*

1. Profits derived by an enterprise of a Contracting State from the operation of 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. Profits derived by an enterprise of a Contracting State from the operation of ships in international traffic may be taxed in both Contracting States according to the law of each Contracting State:

Provided that where such an enterprise derives profits from such operation in the other Contracting State, for the purposes of taxation in that other State—

(a) such profits shall be deemed to be an amount not exceeding six per cent of the full amount received by the enterprise on account of the carriage of passengers or freight embarked in that other State;

(b) the tax chargeable in that other State shall not exceed fifty per cent of the profits as calculated under the provisions of subparagraph (a).

3. The provisions of paragraph 1 of this Article shall also apply to a share of the profits from the operation of aircraft in international traffic derived by an enterprise of a Contracting State through participation in a pooled service, in a joint air transport operation or in an international operating agency.

#### ARTICLE IX

##### *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 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 profits on which an enterprise of a Contracting State has been charged to tax in the State are also included in the profits of an enterprise of the other Contracting State and taxed accordingly, and the profits so included are profits which would have accrued to that enterprise of the other State, if the conditions made between the enterprises had been those which would have been made between independent enterprises, then the first-mentioned State. In determining such an adjustment due regard shall be had to the other provisions of this Agreement in relation to the nature of the income.

3. A Contracting State shall not change the profits of an enterprise in the circumstances referred to in paragraph 1 after the expiry of the time limits provided in its national laws and, in any case, after five years from the end of the year in which the profits which would be subject to such change would have accrued to an enterprise of that State. This paragraph shall not apply in the case of fraud, wilful default or neglect.

#### ARTICLE X

##### *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 be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the law of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed—

(a) 15 per cent of the gross amount of the dividends if the recipient is a company which owns at least 10 per cent of the voting shares of the the company paying the dividends during the period of six months immediately preceding the date of payment of the dividends;

(b) 25 per cent of the gross amount of the dividends in all other cases.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights assimilated to income from shares or any other item which is deemed to be a dividend or distribution of a company by the taxation law of the Contracting State of which the company making the distribution is a resident.

4. The provisions of paragraph 2 shall not apply if the recipient of the dividends, being a resident of a Contracting State, carries on in the other Contracting State of which the company paying the dividends is a resident, a trade or business through a permanent establishment situated therein, or performs in that other State professional services from a fixed base situated therein, and the holding by virtue of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article VII or Article XV, as the case may be, shall apply.

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

6. Notwithstanding any provision of this Agreement—

(a) a company which is a resident of Kenya and which has a permanent establishment in Canada shall, in accordance with the provisions of Canadian law, remain subject to the additional tax on companies other than Canadian corporations, but the rate of such tax shall not exceed 15 per cent;

(b) a company which is a resident of Canada and which has a permanent establishment in Kenya shall remain subject to an additional rate of tax in accordance with the provisions of Kenyan law, but such additional rate shall not exceed 7.5 per cent.

## ARTICLE XI

*Interest*

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

2. However, such interest may be taxed in the Contracting State in which it arises, and according to the law of that State; but the tax so charged shall, provided that the interest is taxable in the other Contracting State, not exceed 15 per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State and paid to the government of the other Contracting State, political subdivision or local authority thereof, the Central Bank of that other Contracting State, or any agency wholly owned by that government, political subdivision or local authority which is exempt from tax in that other State shall be exempt from tax in the first-mentioned Contracting State. The competent authorities of the Contracting States may ~~be~~ determined by mutual agreement any other governmental institution or organization to which this paragraph applies.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds, or debentures, as well as income assimilated to income from money lent by the taxation law of the State in which the income arises. However, the term "interest" does not include income dealt with in Article X.

5. The provisions of paragraph 2 shall not apply if the recipient of the interest, being a resident of a Contracting State, carries on in the other Contracting State in which the interest arises a trade or business through a permanent establishment situated therein, or performs in that other State professional services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article VII or Article XV, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and that interest is borne by that permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

7. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the

amount of the interest paid, 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 recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

## ARTICLE XII

### *Royalties*

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

2. However, such royalties may be taxed in the Contracting State in which they arise, and according to the law of the State but the tax so charged shall, provided that the royalties are taxable in the other Contracting State, not exceed 15 per cent of the gross amount of the royalties.

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, patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience, and includes payments of any kind in respect of motion picture films and works on films or tapes for use in connection with radio or television.

