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A thematic history of New Zealand's double taxation agreements

Andrew MC Smith[*] and Jonathan Barrett[**]

Abstract

This article seeks to pay tribute to John Taylor's scholarship in the field of the history of Australian double taxation agreements (DTAs). Referencing Taylor's formidable body of research, the article adopts a thematic approach to outline the history of New Zealand's DTAs, including tax treaties with Australia.

Keywords: double taxation agreements, history, Australia, New Zealand, passive income

[*] Associate Professor in Taxation, School of Accounting and Commercial Law, Victoria University of Wellington Te Herenga Waka. Email: andrew.smith@vuw.ac.nz.
[**] Associate Professor in Taxation, School of Accounting and Commercial Law, Victoria University of Wellington Te Herenga Waka.

1. INTRODUCTION

From the Dominion-era and beyond, histories of Australia and New Zealand have been parallel, connected and occasionally entwined, as exemplified by the role of the ANZAC bloodshed in building imageries of nationhood.[1] Indeed, how many states have, as Australia has done, invited another country to join it and maintained that possibility in its *Constitution* for more than a century?[2] New Zealand has often looked across the Tasman for inspiration for its legislation, including tax statutes: for example the *Land and Income Assessment Act 1891* (NZ) closely followed South Australia's *Taxation Act 1884* (SA),[3] Australia's first general income tax legislation.[4] Nevertheless, despite obvious similarities and commonalities of history, in the field of taxation, small but arguably significant differences distinguish the two countries. Specifically, in the development of double taxation agreements (DTAs) before the countries joined the Organisation of Economic Co-operation and Development (OECD),[5] they manifested particularist approaches to engaging with international juridical double taxation. Professor Taylor has extensively investigated the Australian approach; more modestly, here we attempt to sketch the New Zealand means of engagement with that issue, while referencing his work.

Sigmund Freud coined the phrase 'the narcissism of small differences' (*der Narzissmus der kleinen Differenzen*) to explain why the more a relationship shares commonalities, the more likely the partners to that relationship are to engage in interpersonal feuds and mutual ridicule because of hypersensitivity to minor differences perceived in each other.[6] We are, then, conscious of the implications of the 'small differences' between Australian and New Zealand approaches to international juridical taxation but, in general, do not intend a Freudian meaning. Postcolonial Australia and New Zealand are cognate and cooperative countries but nevertheless are rivalrous in certain regards, including trade and the assertion of taxing rights. Those small differences, manifest for example in the ways the countries have differently taxed companies and their distributions, have played an important role in both establishing and overcoming barriers to double taxation.

As an effective historian, in his studies, Taylor identifies historical currents but also teases out particularities from grand narratives. The French historian Emmanuel Le Roy Ladurie has been described as having distinguished members of his profession between 'parachutists', who look at the general contours of a subject from a high-altitude perspective and 'truffle hunters', 'who look for events and vignettes that speak to bigger truths about a time in history [and who] he said, keep "their noses buried in the

[1] See, eg, Marilyn Lake, 'Beyond ANZAC: What Really Shaped Our Nation?' *Pursuit* (Blog Post, 23 April 2018) <https://pursuit.unimelb.edu.au/articles/beyond-anzac-what-really-shaped-our-nation>.
[2] See *Australian Constitution*, s 6, definition of 'States'.
[3] See John Prebble, '100 Years of Income Tax' (1993) 47(2) *Bulletin for International Taxation* 59, 60.
[4] See Peter Mellor, 'Origins of the Judicial Concept of Income in Australia' (2010) 25(3) *Australian Tax Forum* 339.
[5] Australia ratified the Convention on the Organisation for Economic Co-operation and Development (1960) on 7 June 1971, and New Zealand ratified on 29 May 1973. See OECD, 'List of OECD Member Countries – Ratification of the Convention on the OECD' (Web Page) <https://search.oecd.org/about/document/ratification-oecd-convention.htm>.
[6] See Sigmund Freud, *Civilization, Society and Religion: Group Psychology, Civilization and Its Discontents and Other Works, Volume 12,* tr James Strachey (Penguin Books, 1991) 131.

details"'.[7] In the field of DTAs, Taylor was both a parachutist and truffle hunter. And so, while it is important to understand, say, the broad development of DTAs – the Dominion Income Tax Relief (DITR) scheme granted within the British Empire,[8] the early work of the League of Nations in formulating international tax norms,[9] the OECD model tax conventions,[10] and, today, anti-BEPS initiatives[11] – it is nevertheless illuminating to uncover how these broad developments were received and given effect in specific jurisdictions. Taylor's meticulous investigation of Australian DTAs is a paragon of such research,[12] and, while this article cannot do justice to his oeuvre, by referencing his work, it seeks to pay tribute to his scholarship.

The article adopts a thematic, rather than a strictly chronological, approach and is structured as follows. Section 2 analyses the development of New Zealand's DTAs.[13] This history is distinguished by a Canute-like resistance to following international tax norms to retain taxing rights over New Zealand-sourced income but ultimate concession, albeit subject to some victories for recalcitrance. The focus lies with taxation of passive income, in particular dividends. Non-discrimination is an adjunct consideration. Australia's broader political approach to DTAs, which Taylor excavates, is compared with New Zealand's somewhat rudimentary cost benefit analyses. Section 3 then outlines the development of the DTAs negotiated between Australia and New Zealand.

Generally, the article highlights New Zealand's historical approach to relieving double taxation, which may be distinguished from the Australian approach that Taylor identifies.

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[7] Brian Murphy, 'Emmanuel Le Roy Ladurie, Historian of the Downtrodden, Dies at 94' *The Washington Post* (25 November 2023) <https://www.washingtonpost.com/obituaries/2023/11/25/roy-ladurie-historian-french-dies> (accessed 8 August 2024).

[8] DITR was introduced by the *Finance Act 1920* (UK) s 27. For a discussion of DITR, see C John Taylor, '"Send a Strong Man to England – Capacity to Put Up a Fight More Important Than Intimate Knowledge of Income Tax Acts and Practice": Australia and the Development of the Dominion Income Tax Relief System of 1920' (2014) 12(1) *eJournal of Tax Research* 32.

[9] See, generally, Sunita Jogarajan, *Double Taxation and the League of Nations* (Cambridge University Press, 2018).

[10] See, eg, Donald R Whittaker, 'An Examination of the OECD and UN Model Tax Treaties: History, Provisions and Application to US Foreign Policy' (1982) 8(1) *North Carolina Journal of International Law* 39.

