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The information in this article is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

This article represents the views of the authors only and does not necessarily represent the views or professional advice of KPMG.

In this article, the authors provide flowcharts to assist practitioners in determining whether companies are eligible for benefits under the limitation on benefits provision in the New Zealand-U.S. income tax treaty.

To be entitled to benefits under income tax treaties, companies must satisfy specific eligibility requirements. This article includes decision-making flowcharts to assist taxpayers and tax practitioners in navigating the eligibility requirements of the New Zealand-U.S. income tax treaty and its accompanying protocol (collectively, the "treaty"), as applied to New Zealand companies and with a particular focus on the eligibility requirements for a 0 percent withholding tax rate on dividends.[1]

Income tax treaties may exempt business income from source country income taxes and eliminate or reduce domestic withholding taxes on specified payments between residents of countries that are parties to the treaty. To be entitled to benefits under a U.S. income tax treaty, a company generally must not only be a resident of the tax treaty partner's country, but must also satisfy at least one of the tests required by an applicable limitation on benefits provision.

The flowcharts in this article focus on the eligibility of New Zealand companies claiming treaty benefits under the treaty's LOB article (article 16) on income that would otherwise be subject to U.S. federal income taxation. This article does not address eligibility for treaty benefits of entities that are partnerships or are otherwise transparent for U.S. or New Zealand tax purposes. This article is based on the treaty, the accompanying protocol to the treaty, and the U.S. Treasury Department's technical explanations.

This article also addresses the eligibility of New Zealand companies for the 0 percent

[1] "Convention Between the United States of America and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income," signed on July 23, 1982, and accompanying protocol signed on December 1, 2008.

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withholding tax rate on dividends under article 10.3 and the LOB provision of the treaty.

This article contains seven flowcharts that analyze the LOB provision of the treaty as applied to New Zealand resident companies. These flowcharts may serve as a useful practice tool for taxpayers and tax practitioners. Although the flowcharts provide a comprehensive review of applicable treaty provisions, taxpayers and their tax advisers should carefully evaluate each individual case and determine if the treaty's requirements are met based on all of the facts and circumstances.

This article is the 16th in a series of articles[2] that provide flowcharts to assist taxpayers and tax practitioners in determining a company's eligibility for tax treaty benefits under the LOB provisions of specific U.S. income tax treaties and, when applicable, in determining eligibility for a 0 percent withholding tax rate on cross-border intercompany dividend payments to the company.

[2] *See* Jason Connery, Ron Dabrowski, and Jennifer Blasdel-Marinescu, "Eligibility for Treaty Benefits Under the Mexico-U.S. Income Tax Treaty," *Tax Notes Int'l*, June 27, 2016, p. 1285; Connery, Dabrowski, and Blasdel-Marinescu, "Eligibility for Treaty Benefits Under the Denmark-U.S. Income Tax Treaty," *Tax Notes Int'l*, June 29, 2015, p. 1219; Connery and Blasdel-Marinescu, "Eligibility for Treaty Benefits Under the Belgium-U.S. Income Tax Treaty," *Tax Notes Int'l*, Feb. 10, 2014, p. 563; Connery and Blasdel-Marinescu, "Eligibility for Treaty Benefits Under the Ireland-U.S. Income Tax Treaty," *Tax Notes Int'l*, June 17, 2013, p. 1223; Connery, Douglas Poms, and Blasdel-Marinescu, "Eligibility for Treaty Benefits Under the Sweden-U.S. Income Tax Treaty," *Tax Notes Int'l*, July 23, 2012, p. 359; Connery, Poms, and Blasdel-Marinescu, "Eligibility for Treaty Benefits Under the Australia-U.S. Income Tax Treaty," *Tax Notes Int'l*, Dec. 12, 2011, p. 843; Connery, Poms, and Blasdel, "Eligibility for Treaty Benefits Under the Switzerland-U.S. Income Tax Treaty," *Tax Notes Int'l*, May 9, 2011, p. 505; Connery, Poms, and Blasdel, "Eligibility for Treaty Benefits Under the Japan-U.S. Income Tax Treaty," *Tax Notes Int'l*, Sept. 6, 2010, p. 789; Connery, Poms, and Blasdel, "Eligibility for Treaty Benefits Under the 2009 Protocol to the France-U.S. Income Tax Treaty," *Tax Notes Int'l*, Apr. 12, 2010, p. 149; John Venuti, Connery, Poms, and Blasdel, "Eligibility for Treaty Benefits Under the Netherlands-U.S. Income Tax Treaty," *Tax Notes Int'l*, Nov. 23, 2009, p. 601; Venuti, Connery, Poms, and Alexey Manasuev, "Eligibility for Treaty Benefits Under the Canada-U.S. Income Tax Treaty," *Tax Notes Int'l*, June 15, 2009, p. 967; Venuti, Dabrowski, Poms, and Manasuev, "Eligibility for Treaty Benefits Under U.K.-U.S. Income Tax Treaty," *Tax Notes Int'l*, Mar. 23, 2009, p. 1095; Venuti, Connery, Poms, and Manasuev, "Eligibility for Treaty Benefits Under the Luxembourg-U.S. Income Tax Treaty," *Tax Notes Int'l*, July 21, 2008, p. 285; Venuti, Dabrowski, Poms, and Manasuev, "Eligibility for Treaty Benefits Under the France-U.S. Income Tax Treaty," *Tax Notes Int'l*, Feb. 11, 2008, p. 523; and Venuti and Manasuev, "Eligibility for Zero Withholding on Dividends in the New Germany-U.S. Protocol," *Tax Notes Int'l*, Jan. 14, 2008, p. 181.

