SECOND PROTOCOL TO THE AGREEMENT BETWEEN NEW ZEALAND AND THE REPUBLIC OF AUSTRIA WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL, DONE AT VIENNA ON 21st SEPTEMBER 2006

New Zealand and the Republic of Austria,

Desiring to amend the Agreement between New Zealand and the Republic of Austria with respect to Taxes on Income and on Capital (hereinafter referred to as "the Agreement"), and its first Protocol, done at Vienna on 21 September 2006,

Have agreed as follows:

Article I

The title of the Agreement shall be replaced by the following:

"AGREEMENT BETWEEN THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA FOR THE ELIMINATION OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL AND THE PREVENTION OF TAX EVASION AND AVOIDANCE"

Article II

The Preamble to the Agreement shall be deleted and replaced by the following:

"New Zealand and the Republic of Austria,

Intending to conclude an Agreement for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement for the indirect benefit of residents of third States),

Have agreed as follows,"

Article III

1. The existing paragraph of Article 1 (Persons Covered) of the Agreement shall be numbered as paragraph 1.

2. The following new paragraph 2 shall be added to Article 1 (Persons Covered) of the Agreement:

"**(2)** This Agreement shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 2 of Article 9, Articles 18, 19, 22, 23, 24 and 26."

Article IV

1. The following new subparagraph k) shall be added to paragraph 1 of Article 3 (General Definitions) of the Agreement:

"k) the term "recognised stock exchange" means:

(i) the Wiener Börse AG and any other Austrian stock exchange recognised as such under the laws of Austria;

(ii) the securities markets (other than the New Zealand Debt Market) operated by the New Zealand Exchange Limited and any other New Zealand securities exchange recognised under the laws of New Zealand; and

(iii) any other stock exchange agreed upon by the competent authorities."

2. The existing paragraphs 2 and 3 of Article 3 (General Definitions) of the Agreement shall be deleted and the following new paragraph 2 shall be inserted into Article 3 (General Definitions) of the Agreement:

"**(2)** As regards the application of the Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 24, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Agreement 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 V

The existing paragraph 3 of Article 4 (Resident) of the Agreement shall be deleted and replaced by the following:

"**(3)** Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated. In cases of doubt, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement in accordance with Article 24 the State in which the person's place of effective management is exercised, and in doing so shall take into account all relevant factors including the place where it is incorporated or otherwise constituted. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Agreement except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States."

Article VI

1. Existing subparagraphs e) and f) of paragraph 5 of Article 5 (Permanent Establishment) of the Agreement shall be deleted and replaced by the following:

"e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e),

provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character."

2. Existing paragraph 6 of Article 5 (Permanent Establishment) of the Agreement shall be deleted and replaced by the following:

"**(6)** Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 7, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:

a) in the name of the enterprise,

b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or

c) for the provision of services by that 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 5 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph."

3. Existing paragraph 7 of Article 5 (Permanent Establishment) of the Agreement shall be deleted and replaced by the following:

"**(7)** Paragraph 6 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise."

4. The following new paragraph 9 shall be added to Article 5 (Permanent Establishment) of the Agreement:

"**(9)** For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 percent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises."

Article VII

The following new paragraph 3 shall be added to Article 9 (Associated Enterprises) of the Agreement:

"**(3)** A Contracting State shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but by reason of the conditions referred to in paragraph 1 have not so accrued, after ten years from the end of the taxable year in which the profits would have accrued to the enterprise. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default."

Article VIII

1. Existing paragraph 2 of Article 10 (Dividends) of the Agreement shall be deleted and replaced by the following:

"**(2)** However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State 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:

a) 5 per cent of the gross amount of the dividends if the beneficial owner of those dividends is a company which holds directly:
   (i) in the case of Austria, at least 10 per cent of the capital of the company, and
   (ii) in the case of New Zealand, at least 10 per cent of the voting power in the company

   paying the dividends throughout a 365-day period that includes the day of the payment of the dividend; and

b) 15 per cent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid."

2. Existing paragraph 3 of Article 10 (Dividends) of the Agreement shall be renumbered as paragraph 4 and the following shall be inserted as new paragraph 3:

"**(3)** Notwithstanding the provisions of paragraph 2 of this Article, dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident if the beneficial owner of the dividends is a company that is a resident of the other Contracting State that has owned, directly or indirectly through one or more residents of either Contracting State, shares representing 80 per cent or more of the voting power of the company paying the dividends for a 12 month period ending on the date the dividend is declared and the company that is the beneficial owner of the dividends:

a) has its principal class of shares listed on a recognised stock exchange specified in subsubparagraph k)(i) or (ii) of paragraph 1 of Article 3 and is regularly traded on one or more recognised stock exchanges;

b) is owned directly or indirectly by one or more companies:

(i) whose principal class of shares is listed on a recognised stock exchange specified in subsubparagraph k)(i) or (ii) of paragraph 1 of Article 3 and is regularly traded on one or more recognised stock exchanges; or

(ii) every one of which, if they owned directly the holding in respect of which the dividends are paid, would be entitled to equivalent benefits in respect of such dividends under a tax treaty between the State of which that company is a resident and the Contracting State of which the company paying the dividends is a resident; or

c) does not meet the requirements of subparagraphs a) or b) of this paragraph but the competent authority of the first-mentioned Contracting State determines that paragraph 2 of Article 26A does not apply. The competent authority of the first-mentioned Contracting State shall consult the competent authority of the other Contracting State before refusing to grant benefits of this Agreement under this subparagraph."

