Corporate Taxpayers Group

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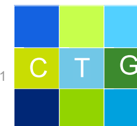

7 April 2017

New Zealand's implementation of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*
C-/ Cath Atkins
Deputy Commissioner, Policy and Strategy
Inland Revenue Department
PO Box 2198
WELLINGTON 6140

Dear Cath

NEW ZEALAND'S IMPLEMENTATION OF THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BEPS

The Corporate Taxpayers Group ("the Group") is writing to submit on the Officials' Issues Paper "New Zealand's implementation of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*" (the "Issues Paper"). The Group appreciates the opportunity to submit on the Issues Paper and looks forward to further discussing the issues with officials.

Summary of our submission

The key points in our submission are:

- The Group is concerned that the MLI will see an unnecessary increase in complexity and compliance costs. As with all tax policy proposals, the Group believes that the adoption of the MLI needs to be considered in the context of the overall impact to the New Zealand economy and "NZ Inc.". This includes consideration of tax take, attractiveness of New Zealand as an investment destination and the ease of doing business in New Zealand. New Zealand enjoys a sought after reputation as being an easy country to do business with and undertake business in. It is paramount that this reputation is protected.

- The Group does not support New Zealand's adoption of all the substantive provisions in the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the multilateral instrument or "MLI") as is proposed in the Appendix to the Issues Paper. Most of the proposed provisions are not minimum standards (i.e., there is no requirement that they be adopted), and in some cases the costs to New Zealand of including the provision in its Double Tax Agreements ("DTAs") would outweigh the benefit. We have (in Appendix Two to this letter) replicated the Appendix to the Issues Paper and summarised the Group's submissions on whether New Zealand should adopt each measure. Set out immediately below is an overview of the Group's submissions. Detailed comments expanding on the overview are set out in Appendix One.

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We note the views in this document are a reflection of the views of the Corporate Taxpayers Group and do not necessarily reflect the views of individual members.

- The Group considers that its measures should be adopted by New Zealand only if they will be in New Zealand's national interest. Where proposals replicate existing anti-abuse measures (thereby increasing compliance costs, but without achieving a corresponding benefit), the Group does not consider that these measures should be adopted.

Dual resident entities

- The Group does not support replacing the existing dual resident entity tie breaker provisions with a default rule that dual resident entities do not qualify for DTA relief unless the Competent Authorities agree. This amendment would not be in New Zealand's national interest. The mischief that the proposed rule targets is addressed by existing rules (and will be further addressed by the anti-avoidance provisions in the MLI). The proposed rule would, however, result in increased costs and uncertainty (and potentially double taxation) for companies that inadvertently become dual resident.

- If the amendments to the dual resident entity tie breaker provision are adopted, Inland Revenue should publish guidance on the Competent Authority process (including as to how New Zealand would apply that guidance in seeking to agree with the other affected country where a company will be resident for the purposes of the DTA). In addition, at least in the case of Australia (given the likelihood that most dual residence cases could be expected to arise between New Zealand and Australia) there should be a stream-lined application process or a self-assessment option based on published criteria for resolving dual residence cases.

Anti-avoidance provisions

- The Group acknowledges that the treaty anti-abuse rules in Article 7 of the MLI are a minimum standard and will therefore be adopted with the MLI. The Group does, however, consider that changes need to be made to New Zealand's domestic law to reduce overlap and the possibility of parallel proceedings being brought under both a DTA and the domestic law general anti-avoidance rule ("GAAR").

- The Group does not support the adoption of the dividend transfer transactions article (Article 8) of the MLI. This rule will cause administrative complexity for Inland Revenue and taxpayers. The Group considers that cases of manipulation of a shareholder's ownership interest to secure DTA relief can be addressed under Article 7 of the MLI. Article 8 would therefore add considerably to compliance costs for little, if any, benefit.

- The Group does not support the adoption of Article 9 of the MLI concerning land rich companies. As with Article 8, Article 9 would add considerably to compliance costs in circumstances where the cases in which it is intended to apply can be addressed by Article 7. In the alternative to our submission that Article 9 should not be adopted, if it is adopted, New Zealand should implement domestic law measures to reduce the additional compliance costs that will result (eg, by allowing quarterly asset values to be taken as representative of the asset values for each day in that quarter).

Artificial permanent establishment avoidance

- The Group submits that greater uncertainty will result from the expanded permanent establishment ("PE") definitions included in both the MLI and domestic law (see the proposed domestic law amendments in the Government discussion document "*BEPS — Transfer pricing and permanent establishment avoidance*"). The proposed domestic law PE rule should not apply in cases in which an arrangement is subject to (but not caught by) the broader PE definition (resulting from Part IV of the MLI) or the anti-abuse provisions in Part III of the MLI.