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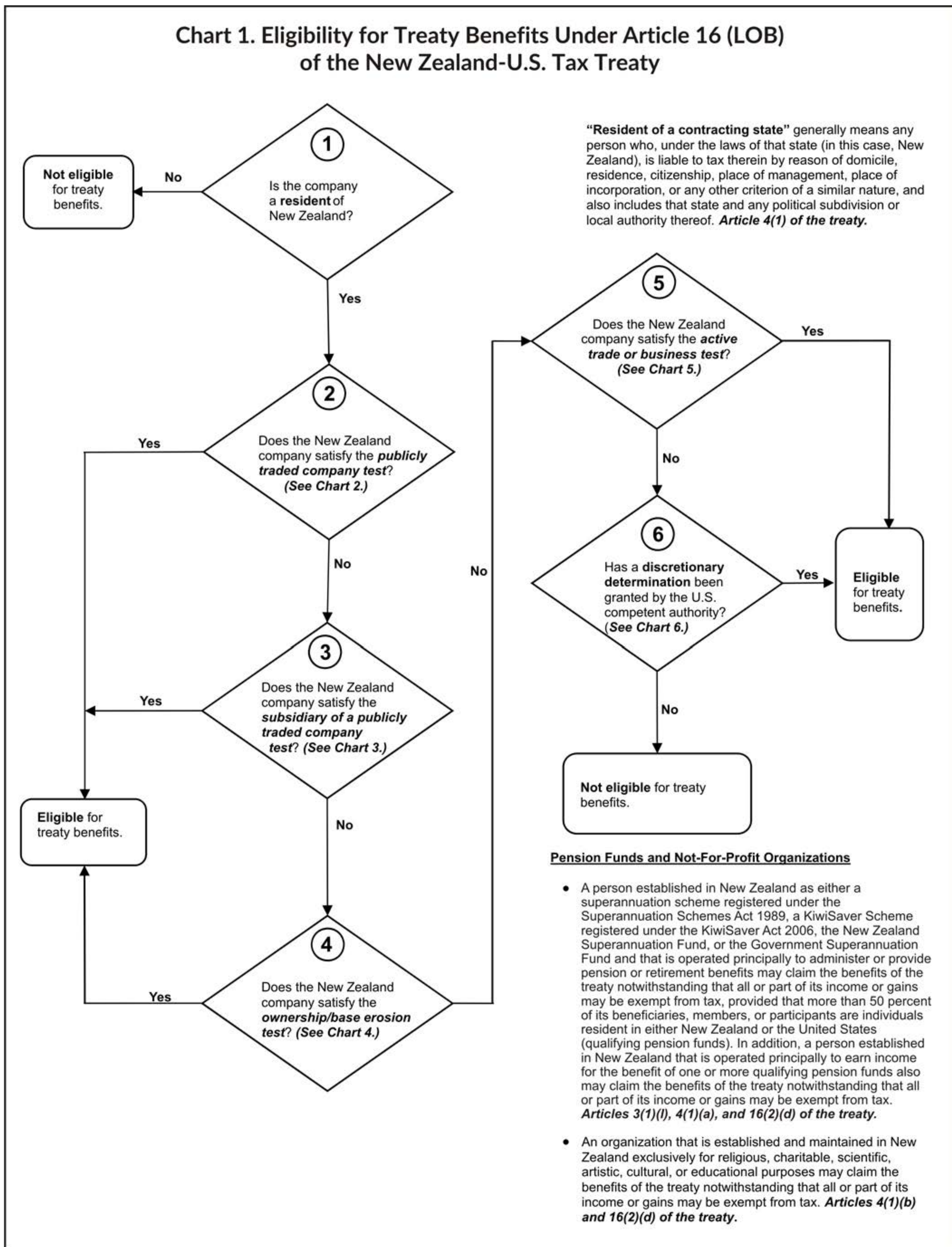

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Chart 2. Publicly Traded Company Test Under Article 16(2)(c)(i) (LOB) of the New Zealand-U.S. Tax Treaty