[11] See, eg, Alison Lobb and Lisa Shipley, 'OECD Inclusive Framework Publishes Outcome Statement on Pillar One and Pillar Two' *Tax Journal* (Blog Post, 21 July 2023) <https://www.taxjournal.com/articles/oecd-inclusive-framework-publishes-outcome-statement-on-pillar-one-pillar-two> (accessed 8 August 2024).

[12] For an item that captures the essence of Taylor's oeuvre, see C John Taylor, 'The History of Australia's Double Tax Conventions' in Michael Lang and Ekkehart Reimer (eds), *The History of Double Taxation Conventions in the Pre-BEPS Era* (IBFD Publications, 2020) 623 ('The History of Australia's Double Tax Conventions').

[13] For a comprehensive chronological history of New Zealand's DTAs, see Andrew MC Smith, 'A History of New Zealand's Double Tax Agreements' (2010) 16 *New Zealand Journal of Taxation Law and Policy* 105; Andrew MC Smith, 'The History of New Zealand's Double Tax Conventions' in Michael Lang and Ekkehart Reimer (eds), *The History of Double Taxation Conventions in the Pre-BEPS Era* (IBFD Publications, 2020) 693.

2. NEW ZEALAND'S DTAS

From the earliest colonial period, New Zealand tended to follow British law and policy,[14] including in the field of taxation.[15] And so, when the UK moved to full worldwide taxation of its residents' incomes in 1914,[16] New Zealand followed this precedent.[17] Despite mimicking the policies of the mother country, significant differences distinguished the economies of New Zealand and the UK. First, New Zealand was a capital importer or 'debtor country',[18] with much of its external investment derived from the UK.[19] Second, New Zealand was primarily an exporter of primary products but lacked a merchant fleet to transport its goods beyond the near Pacific region.[20] These characteristics led the country to seek to claim taxing rights over income of any New Zealand origin. This practice became increasingly incompatible with residence-oriented international tax norms as they developed in the 20th century.[21] Consequently, New Zealand's experience of negotiation of DTAs can be reductively characterised as pursuit of increasingly abnormal claims based on source, and, despite some small victories for recalcitrance, ultimate concession in the face of more powerful negotiating counterparties.

2.1 Early DTAs and issues

The 1924 Royal Commission Report recommended that:

> the question of double taxation be further considered, and arrangements made that will result in British capital invested in New Zealand being placed in a position at least as favourable as in Australia, provided such an arrangement does not put British investors in New Zealand on a better footing than New Zealand investors.[22]

In the arguments presented to the Royal Commission by Dalgety,[23] a British commodities trader, the firm claimed it would be better off investing in Australia (if tax were the only investment consideration).[24] And here is the dilemma New Zealand

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[14] See, eg, *English Laws Act 1858* (NZ).
[15] See Paul Goldsmith, *We Won, You Lost, Eat That! A Political History of Tax in New Zealand Since 1840* (David Ling Publishing, 2008) 104-160. Cf Prebble, above n 3, 60 on another legislative tendency which is to borrow from Australian tax law.
[16] See *Finance Act 1914* (UK) s 5. For a discussion, see MJ Daunton, 'How To Pay For The War: State, Society and Taxation in Britain, 1917-24' (1996) 111(443) *English Historical Review* 882.
[17] See *Land and Income Tax Act 1916* (NZ) s 88(1).
[18] For a discussion of the debtor nations' preference for source-based taxation, see generally Ke Chin Wang, 'International Double Taxation of Income: Relief Through International Agreement 1921-1945' (1945) 59(1) *Harvard Law Review* 73.
[19] See C John McDermott and Rishab Sethi, 'Balance of Payments' *Te Ara – the Encyclopedia of New Zealand* (Web Page, 11 March 2010) <http://www.TeAra.govt.nz/en/balance-of-payments/print> (accessed 8 August 2024).
[20] See Neill Atkinson, 'Seafarers' *Te Ara – the Encyclopedia of New Zealand* (Web Page, 12 June 2006) <http://www.TeAra.govt.nz/en/seafarers/print> (accessed 8 August 2024).
[21] For a discussion of the development of international tax norms, see Marilyne Sadowsky, 'The History of International Tax Law' in Florian Haase and Georg Kofler (eds), *The Oxford Handbook of International Tax Law* (Oxford University Press, 2023) 3.
[22] Royal Commission to Inquire Into and Report Upon Land and Income Taxation (William Alexander Sim, chair), *Land and Income Taxation (Report of the Royal Commission Appointed to Inquire into the Subject of) in New Zealand* (1924) ('Royal Commission') 6.
[23] Ibid 204-205.
[24] Ibid.

policy-makers faced: the country needed to ensure it remained competitive with its much larger neighbour, when both sought UK capital, but it should not disadvantage local investors, who themselves might be tempted to shift capital to Australia. New Zealand's response was to rely on the DITR.

By the mid-1930s, New Zealand treating all commission agents as effective permanent establishments (PEs) was incompatible with international tax norms.[25] In 1935, Belgium, a significant trading partner at that time,[26] threatened to tax New Zealand wool exporters doing business in Belgium in retaliation for New Zealand taxing Belgian exporters on orders obtained in New Zealand through local agents. In response, Parliament passed the *Land and Income Tax Amendment Act 1935* (NZ). This Act, in section 11, amended the *Land and Income Tax Act 1923* (NZ) to provide for a power for the Governor-General power by Order in Council to exempt profits of non-resident traders from New Zealand tax if he was satisfied that New Zealand residents were similarly exempt in the other country.

From 1936 to 1946, in addition to Belgium (1936),[27] Orders in Council were issued in relation Switzerland (1936),[28] Netherlands East Indies (1938) but not the Netherlands itself,[29] Japan (1938),[30] Czechoslovakia (1938),[31] the UK (1942),[32] and Canada (1946).[33]

These exemption orders were rudimentary mechanisms in comparison to modern DTAs that for the most part, simply exempted non-resident traders from New Zealand tax. They also set a precedent of conceding to the more powerful negotiating party. The UK and Canadian Orders were, however, broader in scope. They also exempted income arising from orders obtained by New Zealand agents of non-resident traders, even if they were filled from a warehouse in New Zealand, provided the warehouse was for 'the

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[25] The *Land and Income Tax Act 1923* (NZ) s 104 did not distinguish between dependent and independent commission agents, whereas the League of Nations Model Convention, Art 5 did not consider 'a *bona fide* agent of independent status' to be a PE: League of Nations, 'Draft of a Bilateral Convention for the Prevention of Double Taxation' in League of Nations, *Double Taxation and Tax Evasion: Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion*, Document C.216.M.85.1927.II (April 1927) ('League of Nations Draft Model Convention').