Dispute resolution

- The Group generally supports the amendments to the mutual agreement procedure ("MAP") and the provision for arbitration for cases not resolved by negotiation between the Competent Authorities. In order to make the amendments meaningful:

    - cases involving section BG 1 of the Income Tax Act 2007 ("ITA") should not be excluded from MAP and arbitration. To do so would effectively enable a country with a GAAR that is excluded from MAP and arbitration to also exclude from MAP and arbitration the extensive anti-abuse provisions included in the DTA, which would considerably weaken the DTA dispute resolution process; and

    - the Government should ensure that Inland Revenue is sufficiently resourced to meet the additional demands on its Competent Authority personnel that will result from the MLI.

Other matters

- Inland Revenue should publish on its website consolidated versions of each Covered Tax Agreement. Inland Revenue's compliance model is intended to be customer centric and to aid taxpayers in getting it right, first time. As such, Inland Revenue should invest the necessary resource to make consolidated versions of each Covered Tax Agreement available to all taxpayers.

- Inland Revenue should maintain a list on its website of "entry into effect for specific taxes" for each New Zealand Covered Tax Agreement so that taxpayers can easily determine from when a Covered Tax Agreement has been modified and the effective date of amendments to particular provisions.

Please contact us if you wish to discuss any of the matters raised in our submission.

For your information, the members of the Corporate Taxpayers Group are:

1. Air New Zealand Limited
2. Airways Corporation of New Zealand
3. AMP Life Limited
4. ANZ Bank New Zealand
5. ASB Bank Limited
6. Auckland International Airport Limited
7. Bank of New Zealand
8. Chorus Limited
9. Contact Energy Limited
10. Downer New Zealand Limited
11. Fisher & Paykel Healthcare Limited
12. Fletcher Building Limited
13. Fonterra Cooperative Group Limited
14. Genesis Energy Limited
15. IAG New Zealand Limited
16. Infratil Limited
17. Lion Pty Limited
18. Meridian Energy
19. Methanex New Zealand Limited
20. New Zealand Post Limited
21. New Zealand Racing Board
22. New Zealand Steel Limited
23. New Zealand Superannuation Fund
24. Opus International Consultants Limited
25. Origin Energy New Zealand Limited
26. Pacific Aluminium (New Zealand) Limited
27. Powerco Limited
28. Shell New Zealand (2011) Limited
29. SKYCITY Entertainment Group Limited
30. Sky Network Television Limited
31. Spark New Zealand Limited
32. Summerset Group Holdings Limited
33. Suncorp New Zealand
34. T & G Global Limited
35. The Todd Corporation Limited
36. Vodafone New Zealand Limited
37. Watercare Services Limited
38. Westpac New Zealand Limited
39. Z Energy Limited
40. ZESPRI International Limited

We note the views in this document are a reflection of the views of the Corporate Taxpayers Group and do not necessarily reflect the views of individual members.

Yours sincerely

John Payne
For the Corporate Taxpayers Group

APPENDIX ONE: DETAILED SUBMISSION POINTS

1. General comments

1.1 The Group is concerned that the MLI will see an unnecessary increase in complexity and compliance costs. As with all tax policy proposals, the Group believes that the adoption of the MLI needs to be considered in the context of the overall impact to the New Zealand economy and "NZ Inc.". This includes consideration of tax take, attractiveness of New Zealand as an investment destination and the ease of doing business in New Zealand. New Zealand enjoys a sought after reputation as being an easy country to do business with and undertake business in. It is paramount that this reputation is protected.

1.2 The Group considers that its measures should be adopted by New Zealand only if they will be in New Zealand's national interest. Where proposals replicate existing anti-abuse measures (thereby increasing compliance costs, but without achieving a corresponding benefit), the Group does not consider that these measures should be adopted. It is with this background that the Group makes the following submissions.

2. Changes to rules for determining residence OF (and DTA benefits available to) a dual resident entity (Article 4)

Proposal is based on an incorrect assumption as to how cases of dual residence may arise

2.1 The Issues Paper proposes to replace tie breaker provisions in existing DTAs with a provision requiring the Competent Authority of each state in which the dual resident entity is resident, to "endeavour to determine by mutual agreement" in which state the entity will be deemed to be resident for the purpose of the DTA.[1] The Group considers that this measure would reduce certainty, impose additional compliance costs and increase the risk of double taxation for New Zealand businesses in circumstances where the dual residence often results from inadvertence and does not secure a tax benefit.