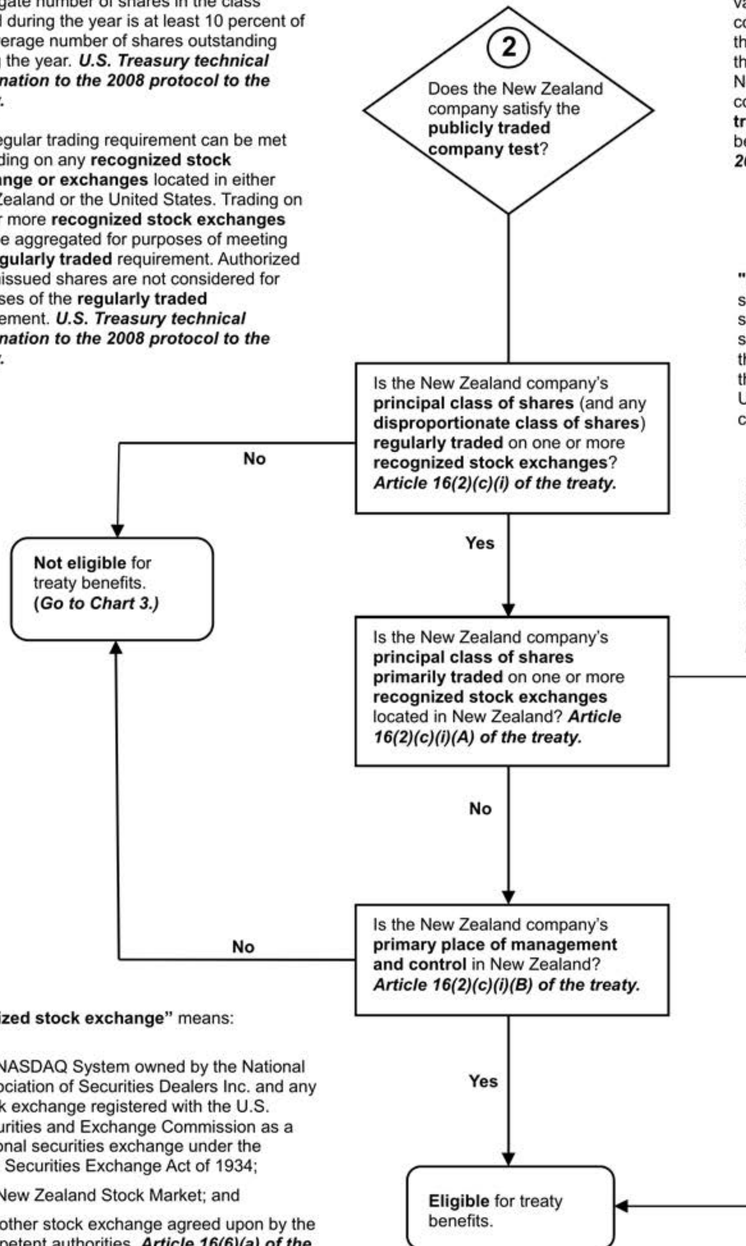
A class of shares comprising the **principal class of shares** is considered to be **regularly traded** if: (i) trades in the class of shares are made in more than de minimis quantities on at least 60 days during the tax year; and (ii) the aggregate number of shares in the class traded during the year is at least 10 percent of the average number of shares outstanding during the year. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

The regular trading requirement can be met by trading on any **recognized stock exchange or exchanges** located in either New Zealand or the United States. Trading on one or more **recognized stock exchanges** may be aggregated for purposes of meeting the **regularly traded** requirement. Authorized but unissued shares are not considered for purposes of the **regularly traded** requirement. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

"Principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the **principal class of shares** are those classes that in the aggregate represent a majority of the aggregate voting power and value of the company. ***Article 16(6)(b) of the treaty.*** If a company has several classes of shares, it is conceivable that multiple combinations of classes could be identified that account for more than 50 percent of the shares. Nevertheless, it is only necessary for one such combination to satisfy the requirements of the **publicly traded company test** for the company to be entitled to benefits. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

"Disproportionate class of shares" means any class of shares of a company resident in one of the contracting states (in this case, New Zealand) that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments, or otherwise, in the earnings generated in the other state (in this case, the United States) by particular assets or activities of the company. ***Article 16(6)(c) of the treaty.***

Stock of a New Zealand company is **"primarily traded"** if the number of shares in the company's **principal class of shares** that are traded during the tax year on all **recognized stock exchanges** in New Zealand exceeds the number of shares in the company's **principal class of shares** that are traded during the year on established securities markets in any other single foreign country. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***



A New Zealand company's **primary place of management and control** will be in New Zealand only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial, and operational policy decision-making for the company (including its direct and indirect subsidiaries) in New Zealand than in any other state and the staff of these people conduct more of the day-to-day activities necessary for preparing and making those decisions in New Zealand than in any other state. ***Article 16(6)(d) of the treaty.*** Thus, the test looks to the overall activities of the relevant persons to see where those activities are conducted. In most cases, it will be a necessary but not a sufficient condition that the headquarters of the company (that is, the place at which the chief executive officer and other top executives normally are based) be located in New Zealand. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

For guidance regarding the people who are considered "executive officers and senior management employees," see ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

"Recognized stock exchange" means:

- the NASDAQ System owned by the National Association of Securities Dealers Inc. and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
- the New Zealand Stock Market; and
- any other stock exchange agreed upon by the competent authorities. ***Article 16(6)(a) of the treaty.***

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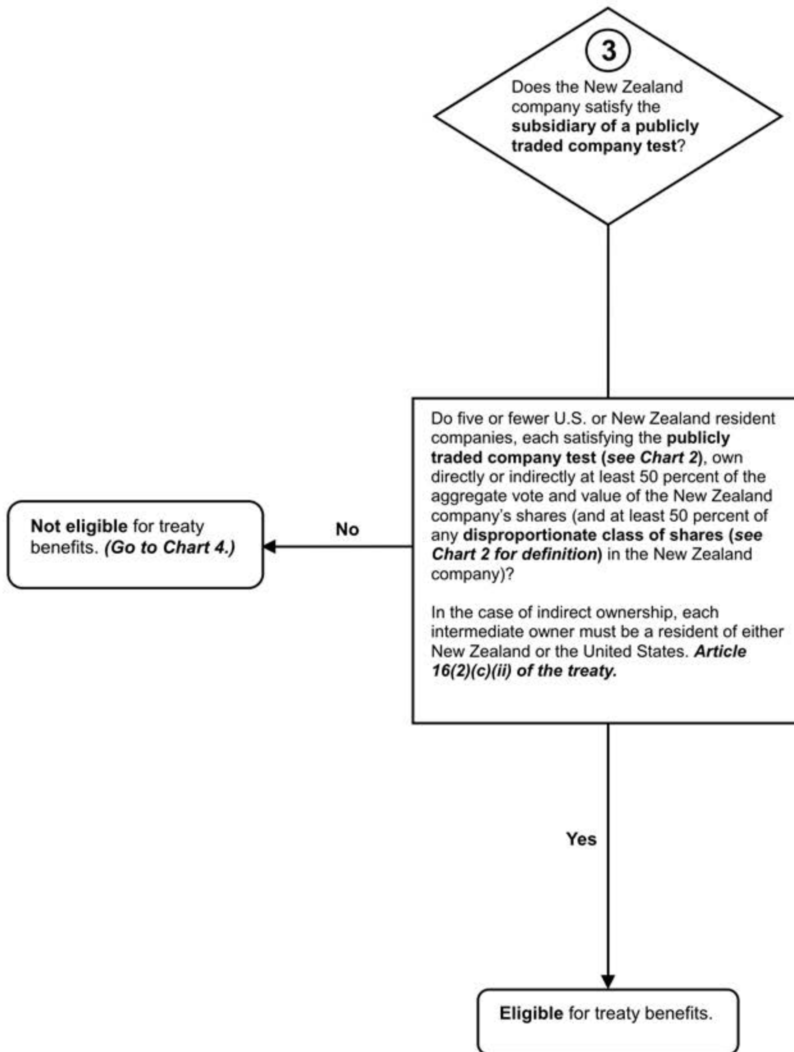
Chart 3. Subsidiary of a Publicly Traded Company Test Under Article 16(2)(c)(ii) (LOB) of the New Zealand-U.S. Tax Treaty



Example

A company that is a resident of New Zealand, all the shares of which are owned by another company that is a resident of New Zealand, would qualify for benefits under the treaty if the **principal class of shares** ***(see Chart 2 for definition)*** (and any **disproportionate classes of shares** ***(see Chart 2 for definition)***) of the parent company are **regularly and primarily traded** ***(see Chart 2 for definition)*** on a **recognized stock exchange** ***(see Chart 2 for definition)*** in New Zealand. However, such a subsidiary would not qualify for benefits under the **subsidiary of a publicly traded company test** if the publicly traded parent company were a resident of a third state, for example, and not a resident of the United States or New Zealand. Furthermore, if a parent company in New Zealand indirectly owned the bottom-tier company through a chain of subsidiaries, each such subsidiary in the chain, as an intermediate owner, must be a resident of the United States or New Zealand in order for the subsidiary to meet the **subsidiary of a publicly traded company test**. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