4. The provisions of paragraph 2 shall not apply if the recipient of the royalties, being a resident of a Contracting State, carries on in the other Contracting State in which the royalties arise a trade or business through a permanent establishment situated therein, or performs in that other State professional services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article VII or Article XV, as the case may be, shall apply.

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

6. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the royalties paid, 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 recipient in the absence

of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

#### ARTICLE XIII

##### *Gains from the Alienation of Property*

1. Gains from the alienation of immovable property may be taxed in the Contracting State in which such property is situated.

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 or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (along or together with the whole enterprise) or of such a fixed base may be taxed in the other State. However, gains from the alienation of ships or aircraft operated in international traffic and movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the Contracting State in which such property is taxable according to paragraph 3 of Article XXIII.

3. Gains from the alienation of—

- (a) shares of a company, the property of which consists principally of immovable property situated in a Contracting State, and
- (b) an interest in a partnership or a trust, the property of which consists principally of immovable property situated in a Contracting State,

may be taxed in that State. For the purposes of this paragraph the term "immovable property" includes the share of a company referred to in subparagraph (a) or an interest in a partnership or a trust referred to in subparagraph (b).

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

5. The provisions of paragraph 4 shall not affect the right of either of the Contracting States to levy, according to its law, a tax on gains from the alienation of any property derived by an individual who is a resident of the other Contracting State and has been a resident of the first-mentioned State at any time during the ten years immediately preceding the alienation of the property.

#### ARTICLE XIV

##### *Management and Professional Fees*

1. Management or professional fees arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such management or professional fees may be taxed in the Contracting State in which they arise, and according to the law

of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the management or professional fees.

3. The term "management or professional fees" as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of managerial, technical, professional or consultancy nature.

4. The provisions of paragraph 2 shall not apply if the recipient of the management or professional fees, being a resident of a Contracting State, has in the other Contracting State in which the management or professional fees arise a permanent establishment with which the management or professional fees are effectively connected; in such a case the provisions of Article VII shall apply.

5. Management or professional fees shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the management or professional fees; whether he is a resident of that State, or not has in a Contracting State a permanent establishment in connection with which the liability to pay the management or professional fees was incurred and such management or professional fees are borne by such permanent establishment, then such management or professional fees shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

6. Where, owing to a special relationship between the payer and the beneficial owner of the management or professional fees or between both of them and some other person, the amount of the management or professional fees paid, having regard to the services 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 that case the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

#### ARTICLE XV

##### *Independent Personal Services*

1. Subject to the provisions of Article XIV, income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless—

(a) he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities, in which case so much of the income may be taxed in that other state as is attributable to that fixed base; or

(b) he is present in the other Contracting State for the purpose of performing his activities for a period or periods exceeding in the aggregate 183 days in the calendar year concerned, in which case so much of the income may be taxed in that other State as is attributable to the activities performed in that other State.

2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

#### ARTICLE XVI

##### *Dependent Personal Services*

1. Subject to the provisions of Articles XVII, XVIII, XIX and XX, 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 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 the calendar 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 or a fixed base which the employer has in the other State.

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

#### ARTICLE XVII

##### *Directors' Fees*

Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member which is a resident of the other Contracting State, may be taxed in that other State.

#### ARTICLE XVIII

##### *Artistes and Athletes*

1. Notwithstanding the provisions of Articles VII, XV and XVI, income derived by entertainers, such as theatre, motion picture, radio or television artistes, and musicians and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

2. Where income in respect of personal activities as such of an entertainer or athlete accrues not to that entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles VII, XV and XVI, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised.

3. The provisions of paragraphs 1 and 2 shall not apply—

- (a) to income derived from activities performed in a Contracting State by entertainers or athletes if the visit to that Contracting State is wholly or substantially supported by public funds of the other Contracting State, including any political subdivision, local authority or statutory body thereof; or
- (b) to a non-profit organization no part of the income of which was payable to, or was otherwise available for the personal benefit, of any proprietor, member or shareholder thereof.

#### ARTICLE XIX

##### *Pensions and Annuities*

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

2. Pensions arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in the State in which they arise, and according to the law of that State. However, in the case of periodic pension payments, the tax so charged shall not exceed 15 per cent of the gross amount of the payment.

3. Annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in the State in which they arise and according to the law of that State; but the tax so charged shall not exceed 15 per cent of the gross amount of the payment. However, this limitation does not apply to lump-sum payment arising on the surrender, cancellation, redemption, sale or other alienation of an annuity, or to payments of any kind under an income-averaging annuity contract.

4. 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.