2.2 The changes to the dual resident entity tie breaker test are predicated on the assumption that cases of dual residence often involve tax avoidance.[2] This assumption is not reflective of the reality, at least in New Zealand. Cases of dual residence more commonly arise due to inadvertence or unavoidable changes in circumstances; in fact, so far as tax planning is concerned, the usual practice is for companies to plan not to be dual resident.

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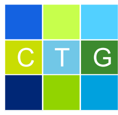
[1] The Issues Paper at page 15, in discussing the effect of Article 4 of the MLI and the consequences of the Competent Authorities agreeing tax residence, states that "[t]he proposed provision will require [Competent Authorities] to agree the residence status of a [dual resident entity] **and** the [dual resident entity] will only be entitled to such treaty benefits as the CAs agree" [emphasis added]. This might be interpreted as suggesting that the Competent Authorities must first agree whether the dual resident should be deemed resident (for DTA purposes) in one or other country and then decide which treaty benefits will be allowed as a result of that residence status. This should be clarified in future Inland Revenue statements so it is clear that if the Competent Authorities agree that the dual resident is resident in a given country for DTA purposes, relief under the DTA is allowed accordingly, and only in cases where they do not so agree will it be necessary for them to determine to what extent, if any, DTA relief should be allowed. The necessary clarification could be achieved by replacing "and" (where emphasised in the quote from the Issues Paper above) with "or".

[2] OECD, "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: Final Report" (OECD Publishing, Paris, 2015) at [47] (page 72). The Report states that the view of many countries was that "cases where a company is a dual-resident often involve tax avoidance arrangements".



2.3 A typical scenario in which dual residence could arise due to inadvertence could involve an Australian incorporated subsidiary ("Aus. Co") of a New Zealand resident company ("NZ Co"). Aus. Co is intended to be tax resident solely in Australia, and so it holds its directors' meetings in Australia and has its senior executives located in (and making management decisions in) Australia. Subsequently, however, directors of Aus. Co who are based in New Zealand make strategic and management decisions for Aus. Co without formal directors' meetings being convened in Australia. This results in Aus. Co being resident in New Zealand under section YD 2(1)(d) of the ITA because "its directors… exercise control of [Aus. Co] in New Zealand, even if the directors' decision-making also occurs outside New Zealand" (i.e., it is enough that some decision-making at director level occurs in New Zealand for the company to be deemed tax resident in New Zealand). The entity is therefore dual resident (in Australia due to incorporation and in New Zealand under section YD 2(1)(d)).

2.4 Dual residence in the above example arises inadvertently. The scenario will often affect businesses expanding their operations across borders for the first time, who are not as experienced in managing cross-border tax issues. Presently, most DTAs will provide a solution; the entity will be deemed to be tax resident in the country where it has its place of effective management, and will be entitled to DTA relief on that basis. The result of the proposed rule is that entities like this Aus Co will be entitled to no DTA relief from double taxation unless the Competent Authorities of New Zealand and Australia agree otherwise.

Proposal will lead to greater uncertainty and cost and increased incidence of double taxation

2.5 Currently, most DTAs to which New Zealand is party contain a dual resident tie-breaker provision. The most common tie breaker provision, contained in both the UN Model DTA (Article 4) and OECD Model DTA (Article 4), is the place of effective management test. The place of effective management test allows a taxpayer to determine the jurisdiction in which they will be resident for the purposes of the DTA by reference to a single criterion.

2.6 This has two beneficial consequences: (i) it allows taxpayers to plan appropriately and conduct risk assessments when expanding business offshore; and (ii) taxpayers can "self-assess" their tax residence for the purposes of their tax returns and pay the right amount of tax in the right jurisdiction. The adoption of Article 4 of the MLI will make it more difficult to plan and assess the risk of a proposed expansion and will make it impossible for dual resident companies to self-assess their tax liability without first approaching the Competent Authorities.

2.7 The Group considers this unsatisfactory. The Government's Business Growth Agenda calls for opportunities for business to grow internationally by reducing domestic and offshore barriers to internationalisation.[3] The proposed amendments to the tie-breaker test seem counter-productive in this regard.

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[3] See Ministry of Business, Innovation and Employment "The Business Growth Agenda: Towards 2025" (Ministry of Business, Innovation and Employment, Wellington, 2015).

2.8 The uncertainty will result in additional costs for taxpayers who find themselves to be dual resident. These costs will be in the form of: (i) double taxation, and/or (ii) administrative costs in requesting the assistance of the Competent Authority. In some cases, the costs of seeking Competent Authority assistance will be such that taxpayers will instead accept the denial of DTA relief. For smaller businesses considering expanding offshore, the increased risk of double taxation will be a barrier to doing so.

