



Memorandum of Arrangement on the Implementation of Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

The competent authorities of New Zealand and the Kingdom of the Netherlands (hereinafter referred to as the 'Contracting Jurisdictions') have established this Memorandum of Arrangement concerning the mode of application of the arbitration process provided for in Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as 'the Convention'). This Memorandum of Arrangement comes into operation pursuant to Article 23 of the Convention between the Government of New Zealand and the Government of the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (hereinafter referred to as 'the Covered Tax Agreement') of October 15, 1980, as modified by Article 16 of the Convention, and paragraph 10 of Article 19 of the Convention. The competent authorities of the Contracting Jurisdictions may modify or supplement this Memorandum of Arrangement by an exchange of letters between them.

Definitions

For the purposes of this Memorandum of Arrangement:

- a) the term 'competent authority' means, in the case of New Zealand, the Commissioner of Inland Revenue or their authorised representative and, in the case of the Kingdom of the Netherlands, the Minister of Finance or their authorised representative;
- b) the term 'Contracting Jurisdiction' means the Contracting States pursuant to the Covered Tax Agreement;
- c) the term 'mutual agreement' means the procedures pursuant to Article 23 of the Covered Tax Agreement, as modified by Article 16 of the Convention.

1. Request for submission of case to arbitration

A request that unresolved issues arising from a mutual agreement case be submitted to arbitration pursuant to paragraph 1 of Article 19 of the Convention (hereinafter referred to as the 'request for arbitration') will be made in writing and sent to one or both of the competent authorities. The request will contain sufficient information to identify the case. The request will also be accompanied by a written statement by each of the persons who either made the request or is directly affected by the case that no decision on the same issues has already been rendered by a court or administrative tribunal of the Contracting Jurisdictions. Within 10 days after the receipt of the request, a competent authority who received it without any indication that it was also sent to the other competent authority will send a copy of that request and the accompanying statements to the other competent authority.

2. Minimum information necessary to undertake substantive consideration of the case

For purposes of Article 19 of the Convention, references to 'the information necessary to undertake substantive consideration of the case' and 'the minimum information necessary for each competent authority to undertake substantive consideration of the case' will be understood as follows:

- a) for the Netherlands, the information and documentation which must be provided when making a request for a mutual agreement procedure set out in Annex B of the Decree of 11 June 2020, no. 2020-0000101607, as such guidance may be amended from time to time;
- b) for New Zealand, the information and documentation which must be provided when making a request for a mutual agreement procedure as set out on the Mutual Agreement Procedure page on the Inland Revenue Department's website, ird.govt.nz, as such guidance may be amended from time to time; and
- c) any other specific additional information requested by the competent authority of a Contracting Jurisdiction within three calendar months after the receipt of the request for a mutual agreement procedure.

The competent authorities of the Contracting Jurisdictions will notify each other of any significant changes that are made with respect to the information requirements provided in their domestic guidance relevant to a request for a mutual agreement procedure.



3. Appointment of arbitrators

1. In the circumstances described in paragraph 3 or paragraph 4 of Article 20 of the Convention, the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting Jurisdiction will make the relevant appointment within 60 days after receiving a request to that effect from the person who made the request for arbitration. In the circumstances described in paragraph 4 of Article 20 of the Convention, the Chair of the arbitration panel will be appointed from the list that has been jointly decided by the competent authorities pursuant to sub-paragraph 3.6 of this Memorandum of Arrangement.
2. Except to the extent that the competent authorities jointly decide on different rules, the procedures provided in Article 20 of the Convention and paragraph 3 of this Memorandum of Arrangement will apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process has begun. In such circumstances, the competent authorities will also jointly decide on necessary adaptations, as appropriate, to the deadlines provided in paragraph 4 of this Memorandum of Arrangement.
3. An arbitrator will be considered to have been appointed when a letter confirming that appointment and signed by both the arbitrator and the person or persons who have the power to appoint that arbitrator has been communicated to both competent authorities.
4. The competent authorities will appoint arbitrators who have expertise or experience in international tax matters. They need not, however, have experience as either a judge or arbitrator. Each arbitrator appointed to the arbitration panel will be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting Jurisdictions and of all persons directly affected by the case (as well as their advisors and any related persons) at the time of accepting an appointment, maintain their impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings. Each arbitrator appointed to the arbitration panel will execute a written statement to this effect. The arbitrators will undertake to promptly disclose to both competent authorities, in writing, any new facts or circumstances that arise during or following the arbitration proceedings that might give rise to doubts with respect to their impartiality or independence.
5. If a competent authority becomes aware of a breach by an arbitrator of the impartiality and independence requirements referred to in sub-paragraph 3.4, that competent authority will bring that breach to the attention of the other arbitrators and the competent authority of the other Contracting Jurisdiction immediately. The competent authorities will then, based on the particular facts and circumstances of the case and the breach, jointly determine how to proceed and may, for example:
 - a) remove and replace the relevant arbitrator; or
 - b) terminate the arbitration proceeding and appoint a new arbitration panel.
6. The competent authorities will identify and jointly decide on a list of persons who are qualified and willing to serve as the Chair of an arbitration panel. The competent authorities will review and revise this list as necessary. The persons to be identified for purposes of this list will meet the requirements of sub-paragraph 3.4.

