



# **International treaty examination of the Agreement between New Zealand and the Republic of Austria with Respect to Taxes on Income and on Capital**

Report of the Finance and Expenditure  
Committee

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The Finance and Expenditure Committee has conducted an international treaty examination of the Agreement between New Zealand and the Republic of Austria with Respect to Taxes on Income and on Capital and has no matters to bring to the attention of the House.

The national interest analysis for the agreement is appended to this report.

Shane Jones  
Chairperson

## Appendix

### **National interest analysis—Agreement between New Zealand and the Republic of Austria with Respect to Taxes on Income and on Capital**

#### **Date of proposed binding treaty action**

- 1 The Agreement between New Zealand and the Republic of Austria with Respect to Taxes on Income and on Capital, with Protocol (the Austrian DTA)—attached as Annex 1 was signed at Vienna on 21 September 2006. Subsequent to the successful completion of the parliamentary treaty examination process, it is proposed that the Austrian DTA would be incorporated into domestic legislation through an Order in Council, and would enter into force by way of an exchange of instruments of ratification.

#### **Reasons for New Zealand to become party to the Austrian DTA**

- 2 New Zealand currently has 32 double tax agreements (DTAs) in force. They are primarily aimed at reducing tax impediments to cross-border trade and investment, but also help tax administrations to detect and prevent tax evasion.
- 3 DTAs give residents of both countries who are considering entering into cross-border trade and investment greater certainty of tax treatment. DTAs also contain a mutual agreement procedure for resolving disputes or issues that might arise in relation to the DTA. DTAs assist tax administrations in the prevention of fiscal evasion by providing for the exchange of information on tax matters between two countries.
- 4 Negotiations were entered into with Austria, after the Austrian Federal Minister approached New Zealand requesting a DTA in light of Austrian oil company OMV AG's acquisition of significant shares in New Zealand oil and gas fields through its affiliated company OMV New Zealand Ltd.
- 5 The level of trade is also a major factor in deciding with which countries to negotiate a DTA. There is a growing trading relationship between Austria and New Zealand, even though current levels are modest. In the year ending December 2005 New Zealand exports to Austria totalled NZ\$18.4 million while imports from Austria totalled NZ\$161.6 million. This Austrian DTA discussed represents a positive outcome for New Zealand.

#### **Advantages and disadvantages to New Zealand of the Austrian DTA entering into force**

- 6 The advantages to New Zealand of the Austrian DTA entering into force are:

it will remove tax impediments to cross-border transactions between New Zealand and Austria—in particular, it shares the cost of relieving the double taxation of income. The Austrian DTA will regulate how transactions should be taxed between the two countries so the income is effectively taxed only once:

- it will generally reduce withholding taxes on dividends, interest and royalties to 15 percent; 10 percent; and 10 percent; respectively, and will exempt many short-term activities of individuals and businesses in the host country
- when both countries are permitted to impose tax, it will ensure that the country of residence allows a credit or exemption for the tax paid in the country of source
- the Austrian DTA will provide taxpayers with greater certainty of tax treatment, along with a mutual agreement procedure for resolving disputed issues that may arise in relation to the DTA
- the Austrian DTA will also assist the tax administrations of both countries by facilitating the exchange of information relating to taxes for the prevention of avoidance and evasion.

- 7 One disadvantage of the Austrian DTA is that New Zealand may forgo some revenue because of the reduction in levels of New Zealand tax and the allocation of some taxing rights to Austria. Although, as explained in the discussion under “Costs” (below), the reciprocal nature of the Austrian DTA means that these revenue costs will be offset by increases in revenue where taxing rights are allocated to New Zealand and where Austrian tax is correspondingly reduced under the Austrian DTA.
- 8 The requirement for New Zealand to provide Austria with information on tax matters under the Austrian DTA’s exchange of information provisions may be seen as a disadvantage. However, again, the ability to request information is reciprocal, and New Zealand’s experience with exchange of information in relation to its approximately 30 other DTAs is predominantly positive; the benefit gained from being able to request information from the other country more than offsets the administrative burden of having to provide information pursuant to its requests.
- 9 It is important to note that the Organisation of Economic Cooperation and Development (OECD) has adopted a new wider formulation for exchange of information, which New Zealand supports. Austria has a strong preference for bank secrecy rules. Therefore, Austria does not support the new OECD formulation. However, a provision has been included in the Protocol to the Austrian DTA that states that if Austria ever agrees to the new formulation they must, without undue delay, enter into negotiations with New Zealand with a view to providing the same treatment.
- 10 On balance, it is in New Zealand’s interest to conclude a DTA with Austria. It is expected to enhance cross-border trade and investment and will assist the New Zealand Government in the prevention of fiscal evasion.