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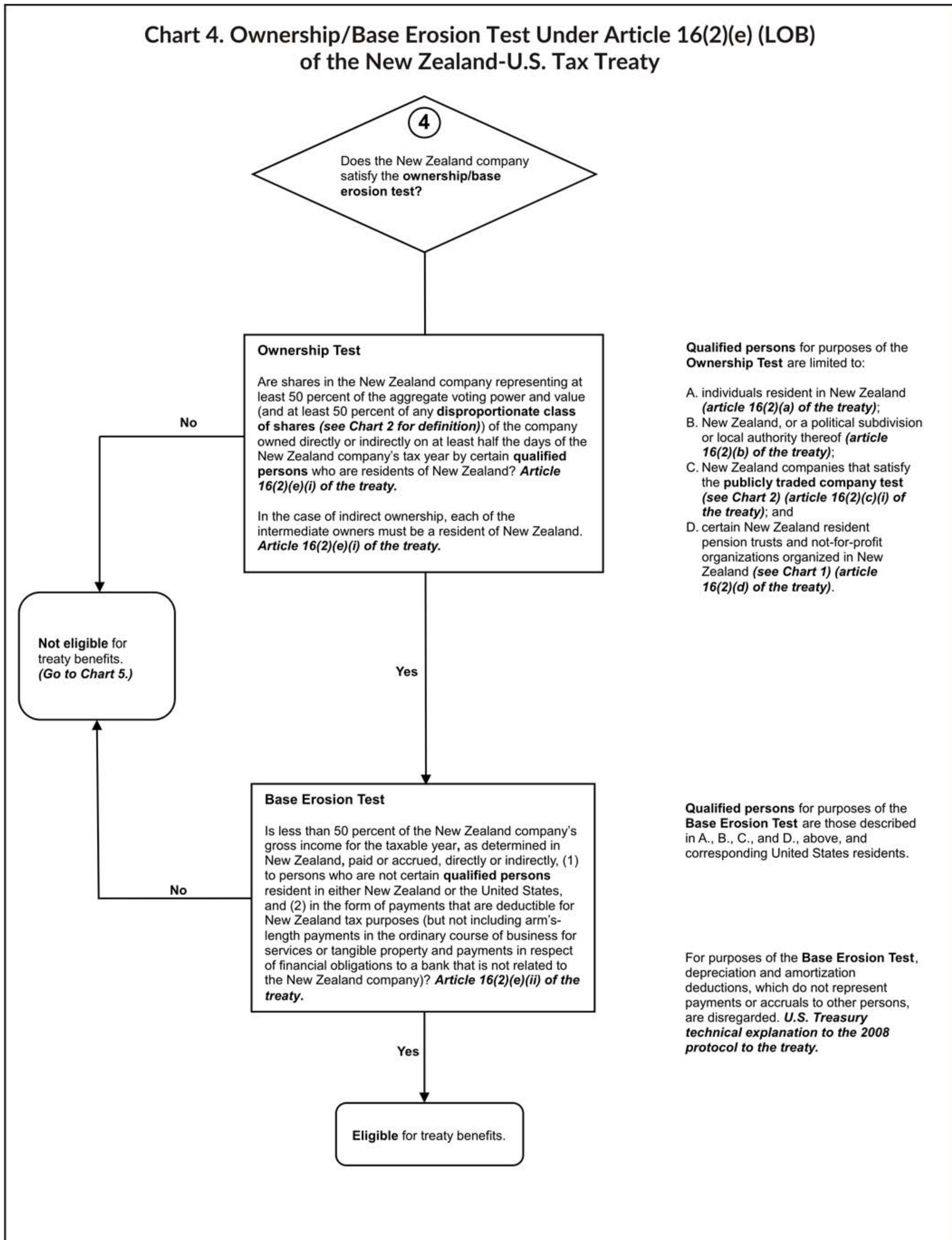

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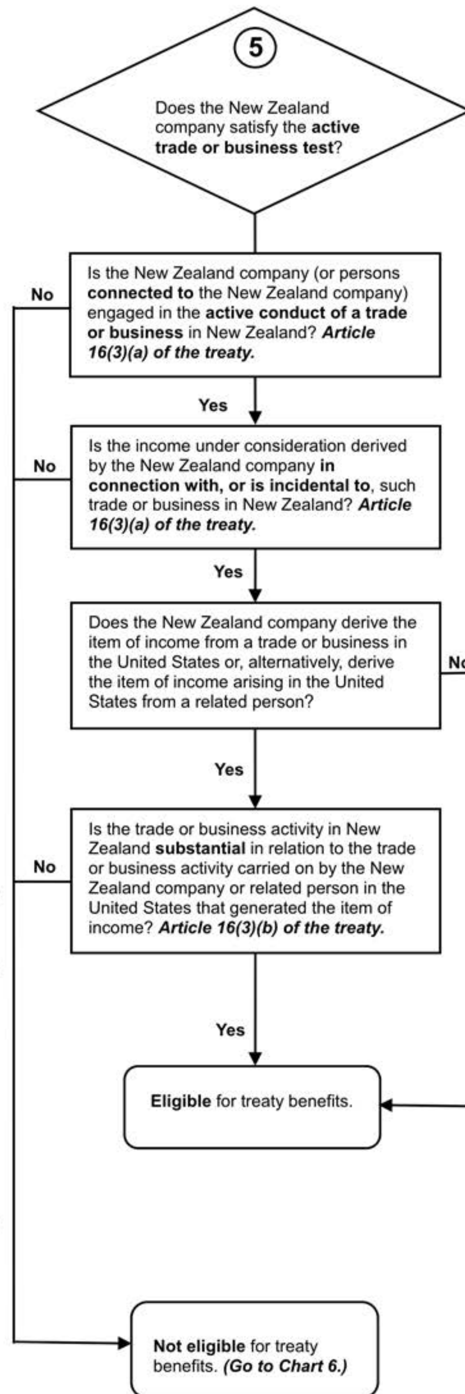
Chart 5. Active Trade or Business Test Under Article 16(3) (LOB) of the New Zealand-U.S. Tax Treaty