2.9 Further, Inland Revenue, too, will be subject to increased uncertainty if Article 4 is adopted, and will incur increased costs due to increased demands on the Competent Authority. Competent Authorities are already under pressure to resolve disputes under the general DTA resolution process the Mutual Agreement Procedure ("MAP") process. The current average time period for resolving a MAP complaint is 20 months.[4] While the Group recognises that the provision requiring Competent Authorities to agree in cases of dual residence is not strictly the same as MAP, the statistic nonetheless indicates that any process requiring the agreement of the Competent Authorities is unlikely to be rapidly concluded, and that further adding to the responsibilities of the Competent Authorities could result in longer timeframes generally.

The mischief is addressed by other measures

2.10 Considering the complexity of the amendments and the extra burden that would be imposed on Inland Revenue and taxpayers, the Group considers it important to identify the mischief that the proposed rule is designed to prevent, and consider whether that mischief is sufficiently problematic to justify the increased cost and compliance costs. On this basis, the Group considers that the proposal does not pass the cost-benefit test and so is not in New Zealand's national interest.

2.11 Domestic law already contains measures to prevent tax avoidance by dual resident companies. Loss offsets by a dual resident company are precluded by section IC 7 of the Income Tax Act 2007 ("ITA") and the consolidation rules in section FM 31(1)(e) of the ITA preclude a dual resident company from joining a consolidated group (an alternative mechanism to offset losses). The anti-hybrid proposals also include measures to prevent double deductions and other hybrid mismatches stemming from hybrid mismatch arrangements. The Group submits therefore, that the mischief the proposed rule is trying to address is already addressed by other provisions of New Zealand's domestic law and by other proposals under consideration and should not be introduced into New Zealand's DTA network.

2.12 Further, the MLI will introduce broadly worded anti-abuse provisions into DTAs to which the MLI applies. This will mean that within the DTA itself, as well as under domestic law, there will be provisions to address any cases in which dual resident companies are being used to secure DTA relief in inappropriate circumstances.

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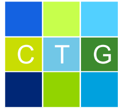
[4] See OECD "Mutual Agreement Procedure Statistics for 2015" http://www.oecd.org/tax/dispute/map-statistics-2015.htm (accessed 29 March 2017).



Alternative submission: proposed solution if the dual resident tie breaker amendment is adopted

2.13 If the Government nevertheless considers it necessary to adopt the proposed rule, the Group proposes the following suggestions with a view to reducing the cost and uncertainty that will result:

(a) Inland Revenue should issue guidance to taxpayers setting out New Zealand's position as to when the New Zealand Competent Authority would consider an entity should be tie-broken into one or other country (ie, what are the factors that the New Zealand Competent Authority would consider when negotiating with other Competent Authorities on the question of where a dual resident entity should be agreed to be resident).

(b) For states with which New Zealand has significant trading relations and in respect of which taxpayers are at greatest risk of becoming dual resident (eg, Australia), Inland Revenue should seek to negotiate a formal, public MAP decision which will set out the criteria by which dual resident entities can "self-assess" residence without having to be subject to double taxation or incur the costs of requesting Competent Authority assistance. The Group would be happy to discuss this proposal further with officials.

3. Treaty anti-abuse rules

Overview

3.1 The treaty anti-abuse rules in Article 7 of the MLI are a minimum standard. Of the three options available under the MLI, the principal purpose test ("PPT") appears to the Group to be most in keeping with New Zealand's existing DTA practice and domestic law. The Group therefore accepts the appropriateness of New Zealand opting for the PPT test in Covered Tax Agreements.

3.2 The Group is concerned, however, that given the multiple layers of anti-avoidance measures being proposed, much greater uncertainty for taxpayers could result, for no demonstrable benefit for New Zealand. The Group's submissions that follow therefore suggest a rationalisation of the potential multiple layers of anti-abuse rules introduced in the MLI, and guidance as to the relationship between the PPT that will be introduced by the MLI and the domestic law general anti-avoidance rule ("GAAR") in section BG 1 of the ITA.

Dividend transfer transactions (Article 8)

3.3 The Group does not support the adoption of the dividend transfer transactions article (Article 8) of the MLI. This 365-day ownership requirement will cause administrative complexity for Inland Revenue and taxpayers. Any cases of manipulation of a shareholder's ownership interest to secure DTA relief can be addressed under Article 7 of the MLI. Article 8 would therefore add considerably to compliance costs for little, if any, benefit.