## Obligations

- 11 The Austrian DTA does not impose requirements on taxpayers. The obligations it imposes are on the Contracting States, restricting their taxing rights under domestic law on a reciprocal basis. A DTA can only reduce tax already imposed under domestic law; it cannot impose tax.
- 12 New Zealand taxes its residents based on their New Zealand and worldwide income. Non-residents are taxed only on their New Zealand-sourced income. Austria has a similar system. This gives rise to the possibility that cross-border flows of income will be subject to double taxation. The Austrian DTA provides a way of allocating taxing rights as between New Zealand and Austria. Under this Austrian DTA, New Zealand and Austria will be required to comply with the following rules when imposing tax on residents of either country:
- income from immovable property will generally be taxed in the country where the property is situated (Article 6 refers)
  - business profits will generally be taxable only in the country where the business is resident. However, the profit attributable to a permanent establishment situated in the other country may be taxed in that country. A permanent establishment generally exists in the country in question when there is a fixed place of business where the business of an enterprise is carried on (Article 7 refers)
  - profits of an enterprise of a country from the operation of ships or aircraft shall be taxable only in that country, subject to various rules applicable in specific situations (Article 8 refers)
  - dividends paid by a company of one country to a resident of the other country may be taxed in that other country. The source country may also tax the dividend up to a maximum of 15 percent on the gross amount of the dividends (Article 10 refers)
  - interest may generally be taxed in both countries. However, the country in which the interest arises must not impose tax in excess of 10 percent if the interest is paid to a resident of the other country (Article 11 refers)
  - royalties may generally be taxed in both countries. However, the country in which the royalties arise must not impose tax in excess of 10 percent of the royalties if they are paid to a resident of the other country (Article 12 refers)
  - specific rules apply to the taxation of income, profits or gains derived from the sale of property. In the case of immovable property the profits are taxable where the property is situated (Article 13 refers)
  - income from employment will be taxable only in the country where the employee is resident, unless the employment is performed in the other country. In this case, the country where the employment is performed may also tax the

income, if the employee is present for at least 183 days and various conditions are met (Article 14 refers)

- directors' fees may be taxed in the country where the relevant company is resident (Article 15 refers)
- entertainers and sportspersons may be taxed in the country in which the activities of the sportsperson or entertainer take place (Article 16 refers)
- pensions and annuities are only taxable in the country where the recipient is resident. Alimony or maintenance payments are only taxable in the country where the payment was made (Article 17 refers)
- salaries and wages for services to a Government of one country are generally exempt from tax in the other country (Article 18 refers)
- students are generally not taxed on payments received from outside the country when those payments are for the maintenance and education of the student (Article 19 refers)
- capital can generally be taxed in the country where the property is situated (Article 21 refers)
- New Zealand has to comply with the various administrative requirements of the Austrian DTA that make its operation possible. These include, in particular, the elimination of double taxation by exempting or giving credits for overseas tax paid in certain situations; not enacting tax laws that discriminate against residents of Austria (vis-à-vis residents of any other state); complying with the mutual agreement procedures set out in the Austrian DTA; and complying with the exchange of information procedures (Articles 22, 23, 24 and 25 refer).

### **Economic, social, cultural and environmental effects**

- 13 No social, cultural or environmental effects are anticipated. Any economic effects are expected to be favourable, as noted above.