4. Arbitration process

1. Within 60 days after the appointment of the Chair of the arbitration panel (unless, before the end of that period, the competent authorities jointly decide on a different period or jointly decide to use a different type of arbitration process (such as the approach described in sub-paragraph 4.7 below) with respect to the relevant case), the competent authority of each Contracting Jurisdiction will submit to each arbitrator and to the other competent authority a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities). The proposed resolution will be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax that may be charged pursuant to the provisions of the Covered Tax Agreement (as it has been or may be modified by the Convention), for each adjustment or similar issue in the case. In a case in which the competent authorities of the Contracting Jurisdictions have been unable to reach a mutual decision on an issue regarding the conditions for application of a provision of the Covered Tax Agreement (as it has been or may be modified by the Convention) (hereinafter referred to as a 'threshold question'), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions. The proposed resolution will not exceed five pages.
2. The competent authority of each Contracting Jurisdiction may also submit a supporting position paper for consideration by the arbitrators. Any such supporting position paper will be submitted to the arbitrators and to the other competent authority within the period of time provided for in



sub-paragraph 4.1. A supporting position paper will not exceed 30 pages, plus annexes. Any annex to a supporting position paper will be a document that was provided by one competent authority to the other, or by the taxpayer to both competent authorities, for use in the negotiation of the mutual agreement procedure case.

3. In the event that the competent authority of one Contracting Jurisdiction fails to submit a proposed resolution within the period of time provided for in sub-paragraph 4.1, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.
4. Each competent authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. Any such reply submission will be submitted to the arbitrators and to the other competent authority within 120 days after the appointment of the Chair of the arbitration panel. A reply submission will not exceed 10 pages.
5. As far as possible, the arbitrators will use tele- and videoconferencing to communicate between themselves and with both competent authorities. If a face-to-face meeting involving additional costs is necessary, the Chair will contact the competent authorities who will decide when and where the meeting should be held and will communicate that information to the arbitrators.
6. The arbitration panel will select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and will not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will be delivered to the competent authorities of the Contracting Jurisdictions in writing within 60 days after the reception by the arbitrators of the last reply submission or, if no reply submission has been submitted, within 150 days after the appointment of the Chair of the arbitration panel. The arbitration decision will have no precedential value.
7.
 - a) If, within 60 days after the appointment of the Chair of the arbitration panel, the competent authorities jointly decide to use the approach described in this paragraph with respect to a given case, each competent authority must provide to the arbitration panel and to the other competent authority, within 120 days after that arrangement, any information that it considers necessary for the panel to reach its decision. That information should include a description of the facts and of the unresolved issues to be decided together with the position of the competent authority concerning these issues and the arguments supporting that position. Unless the competent authorities jointly decide otherwise, the arbitration panel may not take into account any information that was not available to both competent authorities before both competent authorities received the request for arbitration (or a copy thereof).
 - b) In the event that the competent authority of one Contracting Jurisdiction fails to submit the information described in subparagraph a) within the period of time provided for in that subparagraph, the arbitration panel will select as its decision the position submitted by the other competent authority.
 - c) The competent authority who received the written request for arbitration will notify the person who made the request for arbitration of a competent authority arrangement to use the approach described in this sub-paragraph within 7 days of such an arrangement (if the written request for arbitration indicates that it was also sent to the other competent authority, such notification will be provided by the competent authority of the jurisdiction of residence of the person who made the request for arbitration). The person who made the request for arbitration may, either directly or through their representatives, present their position to the arbitrators in writing to the same extent that they can do so during the mutual agreement procedure.
 - d) Within 30 days after the Chair has informed the competent authorities that a meeting of the arbitration panel should be held, the competent authorities will decide when and where the meeting will be held and will communicate that information to the arbitrators.
 - e) The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Covered Tax Agreement and, subject to these provisions, of those of the domestic laws of the Contracting Jurisdictions. The arbitrators will also consider any other sources which the competent authorities of the Contracting Jurisdictions may by joint decision expressly identify.
 - f) Subject to the provisions of the Covered Tax Agreement and of this Memorandum of Arrangement, the arbitrators may adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.
 - g) Unless the competent authorities jointly decide otherwise, the arbitration decision will be delivered to the competent authorities of the Contracting Jurisdictions in writing within 365 days after the date of the appointment of the Chair and will indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will have no precedential value.