[26] Belgium was also an important trading partner for Australia during the 1930s. See Boris Schedvin, *Emissaries of Trade: A History of the Australian Trade Commissioner Service* (Austrade, 2008) 60.

[27] See 'Reciprocal Application of Income-tax Exemption to Non-resident Traders Resident in or Nationals of Belgium', Order in Council, 18 February 1936 in New Zealand, *Government Gazette*, No 16, 27 February 1936, 340. 'The principal provisions of this agreement were: (a) Each country granted most-favoured-nation treatment to the other; (b) New Zealand reduced the duty on certain Belgian goods, chiefly matches (by abolition of surtax), carpets, glassware, sensitized surfaces, and firearms; and (c) Belgium reduced the duty on New Zealand cheddar cheese and fresh apples, and provided for the free admission into Belgium of New Zealand tallow, hides, skins, greasy wool, and phormium fibre': New Zealand, *The New Zealand Official Year-Book, 1936* (1935), reproduced at: *Statistics New Zealand* <https://www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1936/NZOYB_1936.html>.

[28] See *Income-Tax: Exemption of Traders Resident in or Nationals of Switzerland*, Order in Council, 12 August 1936, 4/1936.

[29] See *Income-Tax: Exemption of Traders Resident in or Nationals of Netherlands East Indies*, Order in Council, 23 February 1938, 1938/35.

[30] See *Income-Tax: Exemption of Traders Resident in or Nationals of Japan*, Order in Council, 12 April 1938, 1938/50. This order was suspended when New Zealand declared war with Japan in 1941 and was not resumed when a peace treaty was signed with Japan in 1951.

[31] See *Income-Tax: Exemption of Traders Resident in or Nationals of Czechoslovakia*, Order in Council, 13 July 1938, 1938/85.

[32] See *Income-Tax (United Kingdom Traders) Exemption Order 1942*, Order in Council, 1 July 1942, 1942/199.

[33] See *Income-Tax (Canadian Traders) Exemption Order 1946*, Order in Council, 15 May 1946, 1946/71.

convenience of delivery' and not for the 'purposes of display'. This broader scope is probably attributable to the UK and Canadian Orders being treaty-based.[34]

After concluding a comprehensive DTA with the US in 1945,[35] the UK pressured its Dominions to negotiate DTAs to replace the DITR system. In 1947, New Zealand's first comprehensive DTA was therefore concluded with the UK and was based on a template provided by the senior partner.[36] At the time of negotiation, New Zealand's economic ties to the UK were extensive – the UK was both New Zealand's dominant export market and principal source of capital.[37] New Zealand had the opportunity to monitor and observe negotiations between the UK and Australia to gauge concessions being made and sticking points. It seems that New Zealand concluded its UK DTA more easily than Australia, an experience that was perhaps attributable to its smaller economy and coming later to the negotiating table.

New Zealand concluded a tax treaty with Canada in 1948,[38] using the UK–Canada DTA as a template. Negotiations for a treaty with the US were completed in the same year, although the DTA did not come into effect until late 1951.[39] This early flurry of tax treaty-making ended with a DTA negotiated with Sweden in 1956.[40] Negotiations stalled due to New Zealand's efforts to protect its source-dependent tax base. By adhering to its conception of national interest (retaining taxing rights over source

[34] See Land and Income Tax Department *Agreement Dated 10th Day of March 1942, Between His Majesty's Government in the United Kingdom and His Majesty's Government in New Zealand for the Reciprocal Exemption from Income-Tax on Certain Profits or Gains Arising Through an Agency,* Appendix to the Journals of the House of Representatives (AJHR), 1942 Session I, A-02, (SR) 1942 No 1179 and Land and Income Tax Department, *Agreement Dated 3rd November, 1945, Between His Majesty's Government in Canada and His Majesty's Government in New Zealand for the Reciprocal Exemption from Income-Tax on Certain Profits or Gains Arising Through an Agency*, AJHR, 1946 Session I, A-06.
[35] See Peter Harris, 'An Historic View of the Principle and Options for Double Tax Relief' [1999] (6) *British Tax Review* 469, 477. Harris notes that, despite the growth of DTAs elsewhere to relieve international double taxation, the UK and its Dominions maintained DITR for 25 years: ibid 476-477. See also John F Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement' [2007] (3) *British Tax Review* 211.
[36] See *Agreement Between the Government of the United Kingdom and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 27 May 1947, 17 UNTS 211 (entered into force 8 August 1947) ('New Zealand–UK DTA'). See also *Double Taxation Relief (United Kingdom) Order 1947*, Order in Council, 24 June 1947, 1947/96.
[37] In the period 1947-49, exports to the UK were worth £107,912,430 (£40,491,147 trade surplus), whereas those to Australia, the next highest destination were worth £3,955,960 (£10,745,875 trade deficit). See New Zealand, *The New Zealand Official Year-Book, 1947-49* (1950), reproduced at: *Statistics New Zealand* <https://www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1947-49/NZOYB_1947-49.html#idsect1_1_5340>.
[38] *Agreement Between the Government of New Zealand and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 12 March 1948, 231 UNTS 219 (entered into force 30 June 1948) ('New Zealand–Canada DTA').
[39] *Convention Between the Government of New Zealand and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 16 March 1948, 127 UNTS 133 (entered into force 18 December 1951) ('New Zealand–USA DTA').
[40] *Convention Between the Government of New Zealand and the Government of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 16 April 1956, 274 UNTS 259 (entered into force 22 November 1956) ('New Zealand–Sweden DTA').

income) New Zealand was unable to finalise negotiations with Austria, Denmark, the Federal German Republic, France, Greece, Italy, the Netherlands, and Norway.[41]

In these early tax treaties, omissions, lacunae, and vagaries generally favoured New Zealand's assertion of taxing rights on a source basis. Since royalties were tax exempt in the source state under the New Zealand–Canada and New Zealand–UK DTAs, the definition of 'royalty' was important for New Zealand in terms of retention of taxing rights. The royalty article in the Canadian DTA applied to copyright royalties only,[42] while the UK DTA contained a more expansive definition which also included industrial royalties, except those relating to mining and natural resource exploitation.[43]

Since dividends were not contemplated in the Canadian treaty, New Zealand-sourced distributions could be taxed in New Zealand. Likewise, neither the New Zealand–Canada nor New Zealand–UK DTA considered interest or included a residence tiebreaker clause which again favoured the source country. These early victories in maintaining New Zealand's source-based taxing rights became, however, increasingly abnormal.

