PROTOCOL

AMENDING

THE CONVENTION

BETWEEN

NEW ZEALAND

AND

THE SWISS CONFEDERATION

FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME

The Government of New Zealand

and

the Swiss Federal Council;

Desiring to amend the Convention between the Swiss Confederation and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Berne on 6 June 1980 (hereinafter "the Convention");

Have agreed as follows:

Article I

The following new preamble shall replace the existing preamble:

"*The Swiss Federal Council and the Government of New Zealand;*

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income 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 Convention for the indirect benefit of residents of third States);

Have agreed as follows:"

Article II

1. The existing paragraph 7 of Article 7 (Business profits) of the Convention shall be renumbered as paragraph 8.

2. The following new paragraph 7 shall be added to Article 7 (Business profits) of the Convention:

"7. A Contracting State shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States after 5 years from the end of the taxable year in which the profits would have been attributable to the permanent establishment. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default."

Article III

The existing paragraph of Article 9 (Associated enterprises) of the Convention shall be numbered as paragraph 1.

2. The following new paragraph 2 shall be added to Article 9 (Associated enterprises) of the Convention:

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

3. The following new paragraph 3 shall be added to Article 9 (Associated enterprises) of the Convention:

"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 5 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 IV

The following new paragraph 6 shall be added to Article 22 (Elimination of double taxation) of the Convention:

"6. The provisions of paragraph 3 shall not apply to income derived by a resident of Switzerland where New Zealand applies the provisions of this

Convention to exempt such income from tax or applies the provisions of paragraph 2 of Article 10, paragraph 2 of Article 11 or paragraph 2 of Article 12 to such income."

Article V

The first sentence of paragraph 1 of Article 23 (Mutual agreement procedure) of the Convention shall be deleted and replaced by the following sentence:

"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 Convention, that person may, irrespective of the remedies provided by the domestic law of those States, present the case to the competent authority of either Contracting State."

Article VI

The following new paragraphs 5 and 6 shall be added to Article 23 (Mutual agreement procedure) of the Convention:

"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 Convention, 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. 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.

6. The Contracting States may release to the arbitration board, established under the provisions of paragraph 5, such information as is necessary for carrying out the arbitration procedure. The members of the arbitration board shall be subject to the limitations of disclosure described in paragraph 1 of Article 24 with respect to the information so released."

Article VII

The following new Article 25A (Entitlement to benefits) shall be added to the Convention immediately following Article 25:

"Article 25A Entitlement to benefits

Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income 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 Convention."

Article VIII

1. The existing paragraph 4 of the Protocol to the Convention shall be renumbered as paragraph 5.

2. The following new paragraph 4 shall be added to the Protocol to the Convention:

“4. With reference to paragraph 5 of Article 23

Notwithstanding paragraph 5 of Article 23 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 these anti-avoidance rules. New Zealand shall notify the Swiss Confederation 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 these anti-avoidance rules. New Zealand shall notify the Swiss Confederation through diplomatic channels of any such subsequent provisions; and

(b) in the case of Switzerland, the case involves the application of tax avoidance as defined under case law by the Swiss Federal Court.

It is further understood that the provisions of paragraph 5 of Article 23 shall not apply if:

(a) the case concerns issues where Chapter VI D.4 (hard-to-value intangibles) of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (July 2017 or a later version of those Guidelines) is applied by a Contracting State in an adjustment according to paragraph 1 of Article 9:

(i) in a fiscal year that is not time barred but concerns profits that relate to a time barred fiscal year in that Contracting State; or

(ii) through the application of domestic legislation which provides for a more extended period for adjustments specifically for hard-to-value

intangibles than what applies under the regular statute of limitation for reassessments;

(b) the case is connected with fraud, gross negligence or wilful default."

Article IX

1. Each of the Contracting States shall notify the other via 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 receipt of the later of these notifications and shall thereupon 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 January following the calendar year in which the Protocol enters into force;

(ii) in respect of other taxes, for any taxation year beginning on or after 1 April next following the date on which the Protocol enters into force; and

(b) in the case of Switzerland:

(i) in respect of taxes withheld at source, for amounts paid or credited on or after the first day of January of the year next following the date on which the Protocol enters into force;

(ii) in respect of other taxes, for taxation years beginning on or after the first day of January of the year 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 Articles II, III, V, VI and VIII of this Protocol shall have effect from the date of entry into force of this Protocol, without regard to the taxable period to which the matter relates. However, for cases that are under

consideration under paragraph 2 of Article 23 of the Convention at the date of entry into force of this Protocol, the start date of the 3-year period referred to in paragraph 5 of Article 23 of the Convention shall be the later of the date of entry into force of this Protocol and the date otherwise provided for under paragraph 5 of Article 23 of the Convention.