3.4 In the alternative to our submission above that Article 8 should not be adopted, if Article 8 is adopted, Inland Revenue should release guidance as to how the rule will work in practice and should consider domestic law amendments to facilitate compliance with Article 8. In particular, is it intended that the shareholder receive the benefit of the lower withholding rate at source only if it has already held the required shareholding for 365 days before the dividend is paid? In that case, where the higher rate is applied and the shareholder subsequently passes the 365-day period, the shareholder would need to seek a refund of over-deducted tax. Alternatively, can a company, when paying a dividend, rely on a representation that the shareholder intends to hold the interest for 365 days? In that case, any additional source country tax payable by the shareholder should the shareholder not hold the required interest for the full 365-day period should be the responsibility of the shareholder, not of the company that has paid the dividend.

3.5 The administrative complexities associated with the proposed rule demonstrate the merit in our primary submission. That is, in view of the wide reaching PPT test, any benefit in adopting the rule is outweighed by the costs, such that it should not be adopted by New Zealand.

Land rich company rules (Article 9)

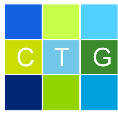
3.6 The land rich company test (eg, whether more than 50% of the value of shares in the company is derived from real property) is intended to permit a source country to tax gains on the disposal of shares in a company the value of which is mainly attributable to land situated in the source country. The proposal is that a land rich test be required to be applied on each day of the 365-day period preceding a disposal to which the alienation of property article in the DTA might apply. The concern apparently underlying Article 9 is that the company's assets can be manipulated prior to a disposal of its shares so the value of real property falls below the threshold (say 50%).

3.7 The Group does not support the adoption of the rule in Article 9 of the MLI. As with Article 8, Article 9 would add to compliance costs in circumstances where the scenarios in which it is intended to apply can be addressed by Article 7.

3.8 In the alternative to our submission that Article 9 should not be adopted, if it is adopted, New Zealand should implement domestic law measures to reduce the additional compliance costs that will result (eg, by allowing quarterly asset values to be taken as representative of the asset values for each day in that quarter).

Guidance as to the relationship between the PPT and section BG 1 of the ITA

3.9 Recent amendments to section BH 1 of the ITA provide that (in contrast to the usual position, that a DTA has effect despite anything in the ITA) a DTA (including its dispute resolution provisions) will not override section BG 1. Yet the MLI would introduce to Covered Tax Agreements a PPT which on the face of it is intended to operate as the DTA equivalent of section BG 1.



3.10 This layering of anti-avoidance provisions (one regime (the PPT) contained in the DTA, and a second (section BG 1) contained in domestic law and expressed to override the DTA) will be problematic. Countries party to a DTA which incorporates the PPT could reasonably expect that the PPT should be the reference point for determining whether an arrangement should be considered abusive such that DTA relief otherwise available should be denied. If a taxpayer satisfies (ie, is not caught by) the very broad PPT in a Covered Tax Agreement, it would be reasonable for that taxpayer to conclude that DTA relief should not then be denied unilaterally by New Zealand under section BG 1, the domestic law counterpart to the DTA's PPT.

3.11 The correct policy result is that if a taxpayer satisfies (ie, is not caught by) the PPT in a Covered Tax Agreement, it should not be open for Inland Revenue to invoke section BG 1 to unilaterally deny DTA relief otherwise available. This could be achieved by:

(a) amending section BH 1(4) so that the reference to section BG 1 applies "other than in the case of a double tax agreement that contains or is subject to Article 7 of the MLI or an anti-abuse rule substantially similar to Article 7 of the MLI"; and/or

(b) Inland Revenue issuing guidance (in the form of a Standard Practice Statement) to the effect that Inland Revenue will not invoke section BG 1 to deny DTA relief otherwise available to a taxpayer if the DTA contains or is subject to Article 7 of the MLI or an anti-abuse rule substantially similar to Article 7 of the MLI.

4. Preventing the artificial avoidance of permanent establishment status

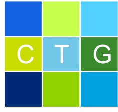
4.1 The Group is concerned by the uncertainty (and increased risk of double taxation) that will result from layers of rules intended to extend the reach of the PE definition. For some DTAs, the MLI amendments may apply, and in respect of all DTAs, the separately proposed domestic law PE avoidance rule could apply.

4.2 Further consideration should be given to the relationship between these measures and to the uncertainty that will result from multiple layers of rules with the same broad objective. The Group submits that Inland Revenue should include a provision in the proposed domestic PE avoidance rule confirming that if an entity does not have a PE under the provisions of a DTA containing the expanded PE definition (Part IV of the MLI) read with the anti-abuse provisions in Part III of the MLI, then the domestic law PE avoidance rule will not apply.

5. Improved mechanism for effective dispute resolution

Greater resourcing will be required to meet the increase in cases requiring Competent Authority involvement

5.1 The Group supports the amendments to MAP and the inclusion of arbitration. But for the improvements to dispute resolution to be meaningful, the Government must ensure that the Competent Authority is sufficiently resourced to meet the expected increase in cases requiring Competent Authority determination, and/or which are referred to MAP and arbitration.