2.2 Abnormal tax claims

Before it joined the OECD in 1973 and became obliged to follow the template of the Organisation's model tax conventions,[44] New Zealand's taxing claims consistently ran counter to international tax norms as they developed in the 20th century. Four instances demonstrate this theme – the treatment of shipping, agents, insurance, and, most significantly for the purposes of this article, passive income, in particular dividends.

2.2.1 Shipping

Income derived by a non-resident shipper from the carriage of goods from New Zealand was deemed to have a New Zealand source.[45] This policy was justified on the grounds that New Zealand was dependent on foreign shipping companies for its international trade and these companies could be expected to pay some local tax on the profits they derived from this business. In contrast, under the League of Nations Model Tax Convention,[46] shipping enterprises were taxable only in the place where their 'real centre of management is situated' (ie, on a residence basis).[47]

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[41] See Letter from the Commissioner of Inland Revenue to the Secretary of the Treasury on 'Double Tax Agreements: Review of Policy', dated 20 August 1975, sighted by author's search of Archives New Zealand.
[42] New Zealand–Canada DTA, above n 38, Art VI.
[43] New Zealand–UK DTA, above n 36, Art VII.
[44] The Convention on the Organisation for Economic Co-operation and Development (1960) does not specifically mention DTAs but Article 3 provides: 'With a view to achieving the aims set out in Article 1 and to fulfilling the undertakings contained in Article 2, the Members agree that they will:
(a) keep each other informed and furnish the Organisation with the information necessary for the accomplishment of its tasks;
(b) consult together on a continuing basis, carry out studies and participate in agreed projects; and
(c) co-operate closely and where appropriate take co-ordinated action'.
[45] See *Land and Income Tax Act 1923* (NZ) s 87; *Land and Income Tax Act 1954* (NZ) s 167(m).
[46] See League of Nations Draft Model Convention, above n 25. For a discussion on the informing recommendations, see WH Coates, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp' (1924) 87(1) *Journal of the Royal Statistical Society* 99.
[47] See League of Nations Draft Model Convention, above n 25, Art 5.

During the 1950s, New Zealand suspended taxation of non-resident shippers on the commencement of DTA negotiations on an administrative basis (ie, not authorised by law) as a goodwill gesture but did not resume taxing shippers if the negotiations failed.[48]

2.2.2 *Agents*

Since New Zealand was primarily an exporter of primary products,[49] overseas businesses could engage in trade with New Zealand by using local agents without the need for establishing a branch or subsidiary. The policy response was to deem a New Zealand source to income derived by a non-resident trader from business obtained on their behalf by a commission agent resident in New Zealand.[50] This policy put foreign principals on a similar footing to overseas companies with branch operations but was inconsistent with the increasingly normalised concept of a taxable PE.[51]

As more DTAs were negotiated, resident trader exemptions New Zealand had granted tended to be removed. Nevertheless, new non-resident trader exemptions were extended to several European countries and Japan. Both unilateral concessions undermined New Zealand's position in DTA negotiations.[52]

2.2.3 *Insurance*

Being reliant on overseas insurers, New Zealand generally sought to keep foreign insurance operations outside the scope of the business profits article. For example, in the New Zealand–Canada and New Zealand–UK DTAs, the business profits article did not cover the business of insurance carried on in New Zealand by a resident of the other contracting state.[53] The effect of this provision allowed New Zealand to tax non-resident insurers in the absence of a PE. Without such an exclusion for insurance from the business profits article, New Zealand could only tax foreign insurers if they operated a PE there.

Only the DTA with Switzerland does not contain the exclusion for insurance from the business profits article.[54] A protocol of 2001 to the New Zealand–Netherlands DTA 1980 excludes only general insurance from the scope of the business profits article. It limits the amount to be taxed at 10 per cent of gross premiums with the result that Dutch life insurers can only be taxed in New Zealand if they have a PE there.[55] In particular,

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[48] See Commissioner of Inland Revenue and The Treasury, 'Note to Minister of Finance on Double Taxation' (Report, 1962) 6-7, sighted by author's search of Archives New Zealand.

[49] See 'Trade, External – Historical Evolution and Trade Patterns' in AH McLintock (ed), *An Encyclopedia of New Zealand* (1966), available at *Te Ara – the Encyclopedia of New Zealand* <http://www.TeAra.govt.nz/en/1966/trade-external>.

[50] See *Land and Income Tax Act 1923* s 168 carried over to *Income Tax Act 2007* (NZ) ss HD 26 and 29.

[51] See, generally, Michael Kobetsky, *International Taxation of Permanent Establishments: Principles and Policy* (Cambridge University Press, 2011).

[52] See 'Note to Minister of Finance on Double Taxation from the Commissioner of Inland Revenue and The Treasury' (Report, 1955), sighted by author's search of Archives New Zealand.

[53] See New Zealand–Canada DTA, above n 38, art IV; New Zealand–UK DTA, above n 36, art III.

[54] See *Convention Between New Zealand and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income*, signed 6 June 1980, 1324 UNTS 173 (entered into force 21 November 1981); *Double Taxation Relief (Switzerland) Order 1981*, Order in Council, 15 October 1981, SR 1981/285.

[55] See *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*, signed 15 October 1980, 1315 UNTS 115 (entered into force 18 March 1981) Art 4 as amended by the *Second Protocol Amending the Convention Between the Government of the Kingdom of*

this concession concerning insurance made in negotiations for the Swiss DTA has made it difficult for New Zealand to protect its right to tax non-resident insurers in the absence of a PE.

2.2.4 *Passive income*

Not only was New Zealand an importer of capital, it was also an importer of intellectual property and know-how, and therefore sought to maintain taxing rights over various forms of passive income with a New Zealand source. Again, this brought its policies into conflict with the expectations of potential DTA partners.

A compromise concerning the taxation of passive income was reached with Sweden in 1956 through a DTA provision for interest and royalties to be taxed on a split basis 60 per cent/40 per cent in favour of the source state.[56] Until the 2000s, New Zealand was able to prevail in its DTA negotiations and retain taxation of royalties at source (at rates of 10 per cent to 15 per cent) and not agree to a lower rate of withholding tax for parent-subsidiary dividends.

The 2008 protocol to the 1982 New Zealand–US DTA and the 2009 New Zealand–Australia and New Zealand–Singapore DTAs include significant reductions in non-resident withholding tax (NRWT) rates for interest, dividends and royalties.[57] These reductions for withholdings on interest and dividends largely reflect reductions that were unilaterally enacted under the foreign investor tax credit (FITC) and approved issuer levy (AIL) regimes and represent a significant concession.[58]

2.3 Non-discrimination

New Zealand is tied under several most favoured nation (MFN) clauses to extend reductions in NRWT rates to other treaty partners. Amending legislation enacted in 2009 effectively passed on the reductions in NRWT on dividends where a non-resident's voting interest in a New Zealand company is 10 per cent or greater.