### **Costs**

- 14 New Zealand may forgo some revenue from the limitation of our taxing rights in relation to income flows between New Zealand and Austria and which we are currently able to tax under our domestic laws. This revenue cost could include, for instance, tax forgone in relation to short-term activities of Austrian residents in New Zealand, which the Austrian DTA will exempt. It could also include tax forgone on dividends, interest and royalties paid by New Zealand residents to the residents of Austria in respect of which the Austrian DTA will lower withholding rates.
- 15 Austria will also be similarly constrained from taxing certain income flows between Austria and New Zealand, and this reduced Austrian tax will often flow through to the New Zealand tax base through a reduction in credits for foreign tax paid. It is

likely that these factors will offset each other to some extent over time. But, to the extent that the cost to the New Zealand revenue is not fully offset by the reduction in creditable Austrian tax, we would expect that the economic benefits of the Austria DTA will outweigh these costs.

### **Future protocols and amendments**

- 16 No future protocols are anticipated. However, if the need arose to amend the DTA, this would be done by way of a Protocol.

### **Implementation**

- 17 Subject to the successful completion of the parliamentary treaty examination process, this Austrian DTA will be implemented domestically by Order in Council in accordance with section BH 1(3) of the Income Tax Act 2004.
- 18 The Austrian DTA will be implemented by way of an overriding treaty regulation. Section BH 1 of the Income Tax Act 2004 enables DTAs to be given effect by Order in Council. It also provides that the DTA will override the Income Tax Act 2004, the Tax Administration Act 1994, any other Inland Revenue Act, the Official Information Act 1982, the Privacy Act 1993 in relation to income tax, unpaid tax and the exchange of information relating to a tax. This override is necessary to give effect to the terms of the DTA.

### **Consultation**

The Ministry of Foreign Affairs and Trade and the Treasury have been consulted and concur with the terms of the Austrian DTA. No private sector consultation was entered into.

### **Withdrawal or denunciation**

Article 28 of the Austrian DTA provides that either Contracting State may terminate the DTA by giving notice, through diplomatic channels, of termination on or before 30 June in any calendar year beginning after the expiration of five years from the date of its entry into force.

**Annex 1****AGREEMENT BETWEEN NEW ZEALAND AND THE REPUBLIC OF AUSTRIA WITH  
RESPECT TO TAXES ON INCOME AND ON CAPITAL**

New Zealand and the Republic of Austria, desiring to conclude an Agreement with respect to taxes on income and on capital,

Have agreed as follows:

Article 1

**PERSONS COVERED**

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

Article 2

**TAXES COVERED**

- (1) This Agreement shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions, 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 Austria:
    - i. the income tax (die Einkommensteuer);
    - ii. the corporation tax (die Körperschaftsteuer);
    - iii. the land tax (die Grundsteuer);
    - iv. the tax on agricultural and forestry enterprises (die Abgabe von land- und forstwirtschaftlichen Betrieben);
    - v. the tax on the value of vacant plots (die Abgabe vom Bodenwert bei unbebauten Grundstücken);

- b) in New Zealand:  
  
the income tax.
- (4) The Agreement shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other within a reasonable period of time of any significant changes that have been made in their taxation laws.

### Article 3

#### **GENERAL DEFINITIONS**

- (1) For the purposes of this Agreement, unless the context otherwise requires:
  - a) the term “person” includes an individual, a company and any other body of persons;
  - b) the term “company” means any body corporate or any entity that is treated as a body corporate for tax purposes;
  - c) the term “enterprise” applies to the carrying on of any business;
  - d) 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;
  - e) 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;
  - f) the term “competent authority” means:
    - (i) in Austria: the Federal Minister of Finance or an authorised representative;
    - (ii) in New Zealand: the Commissioner of Inland Revenue or an authorised representative;
  - g) the term “national”, in relation to a Contracting State, means:
    - (i) any individual possessing the nationality or citizenship of that Contracting State; and
    - (ii) any legal person, partnership or association deriving its status as such from the laws in force in that Contracting State;