3. Existing paragraph 4 of Article 10 (Dividends) of the Agreement shall be renumbered as paragraph 5 and the first sentence of that paragraph shall be deleted and replaced by the following:

"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."

4. Existing paragraph 5 of Article 10 (Dividends) of the Agreement shall be renumbered as paragraph 6.

Article IX

Existing paragraph 3 of Article 11 (Interest) of the Agreement shall be deleted and replaced by the following:

"**(3)** Notwithstanding the provisions of paragraph 2, interest shall be taxable only in the Contracting State of which the recipient is a resident, if such recipient is the beneficial owner of the interest and if such interest is paid:

a) to the Government of the Republic of Austria or to the Government of New Zealand;

b) to the Oesterreichische Nationalbank or the Reserve Bank of New Zealand;

c) in respect of a loan made, guaranteed or insured, or any other debt-claim or credit guaranteed or insured, by

(i) in the case of Austria, the Oesterreichische Kontrollbank Aktiengesellschaft or the Oesterreichische Entwicklungsbank Aktiengesellschaft;

(ii) in the case of New Zealand, the New Zealand Export Credit Office."

Article X

Subparagraph b) of paragraph 3 of Article 12 (Royalties) of the Agreement shall be deleted. Subparagraph c) of paragraph 3 of Article 12 (Royalties) of the Agreement shall be renumbered as subparagraph b).

Article XI

Existing paragraph 4 of Article 13 (Alienation of Property) of the Agreement shall be deleted and replaced by the following:

"**(4)** Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State."

Article XII

The following new paragraph 5 shall be added to Article 24 (Mutual Agreement Procedure) of the Agreement:

"**(5)** Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States

have resulted for that person in taxation not in accordance with the provisions of this Agreement, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. If, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting States, the arbitration process shall terminate. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph."

Article XIII

1. The following shall be added to paragraph 2 of Article 25 (Exchange of Information) of the Agreement immediately following the third sentence:

"Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use."

2. The following new paragraph 5 shall be added to Article 25 (Exchange of Information) of the Agreement:

"**(5)** In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."

Article XIV

The following new Article 25A shall be added to the Agreement immediately following existing Article 25 (Exchange of Information) of the Agreement:

"**Article 25A**
ASSISTANCE IN THE COLLECTION OF TAXES

(1) The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

(2) The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Agreement or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

(3) When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

(4) When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.

(5) Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

(6) Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

(7) Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be

a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or
b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection

the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.

(8) In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
b) to carry out measures which would be contrary to public policy (ordre public);
c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;
d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State."

Article XV

The following new Article 26A shall be added to the Agreement immediately following existing Article 26 (Members of Diplomatic Missions and Consular Posts) of the Agreement:

"**Article 26A**
ENTITLEMENT TO BENEFITS

(1) a) Where

(i) an enterprise of a Contracting State derives income from the other Contracting State and the first-mentioned State treats such income as attributable to a permanent establishment of the enterprise situated in a third jurisdiction, and

(ii) the profits attributable to that permanent establishment are exempt from tax in the first-mentioned State,

the benefits of this Agreement shall not apply to any item of income on which the tax in the third jurisdiction is less than the lower of 15 per cent of the amount of that item of income and 60 per cent of the tax that would be imposed in the first-mentioned State on that item of income if that permanent establishment were situated in the first-mentioned State. In such a case any income to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State, notwithstanding any other provisions of the Agreement.

b) The preceding provisions of this paragraph shall not apply if the income derived from the other State emanates from, or is incidental to, the active conduct of a business carried on through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively).

c) If benefits under this Agreement are denied pursuant to the preceding provisions of this paragraph with respect to an item of income derived by a resident of a Contracting State, the competent authority of the other Contracting State may, nevertheless, grant these benefits with respect to that item of income if, in response to a request by such resident, such competent authority determines that granting such benefits is justified in light of the reasons such resident did not satisfy the requirements of this paragraph

(such as the existence of losses). The competent authority of the Contracting State to which a request has been made under the preceding sentence shall consult with the competent authority of the other Contracting State before either granting or denying the request.

(2) Notwithstanding the other provisions of this Agreement, a benefit under this Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement."

Article XVI

1. A new paragraph 2a shall be inserted into the Protocol to the Agreement immediately following existing paragraph 2:

"**2a**: With reference to paragraph 6 of Article 5:

Paragraph 6 of Article 5 of the Agreement has been amended in order to implement the new version of paragraph 5 of Article 5 of the 2017 OECD Model Tax Convention on Income and on Capital. It has always been Austria's position and administrative practice that, in accordance with para 32.1. of the 2014 OECD Model Commentary on Article 5, a dependent agent permanent establishment may be constituted if a person has the authority to conclude contracts in an economic sense and exercises this authority in the other Contracting State. Therefore, the amendment of paragraph 6 of Article 5 of the Agreement is considered to be a clarification of Austria's existing interpretation of paragraph 6 Article 5 of the Agreement."