New Zealand DTAs negotiated since 1995 have been based on the OECD Model. Reservations about including non-discrimination articles appear otiose since seven of the 11 most recent DTAs include such an article, and another (with Taiwan) included

the Netherlands and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with Protocol, Signed at the Hague on 15 October 1980, signed 20 December 2001 (entered into force 22 August 2004) Art 4.

[56] See New Zealand–Sweden DTA, above n 40, Arts 7 and 8; *Double Taxation Relief (Sweden) Order 1956*, Order in Council, 21 November 1956, 1956/191.

[57] *Protocol Amending the Convention Between New Zealand and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 1 December 2008, 2728 UNTS 167 (entered into force 12 November 2010) Arts 6-8; *Convention between New Zealand and Australia for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion*, signed 26 June 2009, 2723 UNTS 3 (entered into force 19 March 2010) Arts 10-12 ('New Zealand–Australia DTA 2009'); *Agreement Between the Government of New Zealand and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 21 August 2009, 2722 UNTS 319 (entered into force 12 August 2010) Arts 10-12. NRWT was introduced into the *Land and Income Tax Act 1954* as s 203S by *Land and Income Tax Amendment Act 1964* (NZ) s 17.

[58] For a discussion of the FITC and AIL regimes, see Inland Revenue Department, 'Taxation of Inbound Investment' (Tax Policy Report, 3 May 2002).

an MFN clause providing for subsequent inclusion of one.[59] A plausible explanation of New Zealand's seeking to maintain this position is it wished to tax branches of non-resident companies at a higher rate to compensate for the inability to levy NRWT on branch profits attributed to their head office, akin to how a local subsidiary pays dividends to its foreign parent company.[60] With the introduction of the FITC rules in 1993 and their extension in 1995 to direct shareholdings, this uplift for non-resident companies has been eliminated and thereby removes one of the reasons for omitting non-discrimination articles. A secondary concern was whether non-discrimination articles would stand in the way of domestic transfer pricing and thin capitalisation rules.[61] Where New Zealand has agreed to a non-discrimination article there is usually specific clarification that the non-discrimination article does not apply to its domestic transfer pricing and thin capitalisation rules.[62]

2.4 Concessions

Some double taxation issues could be settled through domestic measures, but it was inevitable that New Zealand, as a minor player in the world economy, would need to make compromises to negotiate DTAs with economically more powerful states. At the time of accession to the OECD, the Organisation was in the process of revising the 1963 Draft Model Convention.[63] Officials thought New Zealand would have needed to lodge numerous reservations and observations to that model which they deemed would be unacceptable to other OECD members, especially as New Zealand was a new member.[64] Therefore, New Zealand policy-makers decided, first, to re-examine parts of the country's international tax policy and, secondly, to have its reservations and observations entered in respect of the new 1977 Model Convention,[65] rather the 1963 draft. In the event, the number of reservations and observations New Zealand asserted was similar to those entered into by other OECD members.[66]

New Zealand's principal reservations were capping withholding tax on interest and royalties (10 per cent) and dividends (15 per cent), with no reduced rate for parent/subsidiary dividends; protecting source taxing rights for natural resource exploration and exploitation, such as mining, fishing, and petroleum; and maintaining

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[59] For a discussion on MFN clauses in DTAs, see Ines Hofbauer, 'Most-Favoured-Nation Clauses in Double Taxation Conventions – A Worldwide Overview' (2005) 33(10) *Intertax* 445.
[60] See Graham Hunt, 'New Zealand's Evolving Approach to Tax Treaties' (2008) 14(2) *New Zealand Journal of Taxation Law and Policy* 131, 166. Hunt notes that, given New Zealand's objection to non-discrimination articles, '[o]ne might therefore expect to find that New Zealand does have discriminatory tax laws that it wishes to protect, but that does not seem to be the case'.
[61] Ibid.
[62] See *Agreement Between the Government of New Zealand and the Government of the People's Republic of China for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance*, signed 1 April 2019, 3374 UNTS (entered into force 27 December 2019) Art 24 as amended by Protocol to the Agreement, Art 7(a) ('New Zealand–China DTA').
[63] See OECD Fiscal Committee, *Draft Double Taxation Convention on Income and Capital* (OECD Publications, 1963).
[64] See RP Kellaway, Chief Deputy Commissioner of Inland Revenue, 'Memorandum of Official Attending Meeting on Double Taxation Policy' (4 February 1976).
[65] See OECD, *Model Double Taxation Convention on Income and Capital* (OECD Publishing, 19 October 1977).
[66] See Officials Economic Committee, Memorandum to Cabinet Economic Committee, *International Agreements for the Avoidance of Double Taxation: OECD Draft Model Double Taxation Convention* (16 September 1976) para 3.

the right to tax leasing of industrial, commercial, or scientific equipment at source (usually within the scope of the royalty article).[67]

After accession, New Zealand's DTAs largely followed the 1977 Model Convention. Points of disagreement in negotiations typically arose from New Zealand's insistence on retaining source country taxing rights for interest and royalties and a 15 per cent rate for all dividends. The insistence that a non-discrimination article be omitted was also contentious. In most cases, the disagreements were resolved through the inclusion of protocols containing MFN clauses for taxes on interest, dividends and royalties which would apply if New Zealand agreed in subsequent treaties to lower withholding tax rates.

2.5 Victories

In the first New Zealand–US DTA, a special provision was made for the New Zealand film hire tax imposed on non-resident film renters.[68] Given the importance of US-produced films in the cinema industry of the time, this was a significant concession by the US, although it may be attributable to the relatively small New Zealand market.

New Zealand was receptive to a Japanese approach to negotiating a DTA in the late 1950s. Although trade with Japan was limited at the time, the 'Japanese Economic Miracle' was gathering pace.[69] In 1959, Sumitomo, a major Japanese corporation, and Commonwealth Aluminium Company, an Australian company, formed a joint venture for a New Zealand aluminium smelter powered by hydroelectricity generated in the South Island. The smelter, which opened in 1969, represented a major investment that would lead to significant future exports to Japan, and boosted Japan's interest in negotiating a DTA with New Zealand. This was concluded in 1963.[70] New Zealand was able to negotiate exclusion of articles covering interest and royalties from the Japanese DTA thereby maintaining its existing source taxing rights.