5. Communication of information and confidentiality

1. Each arbitrator will agree in writing, prior to acting in an arbitration proceeding, to abide by and be subject to the confidentiality and non-disclosure provisions of Article 24 of the Covered Tax Agreement and of the applicable domestic laws of the Contracting Jurisdictions. If an arbitrator will use staff in connection with the performance of their duties, each staff member will execute a similar written agreement.
2. If a competent authority becomes aware of a breach by an arbitrator and/or their staff of the confidentiality and non-disclosure requirements referred to in sub-paragraph 5.1, that competent authority will bring that breach to the attention of the other arbitrators and the competent authority of the other Contracting Jurisdiction immediately. The competent authorities will then, based on the particular facts and circumstances of the case and the breach, jointly determine how to proceed and may, for example:
 - a) remove and replace the relevant arbitrator; or
 - b) terminate the arbitration proceeding and appoint a new arbitration panel.
3. Before the Chair is appointed, the competent authorities will send any correspondence concurrently to both arbitrators.
4. After the Chair is appointed, unless jointly decided otherwise by the competent authorities and the Chair, the competent authorities will send any correspondence to the Chair (with a copy sent to the other competent authority). The Chair will send any correspondence from the arbitrators to the competent authorities concurrently to both competent authorities.
5. Except with regard to administrative or logistical matters, no arbitrator will have any ex parte communications with one competent authority with respect to the mutual agreement case that resulted in the arbitration proceeding.
6. All communication, except with regard to administrative or logistical matters, between the arbitrators and the competent authorities will be in writing. Unless otherwise accepted by the competent authorities, written communication by facsimile or email is allowed to the extent that appropriate measures are taken to preserve the confidentiality of any information that may identify the taxpayer. Express or priority mail or a courier service will be used for all correspondence other than that sent via facsimile or email.
7. No substantive discussions may take place without all three arbitrators present.
8. Except as permitted pursuant to sub-paragraph 4.7(c), no arbitrator will have communications regarding the issues or matters before the arbitration panel with:
 - i) the person who presented the case;
 - ii) any other person whose tax liability to either Contracting Jurisdiction may be directly affected by a mutual agreement reached as a result of the case; or
 - iii) their representatives or agents during or subsequent to the arbitration proceedings.
9. At the termination of the arbitration proceedings each arbitrator will immediately destroy all documents or other information received in connection with the proceedings.

6. Operating procedures

1. To the extent needed, the arbitration panel may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Part VI of the Convention, Article 23 of the Covered Tax Agreement, as modified by Article 16 of the Convention, and this Memorandum of Arrangement.
2. If the arbitration panel adopts any additional procedures, the Chair will provide a written copy of them to the competent authorities. These procedures will have effect only if both competent authorities approve them.

7. Costs

1. Unless otherwise decided by the competent authorities:
 - a) each competent authority and the person who requested the arbitration will bear the costs related to its own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of its views);
 - b) costs related to any meeting of the arbitration panel will be borne by the competent authority that hosts that meeting;
 - c) all other costs related to the arbitration proceedings will be borne in equal shares by the two competent authorities.
2. Unless decided otherwise by the competent authorities, compensation of the arbitrators will be determined as follows:
 - a) The fees of the arbitrators will be fixed at EUR 1 000 per person per meeting, preparation or travel day. The reimbursement of the expenses of the arbitrators will be limited to the reimbursement usual for high ranking civil servants of the Contracting Jurisdiction that first received the request for submission of the unresolved issue(s) in the case to arbitration;



- b) The fees of the arbitrators will in no case exceed EUR 5 000 per person. The expenses reimbursed to the arbitrators will in no case exceed EUR 2 500. If the arbitration panel considers that the proper consideration of the case would cause the fees or expenses of the arbitration panel to exceed these amounts, the Chair will contact the competent authorities to request their guidance.