2. Existing paragraph 5 of the Protocol to the Agreement shall be deleted and replaced by the following:

"**5.** With reference to Articles 10, 11 and 12:

If, in an Agreement for the avoidance of double taxation that is made after the date of signature of this Agreement, between New Zealand and a third State, being a State that is a Member State of the European Union, New Zealand agrees to limit the rate of tax:

(a) on dividends paid by a company which is a resident of New Zealand for the purposes of New Zealand tax to which a company that is a resident of the third State is entitled, to a rate less than that provided in paragraphs 2 and 3 of Article 10; or
(b) on interest arising in New Zealand to which a resident of the third State is entitled, to a rate less than that provided in paragraph 2 of Article 11; or
(c) on royalties arising in New Zealand to which a resident of the third State is entitled, to a rate less than that provided in paragraph 2 of Article 12,

the Government of New Zealand shall inform the Government of Austria in writing within six months after the entry into force of the other Agreement through the diplomatic channel and shall enter into negotiations with the Government of Austria to review the relevant provisions with a view to providing the same treatment for Austria as that provided for the third State."

3. Existing paragraph 11 of the Protocol to the Agreement shall be deleted and replaced by the following:

"**11.** With reference to Article 24:

With respect to paragraph 1 of Article 24, it is understood that the Contracting States will notify each other in cases where the competent authority to which the case according to paragraph 1 of Article 24 was presented does not consider the taxpayer's objection to be justified."

4. Existing paragraph 12 of the Protocol to the Agreement shall be deleted and replaced by the following:

"**12.** With reference to Article 24:

Notwithstanding paragraph 5 of Article 24 a case may not be submitted to arbitration if:

(a) in the case of New Zealand:

(i) the case involves the application of New Zealand's general anti-avoidance rule contained in section BG 1 of the Income Tax Act 2007, including any subsequent provisions replacing, amending or updating this anti-avoidance rule. New Zealand shall notify Austria through diplomatic channels of any such subsequent provisions;

(ii) the case involves the application of New Zealand's permanent establishment anti-avoidance rule contained in section GB 54 of the Income Tax Act 2007, including any subsequent provisions replacing, amending or updating this anti-avoidance rule. New Zealand shall notify Austria through diplomatic channels of any such subsequent provisions; and

(b) in the case of Austria, the case involves the application of its domestic general anti-avoidance rules contained in the Federal Fiscal Code ("Bundesabgabenordnung"), in particular its sections 21 and 22. Any subsequent provisions replacing, amending or updating these anti-avoidance rules would also be comprehended. Austria shall notify New Zealand through diplomatic channels any such subsequent provisions."

5. Existing paragraph 13 of the Protocol to the Agreement shall be re-numbered as paragraph 14. A new paragraph 13 shall be inserted into the Protocol:

"**13.** With reference to Article 25:

(a) The competent authority of the applicant State shall provide the following information to the competent authority of the requested State when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:
   (i) the identity of the person under examination or investigation;
   (ii) a statement of the information sought including its nature and the form in which the applicant State wishes to receive the information from the requested State;
   (iii) the tax purpose for which the information is sought;
   (iv) grounds for believing that the information requested is held in the requested State or is in the possession or control of a person within the jurisdiction of the requested State;
   (v) to the extent known, the name and address of any person believed to be in possession of the requested information;
   (vi) a statement that the applicant State has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

(b) It is understood that the standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer."

Article XVII

1. Each of the Contracting States shall notify the other through diplomatic channels of the completion of the procedures required by its law for the bringing into force of this Protocol.

2. The Protocol shall enter into force on the date of the later of these notifications and its provisions shall have effect:

(a) in the case of New Zealand:

   (i) in respect of withholding tax on income, profits or gains derived by a non-resident, for amounts paid or credited on or after the first day of the second month next following the date on which the Protocol enters into force;

   (ii) in respect of other New Zealand tax, for any income year beginning on or after 1 April next following the date on which the Protocol enters into force;

(b) in the case of Austria:

   (i) in respect of withholding tax on income, profits or gains derived by a non-resident, for amounts paid or credited on or after the first day of the second month next following the date on which the Protocol enters into force;

   (ii) in respect of other taxes, for any income year beginning on or after 1 January next following the date on which the Protocol enters into force.

3. Notwithstanding the provisions of subparagraphs (a) and (b) of paragraph 2, the amendments made by Article XII and XIV shall have effect from the date of entry into force of this Protocol, without regard to the taxable period to which the matter relates.

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

Done in duplicate at Vienna this 12th day of September 2023 in the German and English languages, both being equally authentic. In case of divergence of interpretation, the English text shall prevail.

For the Republic of Austria	For New Zealand
Gregor Kössler m. p.	Dell Higgie m. p.

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