In the mid-1960s New Zealand gave notice to the UK to terminate its 1947 DTA. This is the only time New Zealand has given such notice unilaterally. Motivation to terminate lay with the perception that the DTA was costing New Zealand considerable revenue in respect of royalties, payments to non-resident entertainers, and the impact of the territorial extension article. Another factor lay with significant changes in the underlying domestic law of the two countries since the DTA was concluded. The newly introduced NRWT, for example, could not be imposed on royalties and dividends paid to UK residents due to provisions in the 1947 DTA that required exemptions in the source country. The UK had also changed the basis of taxing companies there with the passing of the *Finance Act 1965* (UK).[71]

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[67] Ibid.
[68] See New Zealand–USA DTA, above n 39, Art 8.
[69] See, eg, Hannah Shiohara, 'The Japanese Economic Miracle' *Berkeley Economic Review* (26 January 2023) <https://econreview.berkeley.edu/the-japanese-economic-miracle>.
[70] See *Convention Between New Zealand and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 30 January 1963, 517 UNTS 183 (entered into force 19 April 1963); *Double Taxation Relief (Japan) Order 1963*, Order in Council, 8 April 1963, SR 1963/49.
[71] For a discussion of the Act, see Leonard Lazar, 'Finance Act 1965: The Corporation Tax' (1966) 29(1) *Modern Law Review* 50.

Generally, at the margins, New Zealand has been able to preserve some of its source taxing rights on construction projects, natural resource exploration and exploitation, with oil exploration being the most important.[72] The definition of 'New Zealand' for the purposes of DTAs tends to include the country's extensive continental shelf, which is increasingly important in the context of oil exploration.[73] However, not all treaty partners have been willing to recognise New Zealand's position and it is understood an objection to recognising New Zealand's territorial claims to the Ross Dependency at Antarctica stood in the way in renegotiating a new Japanese DTA until recently.[74]

2.6 Concluding comments

The theme of concession has been a major focus of this section. A plausible narrative may be constructed that tells how a small country, which is remote from the major economies and has demonstrated a penchant for autarky but has a practical need for imported capital and technology, and overseas shipping and insurance services, gradually surrendered taxing rights to comply with the international taxation norms that suited more powerful creditor nations. Yet a counter-narrative may be presented in which presumptions about maximising taxing rights over New Zealand sourced income may have been ill-founded, and the concessions led to gains outside the immediate ambit of the source-residence tax yield calculus.

The analyses undertaken in preparation for the negotiation of the early DTAs apparently omitted consideration of exchange controls or import restrictions which had a considerable influence on trade and investment to and from New Zealand. From the 1930s until the mid-1980s New Zealand had a highly controlled economy with tight exchange controls (making the remittance of capital out of New Zealand by residents very difficult) and import controls limiting or preventing importation of a wide range of products that could otherwise be made locally.[75] In addition, imports often faced high tariffs which were heavily skewed in favour of products from the UK (and, to a lesser extent, those from Australia and British Commonwealth countries) at the expense of goods from other countries.[76]

Little economic analysis appears to have been undertaken in preparation for the negotiations for New Zealand's first three DTAs. Similarly, negotiations during the 1950s and 1960s typically involved a simple assessment of the trade between the other contracting state and the potential for increased trade in addition to other payments and receipts (interest, dividends, pensions, migrant transfers) between New Zealand and the

[72] Of New Zealand's current 40 DTAs, 20 specify a period of 12 months for construction projects to constitute a PE, another 19 specify six months (New Zealand's preferred position) and one provides for only 90 days.

[73] For example, the New Zealand–Australia DTA 2009, above n 57, Art 3(1)(b) and the New Zealand–China DTA, above n 62, Art 3(1)(b) provide the definition that New Zealand for the purposes of each treaty 'means the territory of New Zealand but does not include Tokelau; it also includes any area beyond the territorial sea designated under New Zealand legislation and in accordance with international law as an area in which New Zealand may exercise sovereign rights with respect to natural resources'.

[74] Personal communication from an Inland Revenue Department official to Andrew MC Smith in the mid-1990s.

[75] See, generally, GR Hawke, *The Making of New Zealand: An Economic History* (Cambridge University Press, 1985).

[76] See, eg, Chris Nixon and John Yeabsley, 'Overseas Trade Policy – Early Trade – 1840s to 1920s' *Te Ara - the Encyclopedia of New Zealand* (Web Page, 11 March 2010) <http://www.TeAra.govt.nz/en/overseas-trade-policy/page-1>.

other state. Only from the late 1950s was the possibility of increased foreign investment into New Zealand with associated technology considered.[77]

Officials argued that New Zealand should emphasise domestic laws in relieving double taxation, with DTAs playing a secondary role.[78] They also argued that the country should review its existing DTAs to assess whether they promoted economic growth. It was thought that DTAs 'that have fallen out of line with current policy' should be renegotiated.[79] These arguments appear to reflect a view of some officials that earlier DTAs had been negotiated carelessly and did not serve New Zealand's interests. No public indication was given on how New Zealand's DTAs were out of line with current policy. The report also proposed that '[t]he same criteria that are used to assess proposed changes to domestic tax laws will be used to assess proposed DTAs. Within these constraints, New Zealand will continue to use DTAs where they can provide a positive effect on investment and trade'.[80]

DTA negotiations have always involved several departments. Foreign affairs officials would have been very wary of any radical moves by New Zealand which could give rise to foreign retaliation, especially given New Zealand's heavy dependence and vulnerable position on foreign trade and capital. Given their different roles and functions, Inland Revenue Department (IRD) officials would have been more attuned to the advantages and necessity of DTAs with major trading partners than Treasury officials, who were more likely to view the issues in more in conceptual terms. IRD officials were also in the position of having more regular contact with their counterparts in DTA countries and the day-to-day issues arising under the existing DTAs. Furthermore, New Zealand had probably gained from the reciprocal granting of foreign tax credits under DTAs given it was a capital-importing country and nothing would be gained from trying to move to a deduction regime for foreign taxes.

Analyses generally predicted a net revenue cost to New Zealand through concessions on source taxing rights with little obvious gain in return.[81] However little consideration was given to the possibility of dynamic benefits arising from double taxation relief in the longer term. For example, did taxes on non-resident shippers lead to higher freight rates being charged to New Zealand importers and exporters?