(Applies only if an item of income is derived in connection with or incidental to an active trade or business in New Zealand)

The term **"trade or business"** is not defined in the treaty. The U.S. Treasury explanation to the 2008 protocol to the treaty explains that the United States will refer to the regulations issued under section 367(a) for the definition of the term "**trade or business.**" In general, therefore, a **trade or business** will be considered to be a specific unified group of activities that constitute or could constitute an independent economic enterprise carried on for profit. Furthermore, a corporation generally will be considered to carry on a trade or business only if the officers and employees of the corporation conduct substantial managerial and operational activities. ***U.S. Treasury explanation to the 2008 protocol to the treaty.***

The **active conduct of a trade or business** does not include the business of making or managing investments for one's own account, unless these activities are banking, insurance, or securities activities carried on by a bank, insurance company, or registered securities dealer. ***Article 16(3)(a) of the treaty.*** Because a headquarters operation is in the business of managing investments, a company that functions solely as a headquarters company will not be considered to be engaged in an **active trade or business** for purposes of the **active trade or business test.** ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

In determining whether a person is engaged in the **active conduct of a trade or business** in a contracting state, activities conducted by a partnership in which that person is a partner and activities conducted by persons **connected to** such person shall be deemed to be conducted by such person. A person shall be **"connected to"** another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or another person possesses at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be **connected to** another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons. ***Article 16(3)(c) of the treaty.***



An item of income is derived **in connection with** a trade or business if the income-producing activity in the source state (e.g., the United States) is a line of business that "forms a part of" or is "complementary" to the trade or business conducted in New Zealand by the income recipient. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

A business activity generally will be considered to "form a part of" a business activity conducted in the source state if the two activities involve the design, manufacture, or sale of the same products or type of products, or the provision of similar services. The line of business in the state of residence may be upstream, downstream, or parallel to the activity conducted in the source state. Thus, the line of business may provide inputs for a manufacturing process that occurs in the source state, may sell the output of that manufacturing process, or simply may sell the same sorts of products that are being sold by the trade or business carried on in the source state. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

For two activities to be considered to be "complementary", the activities need not relate to the same types of products or services, but they should be part of the same overall industry and be related in the sense that the success or failure of one activity will tend to result in success or failure for the other. When more than one trade or business is conducted in the source state and one of the trades or businesses forms a part of or is complementary to a trade or business conducted in the state of residence, it is necessary to identify the trade or business to which an item of income is attributable. Royalties generally will be considered to be derived in connection with the trade or business to which the underlying intangible property is attributable. Dividends will be deemed to be derived first out of earnings and profits of the treaty-benefited trade or business, and then out of other earnings and profits. Interest income may be allocated under any reasonable method consistently applied. A method that conforms to U.S. principles for expense allocation will be considered a reasonable method. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

An item of income derived from the source state (in this case, the United States) is **"incidental to"** the trade or business carried on in New Zealand if production of the item facilitates the conduct of the trade or business in New Zealand. An example of incidental income is the temporary investment of working capital of a person in New Zealand in securities issued by persons in the source state. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

Whether the New Zealand company's trade or business (or the trade or business of a person **connected to** the New Zealand company) is **substantial** in relation to the trade or business activity in the United States that generated the item of income is determined based upon all the facts and circumstances and takes into account: (i) the comparative sizes of the trades or businesses in each contracting state; (ii) the nature of the activities performed in each contracting state; and (iii) the relative contributions made to that trade or business in each contracting state. The determination of substantiality is made separately for each item of income derived from the source state. It therefore is possible that a person would be entitled to the benefits of the treaty with respect to one item of income but not with respect to another. If a resident of a contracting state is entitled to treaty benefits with respect to a particular item of income under the **active trade or business test**, the resident is entitled to all benefits of the treaty insofar as they affect the taxation of that item of income in the source state. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