GAAR should not be excluded from arbitration

5.2 The Group also submits that cases involving the GAAR should not be excluded from the arbitration process. The introduction of the PPT will mean that affected DTAs will have embedded in them very similar concepts to the concepts underlying the GAAR. (See further the discussion at paragraphs 3.9 to 3.11 above.) Accordingly, the correct policy outcome is that any disputed denial of DTA relief, whether in reliance on the PPT (in the DTA) or in reliance on the GAAR, should be subject to the same disputes resolution process in the DTA.

5.3 The OECD appears to have recognised the same point in its BEPS Action 14 Final Report, in recommending that whether DTA relief should be denied (whether under a DTA or a domestic law anti-abuse provision) should not be for one country to determine unilaterally, but rather should be able to be referred to MAP:[5]

> *Countries should provide MAP access in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment* ***as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty****.* [Emphasis added]

5.4 If the GAAR is excluded from arbitration, any dispute as to the application of a DTA which raises questions under a PPT could likewise be excluded from arbitration, since Inland Revenue could be expected to invoke the GAAR in parallel with the PPT. This would materially limit the value of the arbitration provision, and lead to disputes being pursued through parallel processes (some issues via MAP and arbitration, and some via the courts). Further, to exclude consideration of the GAAR from arbitration would significantly diminish the utility of MAP, since arbitration is in effect an enhancement to MAP, providing increased assurance the MAP will lead to an outcome.

5.5 Excluding the GAAR from the provisions of MAP and arbitration is, in the Group's view, contrary to the purpose of MAP and arbitration as an alternative dispute resolution process. The BEPS Action 14 Final Report emphasised that the MAP was to provide a disputes resolution process which was an alternative to and "independent from the ordinary legal remedies available under domestic law".[6]

5.6 Many states will require that domestic law processes be stayed before they will consider a MAP complaint. If Inland Revenue invokes the GAAR in parallel with invoking the PPT, and the GAAR question cannot be subject to MAP and arbitration, then the domestic law proceedings may not be stayed, further complicating the taxpayer's access to MAP and arbitration on other issues.

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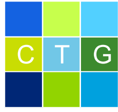
5 OECD "Making Dispute Resolution Mechanisms More Effective, Action 14: Final Report" (OECD Publishing, Paris, 2015) at recommendation 1.2 [emphasis added].

6 OECD "Making Dispute Resolution Mechanisms More Effective, Action 14: Final Report" (OECD Publishing, Paris, 2015) at [10].



5.7 Finally, to exclude the GAAR from arbitration raises the prospect that New Zealand and other countries might be able to tactically invoke the GAAR as a means of preventing the taxpayer from accessing MAP and arbitration in the very cases in which those processes may be of most value to the taxpayer. This would leave the taxpayer, in such cases, without access to MAP (a process which the OECD has described as being "of fundamental importance to the proper application and interpretation of the [DTA]").[7] It would also mark a less cooperative (and more unilateral) approach to international base erosion and profit-shifting concerns, in contrast to the cooperative approach New Zealand has supported to date.

6. Other matters

6.1 Inland Revenue should publish on its website consolidated versions of each Covered Tax Agreement. This would be consistent with Inland Revenue's compliance model which is intended to be customer centric and to assist taxpayers in getting it right. Taxpayers should have equal access to DTAs and should not need to pay for copies in an easy to understand format or to rely on commercial publishers to make consolidated versions available

6.2 Inland Revenue should maintain a list on its website of "entry into effect " for each New Zealand Covered Tax Agreement so that taxpayers can easily determine the effective date(s) of the application of the MLI for a Covered Tax Agreement.

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7 OECD "Making Dispute Resolution Mechanisms More Effective, Action 14: Final Report" (OECD Publishing, Paris, 2015) at [10].