Since 2000, New Zealand negotiators appear to have recognised that, while New Zealand is a net capital importer, in the absence of exchange controls, it is also a capital exporter. This realisation is evidenced in a controlled foreign company (CFC) discussion document in which it was suggested that New Zealand's stringent CFC rules have indirectly contributed to New Zealand's poor export performance and have also encouraged corporate/capital migration.[82] In the same document lower limits for NRWT were identified as potentially reducing barriers to offshore investment to assist with the

[77] See Commissioner of Inland Revenue and The Treasury, above n 48, 4.
[78] See Inland Revenue Department, *Taxing Income Across International Borders: A Policy Framework* (July 1991) 33.
[79] Ibid 35.
[80] Ibid 36.
[81] See 'Memorandum to Minister of Finance on Double Taxation, from the Commissioner of Taxes and the Secretary to the Treasury' (19 June 1962).
[82] See Inland Revenue Department, *New Zealand's International Tax Review: A Direction for Change, A Government Discussion Document* (2006) 1 and 3 ('*New Zealand's International Tax Review: A Direction for Change*').

internationalisation of New Zealand businesses.[83] It appears that policy-makers have recognised that reductions in NRWT rates are not necessarily against its interests when this is done reciprocally under a DTA. This direction is also consistent with the earlier observation of officials that the FITC regime was problematic because it was a unilateral reduction in tax on New Zealand dividends derived by non-residents which did not result in New Zealand investors receiving reciprocal tax reductions in the other direction. Strangely, this point seems to have been forgotten or abandoned a year later with the passing of the *Taxation (Consequential Rate Alignment and Remedial Matters) Act 2009* (NZ) which introduced a zero rate of NRWT for fully imputed dividends paid to non-resident shareholders with voting interests of 10 per cent or more.[84]

In common with New Zealand, Australia faced the problems of a debtor country seeking to negotiate DTAs with creditor countries. Taylor's observation on the difficult negotiations prefatory to the conclusion of the 1947 DTA between Australia and the UK has common relevance:

> The treaty negotiations are a microcosm of the tensions that can exist where the countries involved have fundamental differences on the jurisdictional foundations for international taxation. No country in the world at the time could have been more committed to residence-based taxation that the United Kingdom. At the same time, the Australian federal income tax system had, since its inception, been fundamentally sourced-based.[85]

Taylor identifies eight factors which influenced Australian DTA negotiation practice between 1946 and 1976. These were:

> (a) economic considerations relating to the current and expected trade and investment flows between Australia and the treaty partner; (b) cultural and political considerations; (c) Australian domestic law considerations (including tax avoidance considerations); (d) Australian revenue considerations and jurisdictional claims; (e) the treaty practice and domestic law considerations of and model treaties developed by the other party in the treaty negotiations; (f) the treaty practice of third countries in their prior treaties into the prospective Australian treaty partner; (g) model treaties developed by international organisations such as the League of Nations, the OECD, and the United Nations; and (h) the development of an Australian model treaty reflecting prior Australian treaty practice.[86]

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[83] Ibid 2.
[84] See *Income Tax Act 2007* (NZ) s RF 11B.
[85] See Taylor, 'The History of Australia's Double Tax Conventions', above n 12, 629. For a full analysis of the negotiations leading to the Australia–UK DTA, see C John Taylor, '"I Suppose I Must Have More Discussion on This Dreary Subject": The Negotiation and Drafting of the UK–Australia Double Taxation Treaty of 1946' in John Tiley (ed), *Studies in the History of Tax Law, Vol 4* (Hart Publishing, 2010) 213; C John Taylor, 'The Negotiation and Drafting of the UK–Australia Double Taxation Treaty of 1946' [2009] (2) *British Tax Review* 201. On negotiations for the 1967 DTA, see C John Taylor, 'The Negotiation and Drafting of the 1967 United Kingdom–Australia Taxation Treaty' in John Tiley (ed), *Studies in the History of Tax Law, Vol 5* (Hart Publishing, 2012) 427.
[86] See C John Taylor, 'Factors Influencing Australian Taxation Treaty Practice 1946–1976' (2012) 27(3) *Australian Tax Forum* 571, 571 ('Factors Influencing Australian Taxation Treaty Practice').

The willingness of the Australian government to use DTAs as a political tool or, at least, to understand them in political context, rather than conceiving them as purely technical tax arrangements distinguishes its approach from that of New Zealand.

While the 1946 Australia–UK DTA reflects the long-term connections between Australia and the mother country, the 1953 Australia–US DTA represents the post-World War II presumption, particularly on the part of the second Menzies government (1949-66), that Australia's security was dependent on an alliance with the US,[87] *primus inter pares* of the country's 'Great and Powerful Friends'.[88] And so, while tax officials calculated that no fiscal benefit would arise from a US DTA, broader government strategists saw a tax treaty as a means of 'maintaining good relations' with the US and increasing the possibility of inter-government loans.[89] Despite the arguments of the Treasurer that a DTA would be inconsistent with tax principles, 'it was necessary to consider political considerations arising out of the relationships between the two countries in the then current circumstances'.[90] It is notable that no obvious evidence exists to indicate that such considerations played a role in New Zealand's negotiations with the US, although such considerations may have been present if not documented.

Political considerations also motivated Australia to respond positively to an approach from Canada to negotiate a DTA.[91] Again, no tax benefits would obviously be gained from a treaty but the Australian government 'regarded it as difficult and perhaps embarrassing to deny a DTC to Canada once the DTC with the United States was concluded'.[92] Without discounting the technical negotiations that contributed to the final treaty text, it seems that the treaty was informed by a perception of the politically right thing to do.

One might have presumed that politics would have similarly led to an early DTA with New Zealand, particularly after the conclusion of the 1944 'Canberra Pact'.[93] Nevertheless, New Zealand's request to start negotiations in 1947 gained no traction with Australia until it changed its system of corporate taxation in 1958 to be compatible with Australia's classical method.[94] Even with this barrier removed, another hurdle lay with Australia being a capital exporter to New Zealand. (Negotiations for Australia's treaties with the UK and the US came from the position of a capital importer.[95]) Ultimately, concerns for further capital exportation to New Zealand, which might eventuate from a DTA, were outweighed by expectations of greater trade gains.[96]

[87] See, eg, Frank Bongiorno, 'The Price of Nostalgia: Menzies, the "Liberal" Tradition and Australian Foreign Policy' (2005) 51(3) *Australian Journal of Politics and History* 400.
[88] See Taylor, 'Factors Influencing Australian Taxation Treaty Practice', above n 86, 583.
[89] See Taylor, 'The History of Australia's Double Tax Conventions', above n 12, 636.
[90] Ibid 637 (footnote omitted).
[91] For a full analysis of the negotiation of the Australia–Canada DTA, see C John Taylor, 'The Negotiation and Drafting of the First Australia–Canada Taxation Treaty (1957)' (2013) 61(4) *Canadian Tax Journal* 915.
[92] See Taylor 'The History of Australia's Double Tax Conventions', above n 12, 640 (footnote omitted).
[93] *Australian-New Zealand Agreement 1944*, signed 21 January 1944, 18 UNTS 357 (entered into force 21 June 1944). See, eg, EA Olssen, 'The Australia – New Zealand Agreement' (1944) 16(3) *Australian Quarterly* 10.
[94] See Taylor, 'The History of Australia's Double Tax Conventions', above n 12, 642.
[95] Ibid 644.
[96] Ibid.