8. Failure to communicate the decision within the required period

In the event that the decision has not been communicated to the competent authorities within the period provided for in sub-paragraph 4.6 or subparagraph 4.7(g), as the case may be, or within any other period approved by the competent authorities, the competent authorities and the person directly affected by the case may decide to extend that period for a period not exceeding 90 days or, if they fail to do so within 30 days after the end of the period provided for in that paragraph, the fees of each arbitrator will be limited to EUR 1 000. In such a case, the competent authorities may jointly decide to appoint new arbitrators in accordance with Article 20 of the Convention and paragraph 4 of this Memorandum of Arrangement. The date of such decision to appoint new arbitrators will, for the purposes of the subsequent application of Article 20 of the Convention and paragraph 4 of this Memorandum of Arrangement, be deemed to be the date when the request for arbitration has been received by both competent authorities.

9. Final Decision

1. If a final decision by a court of one of the Contracting Jurisdictions holds that the arbitration decision is invalid, the arbitration decision will not be binding on the Contracting Jurisdictions. In such a case, the request for arbitration under paragraph 1 of Article 19 of the Convention will be considered not to have been made, and the arbitration process will be considered not to have taken place (except for the purposes of Article 21 (Confidentiality of Arbitration Proceedings) and Article 25 (Costs of Arbitration Proceedings) of the Convention and paragraphs 5 and 7 of this Memorandum of Arrangement). In such a case the person who made the request for arbitration may make a new request for arbitration, which will be accepted unless the competent authorities jointly decide that the actions of that person or its representatives were the main reason for the invalidation of the arbitration decision.
2. It is understood that subdivision ii) of subparagraph b) of paragraph 4 of Article 19 of the Convention is intended to apply where, under the domestic laws of a Contracting Jurisdiction, a court has invalidated the arbitration decision based on a procedural or other failure or other conduct that has materially affected the outcome of the arbitration proceeding, which may include –
 - i) a violation of the impartiality or independence requirements applicable to arbitrators pursuant to Article 20 of the Convention and paragraph 4 of this Memorandum of Arrangement;
 - ii) a breach of the confidentiality requirements applicable to arbitrators pursuant to Article 21 of the Convention and paragraph 6 of this Memorandum of Arrangement;
 - iii) any other failure to adhere to the procedural requirements provided in Part VI of the Convention and this Memorandum of Arrangement; or
 - iv) collusion between the person who presented the mutual agreement procedure request and one of the Contracting Jurisdictions.
3. It is understood that paragraph 9 does not provide independent grounds for the invalidation of an arbitration decision where such grounds do not exist under the domestic laws of the Contracting Jurisdictions

10. Implementing the arbitration decision

The competent authorities will implement the arbitration decision within 180 days after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.

11. Entry into effect of Part VI (Arbitration) of the Convention

As provided by Article 36 (Entry into Effect of Part VI) of the Convention, the provisions of Part VI (Arbitration) of the Convention will have effect with respect to cases presented to the competent authority of a Contracting Jurisdiction on or after the later of the dates on which the Convention has entered into force for each of the Contracting Jurisdictions.

12. Reservations with respect to the scope of cases that will be eligible for arbitration under the provisions of Part VI of the Convention

Pursuant to subparagraph a) of paragraph 2 of Article 28 of the Convention, the following reservations have been made with respect to the scope of cases that will be eligible for arbitration under the provisions of Part VI of the Convention:



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- a) New Zealand reserves the right to exclude from the scope of Part VI (Arbitration) any case involving the application of New Zealand's general anti-avoidance rule contained in section BG 1 of the Income Tax Act 2007. Any subsequent provisions replacing, amending or updating these provisions are also included. The competent authority of New Zealand will notify the Depository of the Convention of any such subsequent provisions.
- b) New Zealand reserves the right to exclude from the scope of Part VI (Arbitration) any case involving the application of anti-avoidance rules concerning the avoidance of a permanent establishment in New Zealand. For the purposes of the application of this reservation by New Zealand, 'anti-avoidance rules concerning the avoidance of a permanent establishment' will include the rules provided for in section GB 54 of the Income Tax Act 2007. Any subsequent provisions replacing, amending or updating these anti-avoidance rules are also included. The competent authority of New Zealand will notify the Depository of the Convention of any such subsequent provisions.

Signed in duplicate on 18 September 2023 and 15 August 2023 respectively

For the Competent Authority of New Zealand

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