- h) the term “business” includes the performance of professional services and of other activities of an independent character;
  - i) the terms “a Contracting State” and “the other Contracting State” mean Austria or New Zealand as the context requires;
  - j)
    - (i) the term “Austria” means the Republic of Austria;
    - (ii) the term “New Zealand” means the territory of New Zealand but does not include Tokelau or the Associated Self Governing States of the Cook Islands and Niue; it also includes any area beyond the territorial sea designated under New Zealand legislation and in accordance with international law as an area in which New Zealand may exercise sovereign rights with respect to natural resources.
- (2) For the purposes of Articles 10, 11 and 12, a trustee subject to tax in a Contracting State in respect of dividends, interest or royalties shall be deemed to be the beneficial owner of that interest or those dividends or royalties.
- (3) 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, 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 4

#### **RESIDENT**

- (1) For the purposes of this Agreement, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his or her 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.
- (2) Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then their status shall be determined as follows:
- a) the individual shall be deemed to be a resident only 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 only of the State with which the individual's personal and economic relations are closer (centre of vital interests);
  - b) if the State in which the individual has the centre of vital interests cannot be determined, or if a permanent home is not available to the individual in

either State, the individual shall be deemed to be a resident only 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 only 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 only of the State in which its place of effective management is situated.

#### Article 5

#### **PERMANENT ESTABLISHMENT**

- (1) For the purposes of this Agreement, 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, or a construction, installation or assembly project, or supervisory activities in connection with that building site or construction, installation or assembly project, constitutes a permanent establishment if it lasts more than twelve months.
- (4) An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if:
  - a) for more than 6 months it carries on activities which consist of, or which are connected with, the exploration or exploitation of natural resources, including standing timber, situated in that State;

- b) it furnishes services (including consultancy and independent personal services), but only where activities of that nature continue within the State for a period or periods exceeding in the aggregate 183 days in any 12 month period commencing or ending in the year of income concerned.
- (5) 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;
  - 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.
- (6) Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraph 7 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 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.
- (7) 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.
- (8) 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.

Article 6

**INCOME FROM IMMOVABLE PROPERTY**

- (1) Income derived by a resident of a Contracting State from immovable property (including income from agriculture, forestry or fishing) 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 any natural resources, 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 State in which the permanent establishment is situated or elsewhere.
- (4) 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.

- (5) 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.
- (6) 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.
- (7) Income or profits from any kind of insurance shall be taxed in accordance with the laws of either Contracting State. However, if an enterprise of one of the Contracting States derives premiums paid for the insurance of risks situated in the other State, otherwise than through a permanent establishment situated in that other State, the taxable income or profits derived by the enterprise from the insurance of those risks shall in that other State not exceed 10 percent of the gross premiums paid for the insurance of those risks.

#### Article 8

### **SHIP AND AIRCRAFT OPERATIONS**

- (1) Profits from ship or aircraft operations derived by a resident of a Contracting State shall be taxable only in that State.
- (2) Notwithstanding the provisions of paragraph 1, such profits may be taxed in the other Contracting State where they are profits from ship or aircraft operations confined solely to places in that other State.
- (3) The provisions of paragraphs 1 and 2 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.
- (4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State for discharge at a place in that State shall be treated as profits from ship or aircraft operations confined solely to places in that State.

#### 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 Agreement 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.

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

- (3) The term “dividends” as used in this Article means income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares or other rights, not being debt-claims, participating in profits, as well as income 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.
- (4) The provisions of paragraphs 1 and 2 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.
- (5) 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.

Article 11

**INTEREST**

- (1) Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
- (2) However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest.
- (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) 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;
    - (ii) in the case of New Zealand: an entity of a similar nature.
- (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 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 all other income treated as income from money lent by the laws of the Contracting State in which the income arises, but does not include any income which is treated as a dividend under Article 10. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.
- (5) The provisions of paragraphs 1 and 2 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.