#### ARTICLE XX

##### *Government Service*

1. (a) Remuneration, other than a pension, paid by a Contracting State or a political subdivision or a local authority thereof to any individual in respect of services rendered to that State or subdivision or local authority thereof shall be taxable only in that State.

(b) However, such remuneration shall be taxable only in the Contracting State of which the recipient is a resident if the services are rendered in that State and the recipient did not become a resident of the State solely for the purpose of performing the services.

2. The provisions of paragraph 1 shall not apply to remuneration in respect of services rendered in connection with any trade or business carried on by one of the Contracting States or a political subdivision or a local authority thereof.

ARTICLE XXI

*Students*

Payments which a student, apprentice or business trainee who is, or was immediately before visiting one of the Contracting States, a resident of the other Contracting State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that first-mentioned State, provided that such payments are made to him from sources outside that State.

ARTICLE XXII

*Income not Expressly Mentioned*

1. Subject to the provisions of paragraph 2 of this Article, items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that Contracting State.

2. However, if such income is derived by a resident of a Contracting State from sources in the other Contracting State, such income may also be taxed in the State in which it arises, and according to the law of that State.

ARTICLE XXIII

*Taxes on Capital*

1. Capital represented by immovable property may be taxed in the Contracting State in which such property is situated.

2. Capital represented by movable property forming part of the business property of a permanent establishment of an enterprise, or by movable property pertaining to a fixed base used for the performance of professional services, may be taxed in the Contracting State in which the permanent establishment or fixed base is situated.

3. Ships and aircraft operated by an enterprise of a Contracting State in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in that State.

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

ARTICLE XXIV

*Elimination of Double Taxation*

1. In the case of Canada, double taxation shall be avoided as follows:

(a) Subject to the existing provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent



modification of those provisions—which shall not affect the general principle hereof—and unless a greater deduction or relief is provided under the laws of Canada, tax payable in Kenya on profits, income or gains arising in Kenya shall be deducted from any Canadian tax payable in respect of such profits, income or gains,

- (b) Subject to the existing provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subsequent modification of those provisions—which shall not affect the general principle hereof—for the purpose of computing Canadian tax, a company resident in Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate resident in Kenya.

2. In the case of Kenya, double taxation shall be avoided as follows:

Subject to the provisions of the law of Kenya regarding the allowances as a credit to a resident of Kenya against Kenyan tax of tax payable in a territory outside Kenya, tax payable under the laws of Canada, whether directly or by deduction, in respect of profits, income or gains, from sources within Canada shall be allowed as a credit against any Kenyan tax payable in respect of such profits, income or gains, provided that such credit shall not exceed the Kenyan tax, computed before allowing any such credit, which is appropriate to the income derived from Canada.

3. For the purposes of paragraph 1 (a), tax payable in Kenya by a resident of Canada—

- (a) in respect of profits attributable to a trade or business carried on by it in Kenya;

shall be deemed to include any amount which would have been payable as Kenyan tax for any year but for an exemption from, or reduction of, tax granted for that year or any part thereof under—

- (b) any of the following provisions, that is to say—

- (i) paragraph 24 of the Second Schedule to the Income Tax Act, 1973;
- (ii) paragraph 2 (b) of the Third Schedule to the Income Tax Act, 1973;

so far as they were in force on, and have not been modified since, the date of signature of this Agreement, or have been modified only in minor respects so as not to affect their general character; and except to the extent that any of the said provisions has the effect of exempting or relieving a source of income for a period in excess of ten years;

- (c) any other provision which may subsequently be made granting an exemption or reduction of tax which is agreed by the competent authorities of the Contracting States to be of a

substantially similar character, if it has not been modified thereafter or has been modified only in minor respects so as not to affect its general character.

4. Where a resident of Kenya is exempt from tax in Kenya in respect of income derived from Canada, then Kenya may, in calculating tax on the remaining income of that person, apply the rate of tax which would have been applicable if the income exempted from tax had not been so exempted.

5. For the purposes of this Article, profits, income or gains of a resident of a Contracting State which are taxed in the other Contracting State in accordance with this Agreement shall be deemed to arise from sources in that other State.

#### ARTICLE XXV

##### *Non-Discrimination*

1. The 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 are or may be subjected.

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.

3. Nothing in this Article shall 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.

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, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of a third State, are or may be subjected.

5. In this article, the term "taxation" means taxes which are the subject of this Agreement.

#### ARTICLE XXVI

##### *Mutual Agreement Procedure*

1. Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may,

without prejudice to the remedies provided by the national laws of those States, address to the competent authority of the Contracting State of which he is a resident an application in writing stating the grounds for claiming the revision of such taxation. To be admissible, the said application must be submitted within two years from the first notification of the action which gives rise to taxation not in accordance with the Agreement.