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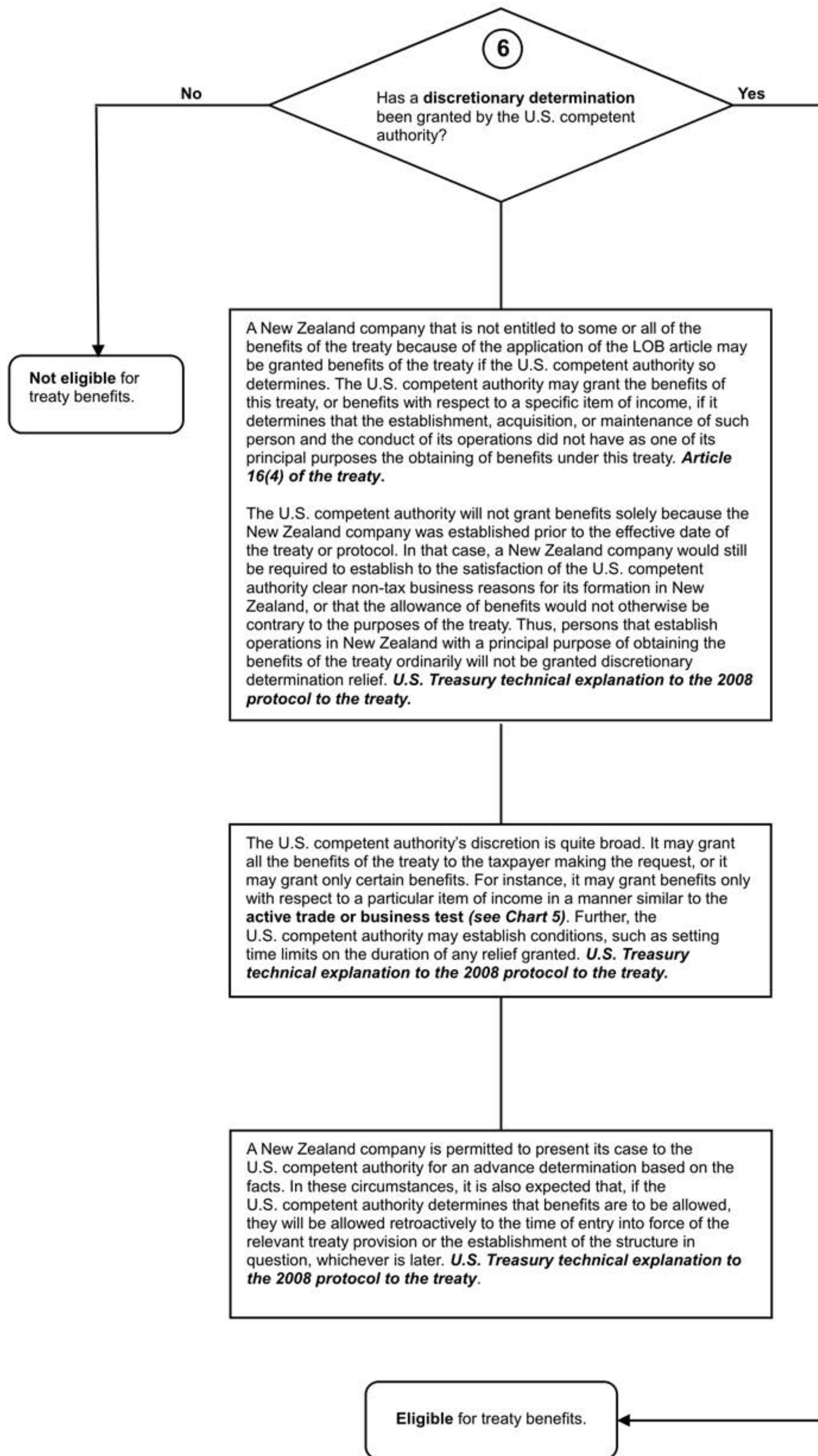
Chart 6. Discretionary Determination by U.S. Competent Authority Under Article 16(4) (LOB) of the New Zealand-U.S. Tax Treaty



The **"U.S. competent authority"** is the Secretary of the Treasury or his delegate. ***Article 3(1)(f)(i) of the treaty.***

Requesting competent authority assistance — A taxpayer may request the assistance of the U.S. competent authority under Rev. Proc. 2015-40. The U.S. competent authority may determine in its own discretion that the taxpayer qualifies for certain benefits under the LOB article of the treaty.

There is a US $37,000 user fee for requesting a discretionary determination under the LOB provision for requests filed on or after September 30, 2016. If a request is submitted for more than one entity, a separate user fee is charged for each entity. Rev. Proc. 2015-40, section 14.02.