- (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 the 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 deductible in determining the income, profits or gains attributable to that permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.
- (7) Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

#### Article 12

#### **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 also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.
- (3) The term “royalties” as used in this Article means payments of any kind, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:
  - a) the use of, or the right to use, any copyright (including the use of or the right to use any literary, dramatic, musical, or artistic works, sound recordings, films, broadcasts, cable programmes, or typographical arrangements of published editions), patent, design or model, plan, secret formula or process, trade-mark, or other like property or right; or
  - b) the use of, or the right to use, any industrial, scientific or commercial equipment; or
  - c) knowledge or information concerning industrial, commercial or scientific experience.
- (4) The provisions of paragraphs 1 and 2 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 person who is a resident of that State. Where, however, the person paying the royalties, whether the person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the liability to pay the royalties was incurred, and the royalties are deductible in determining the income, profits or gains attributable to that permanent establishment, then the 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 Agreement.

#### Article 13

### **ALIENATION OF PROPERTY**

- (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 enterprise alienating such ships, aircraft or other property is a resident.
- (4) Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.
- (5) Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident.

#### Article 14

### **INCOME FROM EMPLOYMENT**

- (1) Subject to the provisions of Articles 15, 17 and 18, 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 year of income 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 deductible in determining the taxable profits of a permanent establishment which the employer has in the other State.
- (3) Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by a resident of a Contracting State may be taxed in that State.

#### Article 15

#### **DIRECTORS' FEES**

Directors' fees and other similar payments derived by a resident of a Contracting State in that person's capacity as a member of the board of directors 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) The provisions of paragraphs 1 and 2 shall not apply to income derived by legal entities which carry on orchestras, theatres, ballet groups as well as to members of

such cultural entities if such legal entities substantially are non-profit entities in the long term and if this is certified by the competent authority of the State of residence.

Article 17

**PENSIONS**

- (1) Pensions (including government service pensions) and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.
- (2) Pensions and other payments made under the social security legislation of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State.

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 shall be taxable only 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 16 shall apply to salaries, wages and other similar remuneration 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

**STUDENTS**

Payments which a student who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of the student's education receives for the purpose of the student's maintenance or education shall not be taxed in that State, provided that such payments arise from sources outside that State.

Article 20

### **OTHER INCOME**

- (1) Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement may be taxed in that State and if such income is derived from sources within the other Contracting State, that income may also be taxed in that other State.
- (2) Income derived by a resident of a Contracting State from the other Contracting State under a legal claim to maintenance may not be taxed in the first-mentioned State if such income would be exempt from tax according to the laws of the other Contracting State.

#### Article 21

### **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 of which the enterprise is a resident.
- (4) All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

#### Article 22

### **ELIMINATION OF DOUBLE TAXATION**

Double taxation shall be eliminated as follows:

- (1) In Austria:
  - a) Where a resident of Austria derives income or owns capital which, in accordance with the provisions of this Agreement, may be taxed in New Zealand, Austria shall, subject to the provisions of subparagraphs b) and c), exempt such income or capital from tax.
  - b) Where a resident of Austria derives items of income which, in accordance with the provisions of Articles 10, 11, 12 and 20, may be taxed in New Zealand, Austria shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in New Zealand. Such deduction shall not, however, exceed that part of the tax, as computed

before the deduction is given, which is attributable to such items of income derived from New Zealand.

- c) Where in accordance with any provision of the Agreement income derived or capital owned by a resident of Austria is exempt from tax in Austria, Austria may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.
- d) The provisions of subparagraph a) shall not apply to income derived or capital owned by a resident of Austria where New Zealand applies the provisions of this Agreement to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10, 11, or 12 to such income.

(2) In New Zealand:

Subject to the provisions of the laws of New Zealand which relate to the allowance of a credit against New Zealand income tax of tax paid in a country outside New Zealand (which shall not affect the general principle of this Article), Austrian tax paid under the laws of Austria and consistent with this Agreement, in respect of income derived by a resident of New Zealand from sources in Austria (excluding, in the case of a dividend, tax paid in respect of the profits out of which the dividend is paid) shall be allowed as a credit against New Zealand tax payable in respect of that income.