APPENDIX TWO: SUBSTANTIVE BEPS PROVISIONS IN THE MULTILATERAL INSTRUMENT AND CTG COMMENTS

BEPS measure	Detail	Minimum standard	Should NZ adopt?	CTG Comment
1. Neutralising the effects of hybrid mismatch arrangements that have a treaty aspect **(Action 2 report)**	**Fiscally transparent entities** The MLI introduces or amends a fiscally transparent entity (FTE) provision. FTEs (like trusts or partnerships) create arbitrage opportunities because they are treated differently for tax purposes by different countries. The MLI provision clarifies that treaty benefits will only be allowed to the extent to which the item of income is taxed in the state in which the entity is resident. New Zealand already includes this provision (or an equivalent provision) in its DTAs with Australia, United States, Chile and Japan. *Article 3 of the MLI*	No	Yes	–
	Dual resident entities The MLI introduces or amends a dual resident entity (DRE) tie breaker provision. Like FTEs, DREs can be used to take advantage of arbitrage opportunities. The proposed provision will require CAs to agree the residence status of a DRE and the DRE will only be entitled to such treaty benefits as the CAs agree. *Article 4 of the MLI*	No	Yes	The Group does not think this article should be adopted as it will increase instances of double taxation and compliance costs and other measures address the perceived mischief.
	Relief of double taxation The MLI allows countries to strengthen their application of the exemption method to relieve double taxation. New Zealand already applies the (more robust) credit method in all of its DTAs, and therefore proposes not to adopt any of the options. *Article 5 of the MLI*	No	Not applicable	The Group agrees that this article is not applicable to New Zealand network of DTAs
2. Preventing the granting of treaty benefits in inappropriate circumstances	**Preamble language – minimum standard** The MLI will amend the preamble to DTAs to emphasise that as well as aiming to relieve double taxation, the treaty also aims to prevent opportunities for non-taxation, reduced taxation or tax avoidance. *Article 6(1) and (2) of the MLI*	Yes	Yes	–

BEPS measure	Detail	Minimum standard	Should NZ adopt?	CTG Comment
(Action 6 report)	**Preamble language – optional amendment** The MLI allows countries to adopt the following optional amendment to the preamble to DTAs: "Desiring to further develop their economic relationship and to enhance their co-operation in tax matters," *Article 6(3) and (6) of the MLI*	No	Yes	—
	Treaty anti-abuse rules The MLI requires jurisdictions to introduce an anti-abuse rule into DTAs. Jurisdictions can meet this minimum requirement in one of three ways: 1. a principal purpose test (PPT) alone; 2. a PPT plus a "simplified limitation on benefits" (LOB) clause. The LOB is a mechanical provision that seeks to identify, through a series of black-letter tests, whether a person is genuinely entitled to the benefits of a DTA; or 3. enter into bilateral negotiations to include a detailed LOB provision plus a PPT or anti-conduit rules. In the case of New Zealand, officials' favour adopting a PPT alone. The PPT is very similar to New Zealand's domestic law GAAR and will deny treaty benefits if the principal purpose of an arrangement was to secure those benefits. Also, in officials' view, it generally covers the same treaty shopping issues as the alternative approaches. *Article 7 of the MLI*	Yes	Yes	The Group acknowledges that the anti-abuse rules are a minimum standard and will be adopted with the MLI. The Group does consider however, that the domestic law amendments and/or guidance may be required to provide for the relationship between the PPT and GAAR.
	Dividend transfer transactions The MLI introduces a provision that requires shares to be held for a minimum of 365 days for the shareholder to be entitled to the reduced withholding tax (WHT) rates on dividends. This is to stop shareholders buying shares temporarily to access the reduced WHT rates and then immediately selling them. *Article 8 of the MLI*	No	Yes	The Group does not consider this amendment is necessary in light of the adoption of the PPT and the increased complexity and costs it will lead to.

BEPS measure	Detail	Minimum standard	Should NZ adopt?	CTG Comment
	Land rich company rules The MLI introduces a treaty provision that strengthens the anti-abuse "land-rich company" test (land rich companies are companies whose assets are mainly land). Some treaties do not contain this provision at all, so the MLI also allows it to be inserted into those treaties. The new rule reinforces the position that the source jurisdiction can tax land held by non-resident owners in the other jurisdiction through corporate vehicles. To prevent artificial and temporary dilution of the amount of land held by a company just before sale, the MLI provision requires the threshold for the amount of land ownership which triggers the rule to be measured on every day in the 365 day period leading up to the sale of the shares. The MLI provision also ensures the same rule applies to other investment vehicles such as partnerships and trusts. *Article 9 of the MLI*	No	Yes	The Group does not consider this amendment is necessary in light of the adoption of the PPT and the increased complexity and costs it will lead to. Alternatively, if this article is adopted, the Group proposes that provisions should be provided in domestic law to ensure that compliance costs are reduced.
	Third-state PE rules The MLI introduces a treaty provision that denies treaty benefits in the case of income derived by a PE of a resident of one of the parties to the DTA, where that PE is situated in a low tax third-state. *Article 10 of the MLI*	No	Yes	—
	Right to tax own residents The MLI introduces a provision that preserves a jurisdiction's right to tax its own residents (for example, this prevents New Zealand residents engaged in a tax avoidance arrangement claiming a DTA prevents New Zealand from using the domestic law GAAR to impose tax). *Article 11 of the MLI*	No	Yes	—