2. The competent authority referred to in paragraph 1 shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate 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 not in accordance with the Agreement.

3. A Contracting State shall not, after the expiry of the time limits provided in its national laws and, in any case, after five years from the end of the taxable period in which the income concerned has accrued, increase the tax base of a resident of either of the Contracting States by including therein items of income which have also been charged to tax in the other Contracting State. This paragraph shall not apply in the case of fraud, wilful default or neglect.

4. 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 Agreement. In particular, the competent authorities of the Contracting States may consult together to endeavour to agree—

(a) to the same attribution of profits to a resident of a Contracting State and its permanent establishment situated in the other Contracting State;

(b) to the same allocation of income between a resident of a Contracting State and any associated person provided for in Article IX.

5. The competent authorities of the Contracting States may consult together for the elimination of double taxation in cases not provided for in the Agreement.

#### ARTICLE XXVIII

##### *Exchange of Information*

1. The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Agreement and of the domestic laws of the Contracting States concerning taxes covered by this Agreement insofar as the taxation thereunder is in accordance with this Agreement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of this Agreement.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation—

- (a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;
- (b) to supply particulars which are 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 XXVIII

##### *Diplomatic and Consular Officials*

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

2. This Agreement shall not apply to international organizations, to organs or officials thereof and to persons who are members of a diplomatic, consular or permanent mission of a third State, being present in a Contracting State and who are not liable in either Contracting State to the same obligations in relation to tax on their total world income as are residents thereof.

#### ARTICLE XXIX

##### *Miscellaneous Rules*

1. Nothing in this Agreement shall be construed as preventing Canada from imposing a tax on amounts included in the income of a resident of Canada according to section 91 of the Canadian Income Tax Act.

2. The competent authorities of the Contracting States may communicate with each other directly for the purpose of applying this Agreement.

#### ARTICLE XXX

##### *Entry into Force*

Each of the Contracting States shall take all measures necessary to give this Agreement the force of law within its jurisdiction and each shall notify the other of the completion of such measures. This Agreement shall enter into force on the date on which the later notification is made and shall thereupon have effect—

- (a) in respect of tax withheld at the source on amounts paid or credited to non-residents on or after the first day of January in the calendar year in which the Agreement enters into force; and

- (b) in respect of other tax for any year of income or any taxation year beginning on or after the first day of January in the calendar year in which the Agreement enters into force.

#### ARTICLE XXXI

##### *Termination*

This Agreement shall continue in effect indefinitely but either Contracting State may, on or before 30th June in any calendar year beginning after the expiration of five years from the date of its entry into force, give notice of termination to the other Contracting State and in such event this Agreement shall cease to have effect--

- (a) in respect of tax withheld at the source on amounts paid or credited to non-residents on or after the first day of January in the calendar year next following that in which the notice is given; and
- (b) in respect of other tax for any year of income or any taxation year beginning on or after the first day of January in the calendar year next following that in which the notice is given.

##### *Protocol*

At the moment of signing the Agreement 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 Canada and the Republic of Kenya, the following provisions shall form an integral part of the Agreement:

1. With reference to paragraph 4 of Article VII, it is understood that no deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

2. With reference to paragraph 2 of Article X of this Agreement, it is understood that:

- (a) If a Convention or an Agreement for the Avoidance of Double Taxation comes into force after the date of signature of this Agreement, between Kenya and one of the countries specified in subparagraph (b), wherein provisions are made for a higher rate of Kenyan tax on dividends from substantial holdings

- than that provided for in subparagraph 2 (a) of Article X, then the provisions of subparagraphs (c) and (d) shall apply instead of the provisions of paragraph 2 of Article X of this Agreement.
- (b) For the purposes of subparagraph (a) the countries specified are Belgium, the Federal Republic of Germany, France, Italy, Japan, the United Kingdom and the United States.
- (c) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may also be taxed in the Contracting State of which the company paying the dividends is a resident; and according to the law of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed the lesser of (i) 20 per cent of the gross amount of the dividends, and (ii) the rate specified in subparagraph (d).
- (d) For the purposes of subparagraph (c) the rate specified is the highest rate of Kenyan tax applicable to dividends from substantial holdings under the provisions of any Convention or Agreement referred to in subparagraph (a).

Dated the 24th March, 1987.

GEORGE SAITOTI,  
*Minister for Finance.*