#### Article 23

#### **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 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 a permanent establishment which an enterprise of a third State has in that other State.
- (3) Enterprises of one of the Contracting States, 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.
- (4) This Article shall not apply to any provisions of the taxation laws of a Contracting State which:

- a) are reasonably designed to prevent or defeat the avoidance or evasion of taxes; or
  - b) are in force on the date of signature of this Agreement, or are substantially similar in general purpose or intent to any such provision but are enacted after the date of signature of this Agreement, provided that any such provision does not allow for different treatment of residents of the other Contracting State as compared with the treatment of residents of any third State.
- (5) The provisions of this Article shall apply only to the taxes which are the subject of this Agreement.
- (6) If one of the Contracting States considers that taxation measures of the other Contracting State infringe the principles set forth in this Article, the competent authorities shall use the mutual agreement procedure to endeavour to resolve the matter.

#### Article 24

### **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 the provisions of this Agreement, 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 person's case comes under paragraph 1 of Article 23, 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 Agreement.
- (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 Agreement. 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 Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.
- (4) The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

#### Article 25

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## **EXCHANGE OF INFORMATION**

- (1) The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning 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 the Agreement. The exchange of information is not restricted by Articles 1 and 2.
- (2) Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. 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.
- (3) In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
  - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
  - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
  - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).
- (4) If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

### Article 26

## **MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS**

Nothing in this Agreement 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.

### Article 27

### **ENTRY INTO FORCE**

- (1) This Agreement shall be ratified and the instruments of ratification shall be exchanged as soon as possible.
- (2) The Agreement shall enter into force on the first day of the third month next following that in which the exchange of instruments of ratification takes place and its provisions shall have effect:
  - a) in 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 third month next following the date on which the Agreement enters into force;
    - (ii) in respect of other Austrian tax, for any assessment year beginning on or after 1 January next following the date on which the Agreement enters into force;
  - b) in 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 third month next following the date on which the Agreement 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 Agreement enters into force.

### **Article 28**

### **TERMINATION**

This Agreement shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Agreement, through diplomatic channels, by giving notice of termination on or before 30 June in any calendar year beginning after the expiration of 5 years from the date of its entry into force. In such event, the Agreement shall cease to have effect:

- a) in 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 third month next following that in which the notice of termination is given;
  - (ii) in respect of other Austrian tax, for any assessment year beginning on or after 1 January in the calendar year next following that in which the notice of termination is given;

- b) in 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 third month next following that in which the notice of termination is given;
  - (ii) in respect of other New Zealand tax, for any income year beginning on or after 1 April in the calendar year next following that in which the notice of termination is given.

IN WITNESS WHEREOF the Plenipotentiaries of the two Contracting States, duly authorised thereto, have signed this Agreement.

DONE in duplicate at \_\_\_\_\_ on \_\_\_\_\_, 2006 in the German and English languages, each text being equally authentic. In case of divergence of interpretation the English text shall prevail.

## PROTOCOL

At the moment of signing the Agreement with respect to Taxes on Income and on Capital, this day concluded between the Republic of Austria and New Zealand, the undersigned have agreed that the following provisions shall form an integral part of the Agreement.

### **1. With reference to Article 2:**

It is understood that the taxes covered by the Agreement do not include any amount which represents a penalty or interest imposed under the laws of either Contracting State. Notwithstanding the preceding sentence, if the competent authorities of both Contracting States agree to adjust a transfer price pursuant to a mutual agreement procedure under Article 24, interest and penalties associated with that transaction can form part of the mutual agreement procedure.

### **2. With reference to Article 5:**

For the purposes of determining the duration of activities under paragraphs 3 and 4, the period during which activities are carried on in a Contracting State by an enterprise associated with another enterprise shall be aggregated with the period during which activities are carried on by the enterprise with which it is associated if the first-mentioned activities are connected with the activities carried on in that State by the last-mentioned enterprise, provided that any period during which two or more associated enterprises are carrying on concurrent activities is counted only once. An enterprise shall be deemed to be associated with another enterprise if one is controlled directly or indirectly by the other, or if both are controlled directly or indirectly by a third person or persons.

### **3. With reference to Article 6:**

The term "immovable property" includes rights to explore for or exploit natural resources or standing timber, and rights to variable or fixed payments either as consideration for, or in respect of, the exploitation of or the right to explore for or exploit natural resources or standing timber.