BEPS measure	Detail	Minimum standard	Should NZ adopt?	CTG Comment
3. Preventing the artificial avoidance of PE status	**Commissionaire arrangements and similar strategies** Currently, a number of artificial structures including the civil law concept of a "commissionaire" can be used to avoid having a PE in a jurisdiction. A new provision will deem non-residents using these structures to have a PE in the jurisdiction. *Articles 12 and 15 of the MLI*	No	Yes	–
	Specific activity exemptions – preparatory and auxiliary qualification Certain specific activities carried on in a jurisdiction are deemed **not** to constitute a PE (for example, premises used for simply storing goods or stock maintained for display or delivery). These specific carve-outs from the PE definition allowed quite substantial economic activities to fall within them. The MLI proposes clarifying that the specific carve-outs listed in the DTA must be subject to an additional requirement that they be "preparatory and auxiliary" in nature. There are two options for dealing with this issues – Option A (which New Zealand favours) which subjects all of the existing specific activities to an explicit "preparatory and auxiliary" test, and Option B, which does not subject the specific activities to the "preparatory and auxiliary" test (because these activities are considered to be inherently preparatory and auxiliary in nature), but subjects any other activity or combination of activities to the "preparatory and auxiliary" test. *Articles 13 and 15 of the MLI*	No	Yes	–
	Specific activity exemptions – Anti-fragmentation rule The MLI introduces an "anti-fragmentation" rule that will prevent an enterprise from dividing up all of its activities so that related parties each carry on a separate part of the business (that fall within the PE exceptions), but taken together they constitute a PE. *Articles 13 and 15 of the MLI*	No	Yes	–

BEPS measure	Detail	Minimum standard	Should NZ adopt?	CTG Comment
	Anti-contract splitting rule Currently a construction, installation or building project does not constitute a PE unless it last for more 12 months. Entities were abusing this 12 month limit by having back-to-back 12 month contracts so they never exceeded the 12 month threshold. Generally the contracts were undertaken by different companies within the same group of companies. The new an "anti-contract splitting" rule will aggregate related projects to prevent PE avoidance. *Articles 14 and 15 of the MLI*	No	Yes	—
4. Providing improved mechanisms for effective dispute resolution	**MAP – access to the CAs of either jurisdiction** In Covered Tax Agreements that do not already have it, the MLI will introduce a provision allowing taxpayers to request mutual agreement procedure (MAP) in cases where they believe taxation is not in accordance with the treaty. If a MAP provision is already contained in a DTA, the MLI will amend it to allow taxpayers to approach the CA of *either* jurisdiction to resolve uncertainty as to how the DTA applies (New Zealand's DTAs currently contain MAP provisions, but taxpayers are only entitled to approach the CA of the jurisdiction of which they are a resident). *Article 16 of the MLI*	Yes	Yes	The Group supports the adoption of the MLI articles relating to MAP. These amendments will ensure that taxpayers have greater access to MAP.
	MAP – corresponding adjustment Requires contracting states to make appropriate corresponding adjustments in transfer pricing cases. *Article 17 of the MLI*	No	Yes	—
	Arbitration If, under the MAP process, the CAs do not agree on the correct interpretation of the DTA, the CAs can submit the matter to an independent arbitrator (or a panel of three arbitrators) for decision. The arbitrators will decide which of the CAs is correct. The CAs are generally bound by the decision of the arbitrators, but the taxpayer is not. Therefore, the taxpayer could pursue a court case if it disagrees with the arbitrators' decision.	No	Yes	The Group supports the adoption of the MLI articles relating to arbitration.

BEPS measure	Detail	Minimum standard	Should NZ adopt?	CTG Comment
	New Zealand's approach is to adopt what is referred to as "final offer" or "last best offer" arbitration (in Article 23(1)), but to accept "independent opinion" arbitration if the other party to the Covered Tax Agreement chooses this (by entering a reservation under Article 23(2)). In the case of "independent opinion" arbitration, New Zealand will adopt Article 24(2) and (3) which means that the arbitrators' decision will not be binding on the CAs if they come to an alternative resolution of all unresolved issues within 3 calendar months of the delivery of the arbitrators' decision. New Zealand also proposes to require undertakings of confidentiality by all parties involved in arbitration (Article 23(5)) and reserves the right not to include arbitration provisions in Covered Tax Agreements with jurisdictions that do not require the same (Article 23(6) and (7)). New Zealand intends to enter a free form reservation in respect to arbitration to carve out cases that involve the application of New Zealand's general anti-avoidance rule contained in section BG 1 of the Income Tax Act 2007. *Articles 18 – 26 of the MLI*			MAP and arbitration should be available as independent and alternative dispute resolution processes. Accordingly, section BG 1 should not be excluded from the scope of the arbitration provisions.