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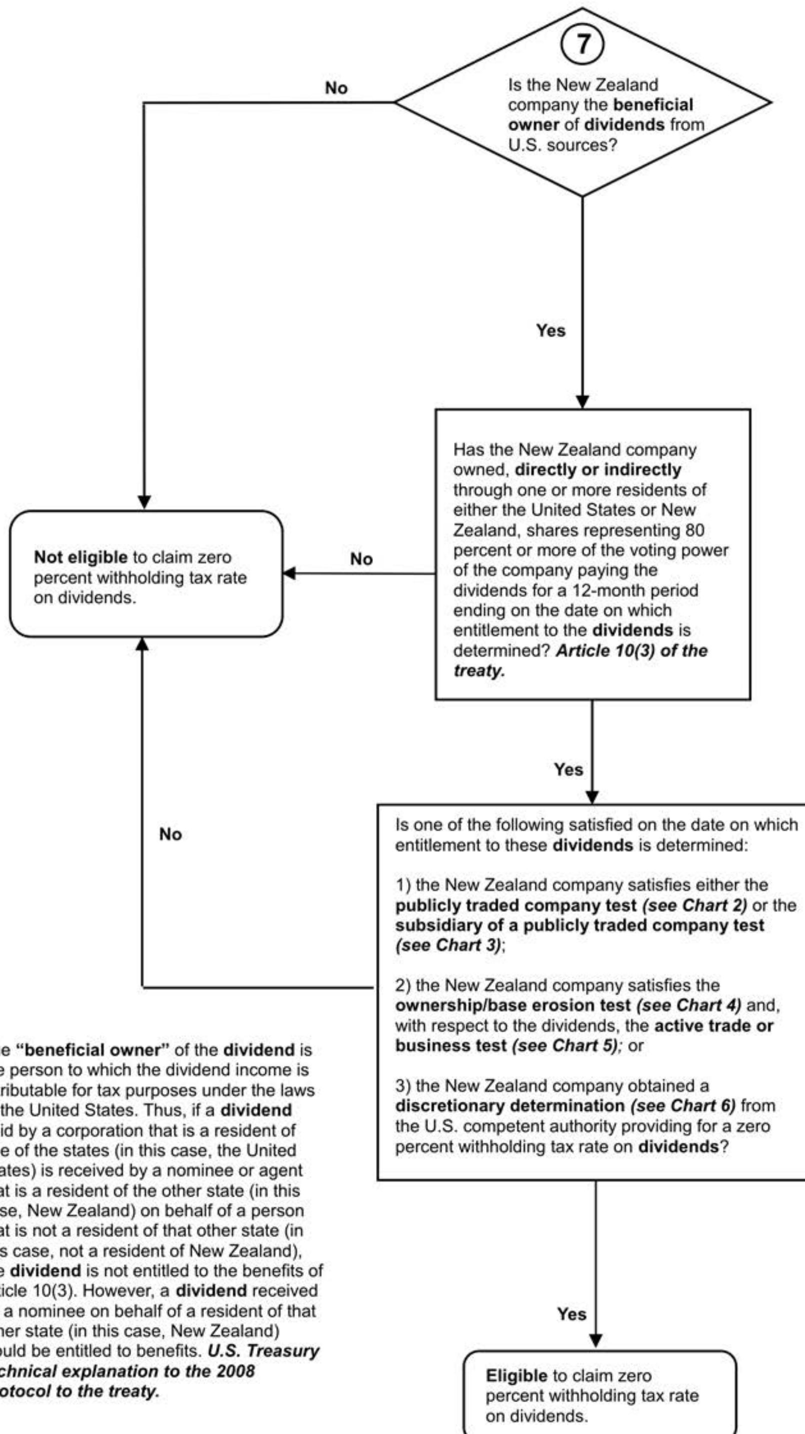
Chart 7. Eligibility for Zero Percent Withholding Tax Rate on Dividend Under Article 10(3) of the New Zealand-U.S. Tax Treaty



The **"beneficial owner"** of the **dividend** is the person to which the dividend income is attributable for tax purposes under the laws of the United States. Thus, if a **dividend** paid by a corporation that is a resident of one of the states (in this case, the United States) is received by a nominee or agent that is a resident of the other state (in this case, New Zealand) on behalf of a person that is not a resident of that other state (in this case, not a resident of New Zealand), the **dividend** is not entitled to the benefits of article 10(3). However, a **dividend** received by a nominee on behalf of a resident of that other state (in this case, New Zealand) would be entitled to benefits. ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

The term **"dividends"** means income from shares or other rights participating in profits, as well as income that is subjected to the same treatment as income from shares under the laws of the state of which the payer is a resident (in this case, the United States). ***Article 10(5) of the treaty.***

The treaty defines the term **"dividends"** broadly and flexibly. The definition is intended to cover all arrangements that yield a return on an equity investment in a corporation as determined under the tax law of the source state (in this case, the United States), as well as arrangements that might be developed in the future. The term includes income from shares, or other corporate rights that are not treated as debt under the law of the source state, that participate in the profits of the company. The term also includes income that is subject to the same tax treatment as income from shares by the law of the source state. Thus, a constructive dividend that results from a non-arm's-length transaction between a corporation and a related party is a dividend. In the case of the United States, the term **"dividend"** includes amounts treated as a dividend under U.S. law upon the sale or redemption of shares or upon a transfer of shares in a reorganization. *See, e.g.,* Rev. Rul. 92-85, 1992-2 C.B. 69 (sale of foreign subsidiary's stock to U.S. sister company is a deemed dividend to extent of the subsidiary's and sister company's earnings and profits). Further, a distribution from a U.S. publicly traded limited partnership, which is taxed as a corporation under U.S. law, is a **dividend** for purposes of article 10. However, a distribution by a limited liability company is not taxable by the United States under article 10, provided the limited liability company is not characterized as an association taxable as a corporation under U.S. law. Finally, a payment denominated as interest that is made by a thinly capitalized corporation may be treated as a **dividend** to the extent that the debt is recharacterized as equity under the laws of the source state (in this case the United States). ***U.S. Treasury technical explanation to the 2008 protocol to the treaty.***

Dividends received by a New Zealand company from U.S. real estate investment trusts and U.S. regulated investment companies are not eligible for a zero percent withholding tax rate. ***Article 10(4) of the treaty.***

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