### **4. With reference to Article 7:**

Where:

- a) a resident of a Contracting State beneficially owns, whether directly or through one or more interposed trusts, a share of the business profits of an enterprise carried on in the other Contracting State by the trustee of a trust other than a trust which is treated as a company for tax purposes; and
- b) in relation to that enterprise, that trustee would, in accordance with the principles of Article 5, have a permanent establishment in that other State,

the enterprise carried on by the trustee shall be deemed to be a business carried on in the other State by that resident through a permanent establishment situated in that other State and that share of business profits shall be attributed to that permanent establishment.

**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 of the Organization for Economic Co-operation and Development, 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 paragraph (2) 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 immediately inform the Government of Austria in writing through the diplomatic channel and shall enter into negotiations with the Government of Austria to review the relevant provisions in order to provide the same treatment for Austria as that provided for the third State.

**6. With reference to Article 11:**

It is understood that, under New Zealand's Approved Issuer Levy legislation in force at the time of signing this agreement, an approved New Zealand resident borrower is, in relation to a registered security, able to pay interest to a non-resident that is not associated with the borrower and deduct zero percent non-resident withholding tax. Under these rules, approved borrowers are required to pay a duty of 2% for every \$1 of interest paid to the non-resident which is not in the nature of an income tax.

**7. With reference to paragraph 3 of Article 12:**

The term “royalties” as used in this Article shall also mean payments of any kind, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for

- (i) any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph (a), any such equipment as is mentioned in subparagraph (b) or any such knowledge or information as is mentioned in subparagraph (c); or
- (ii) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.

**8. With reference to Article 18:**

In the case of Austria, Article 18 shall also apply to other corporations of public law.

**9. With reference to paragraph 2 of Article 20:**

- a) For the purposes of paragraph 2 such remuneration shall also include remuneration for damage resulting from crimes, vaccinations or similar reasons.
- b) The income mentioned in this paragraph shall not be taken into consideration when applying the exemption with progression method.

**10. With reference to Article 20:**

It is understood that if at any time after the date of signature of this Protocol, New Zealand agrees to an Other Income Article in line with the OECD model, in any of its future double tax agreements, New Zealand shall without undue delay enter into negotiations with the Republic of Austria with a view to providing the same treatment.

**11. With reference to Article 25:**

For the purpose of clarification it is understood that Article 25 of the Agreement imposes the obligation on the Contracting State which has received a request for information to collect the requested information for the purposes of the requesting State in the same manner as such information would have been collected for its own purposes. If the requested State can obtain specific information only after the formal commencement of administrative or criminal proceedings concerning tax fraud, the aforementioned principle implies that such information also has to be collected upon the request of the other Contracting State if a comparable proceeding has been formally opened in the other State.

**12. With reference to Article 25:**

It is understood that if at any time after the date of signature of this Protocol, the Republic of Austria shall include provisions allowing the exchange of information that is held by a bank, other financial institution, nominee, or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person in any of its double tax agreements, the Republic of Austria shall without undue delay enter into negotiations with New Zealand with a view to including such provisions in the Agreement signed today.

**13. Interpretation of the Agreement:**

It is understood that provisions of the Agreement which are drafted according to the corresponding provisions of the OECD-Model Convention on Income and on Capital shall generally be expected to have the same meaning as expressed in the OECD Commentary thereon. The understanding in the preceding sentence will not apply with respect to the following:

- a) any reservations or observations to the OECD Model or its Commentary by either Contracting State;
- b) any contrary interpretations in this Protocol;

- c) any contrary interpretation in a published explanation by one of the Contracting States that has been provided to the competent authority of the other Contracting State prior to the entry into force of the Agreement;
- d) any contrary interpretation agreed to by the competent authorities after the entry into force of the Agreement.

The OECD Commentary—as it may be revised from time to time - constitutes a means of interpretation in the sense of the Vienna Convention of 23 May 1969 on the Law of Treaties.

IN WITNESS WHEREOF the Plenipotentiaries of the two Contracting States, duly authorised thereto, have signed this Protocol.