Taylor's analysis of the negotiations for an Australian DTA with Japan provides the most illuminating example of Australia pursuing broader national interests over a simple tax calculus. In short, the DTA negotiations were used as a tool to prise open Japan to Australian investment. 'The incident shows the importance of the mining and agricultural industries to Australia at the time and shows that Australia was prepared to use DTC negotiations to advance trade policy objectives.'[97] The example also tacitly acknowledges the coincidence of government and industries' interests in DTA negotiations.

After joining the OECD in 1971, Australia affirmed its allegiance to the West. Before the disintegration of the Soviet Bloc, Australia received overtures from some Comintern countries to negotiate DTAs, but these were not taken further.[98] It would have been unthinkable for the US' staunchest regional ally to be seen to be acting amicably with Communist countries.[99]

In New Zealand, formal National Interest Analyses (NIAs) only became mandatory in 2002, with the first exercise covering DTAs with South Africa, the United Arab Emirates, Chile, UK, the Philippines and the Netherlands.[100] Even then, NIAs tend to be cursory, boilerplate analyses that focus on possible trade gains, much like the ad hoc officials' analyses that preceded them.

3. DEVELOPMENT OF AUSTRALIA–NEW ZEALAND DTAS

From a contemporary perspective, it seems remarkable that Australia and New Zealand did not conclude a DTA until 1960. Trade between the countries was second only in importance to that with the UK. Australian banks and insurers were major investors in New Zealand, and the free movement of labour between the two countries under the Trans-Tasman Travel Arrangement of 1973 and preceding arrangements had been in place since the 1920s.[101]

In 1951, the New Zealand Government convened the Gibbs Committee to review all aspects of New Zealand's tax system.[102] The Committee noted that international double taxation was a considerable problem, especially with Australia, and 'strongly recommended' early negotiation of a DTA.[103]

New Zealand's system of company-shareholder taxation presented a hurdle to conclusion of a treaty. Australia employed the classical approach to company-shareholder taxation with a much lower company tax rate (35 per cent) than New Zealand. New Zealand exempted dividends from tax until 1958 but had a much higher

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[97] Ibid 679.
[98] Taylor, 'Factors Influencing Australian Taxation Treaty Practice', above n 86, 586.
[99] Cf New Zealand's importation of Czech automotive technology to produce the notorious Trekka. See Eric Pawson, 'Cars and the Motor Industry – Sources of Cars' *Te Ara – the Encyclopedia of New Zealand* (11 March 2010) <http://www.TeAra.govt.nz/en/photograph/22838/trekka>.
[100] See New Zealand Parliament, Finance and Expenditure Committee, *International Treaty Examination of Taxation Agreements with the Republic of South Africa, the United Arab Emirates, the Republic of Chile, the United Kingdom of Great Britain and Northern Ireland, the Republic of the Philippines, and the Kingdom of the Netherlands: Report of the Finance and Expenditure Committee* (2003).
[101] See Susan Love and Michael Klapdor, 'New Zealanders in Australia: A Quick Guide' (Parliamentary Library Research Series 2019-20, 13 February 2020).
[102] See Taxation Committee (Theodore Gibbs, chair), *Report of the Taxation Committee* (1951) (Gibbs Report).
[103] Ibid 100.

company tax rate set at 57.5 per cent. Australian policy-makers believed that, if a DTA were negotiated with New Zealand, they would face pressure to limit source tax on dividends paid to New Zealand residents.[104] A similar limitation on New Zealand, however, would involve no concessions on its part because dividends were already exempt in New Zealand and had effectively been taxed at the corporate level in New Zealand given the high rate of company tax imposed there. This impasse was overcome when New Zealand adopted the classical approach to company/shareholder taxation in 1958.[105] (A comprehensive dividend imputation regime, which included an unanticipated but exploitable inter-company dividend exemption, was introduced in 1988 to replace the classical system.[106])

Another point of contention lay with taxing the salaries of businesspersons when on short trips to the other country.[107] Although New Zealand had adopted a unilateral exemption for such visitors in the late 1950s, this was an area that both countries recognised needed addressing.

The first tax treaty between the two countries when finally concluded omitted an interest article, or a residence tiebreaker. This omission was significant, given the liberal trans-Tasman travel arrangements. The treaty otherwise followed a similar pattern to those New Zealand had negotiated with Canada and the UK in the 1940s.

Juridical taxation assumed greater importance due to increasing trade and investment between the two countries under the 1965 New Zealand–Australia Free Trade Agreement.[108] Consequently, a revised tax treaty was concluded in 1972. This was New Zealand's second DTA to include an interest article, although the limitations on the source taxation of interest did not apply to interest paid between associated persons. This reservation reflected New Zealand concerns that business profits could be stripped out of the New Zealand tax net by inter-company loans between associated companies. The treaty also included a tiebreaker clause for residency, an issue of increasing importance given the significant trans-Tasman migration from the mid-1960s.[109]

Australia's economic importance to New Zealand increased even further after the conclusion of the Closer Economic Relations agreement in 1983, and a new DTA was signed in 1995.[110] While negotiations for the revised DTA indicated a new approach to

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[104] Ibid 98.
[105] See New Zealand Parliamentary Debates, vol 316 (26 June 1958) 286.
[106] See *Income Tax Act 2007* (NZ) ss OB 1 to OB 70.
[107] See *Federal Commissioner of Taxation v French* (1957) 98 CLR 398, illustrating the complications that could arise from such taxation.
[108] See *New Zealand–Australia Free Trade Agreement Act 1965* (NZ). This was New Zealand's first free trade agreement and was replaced with the broader 1983 Closer Economic Relations (CER) agreement. See Ministry of Foreign Affairs and Trade, 'Australia-New Zealand Closer Economic Agreement' (Report, 2005).
[109] See Carl Walrond, 'Kiwis Overseas – Migration to Australia' *Te Ara – the Encyclopedia of New Zealand* (Web Page, 8 February 2005) <http://www.TeAra.govt.nz/mi/kiwis-overseas/page-4>.
[110] *Agreement Between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 27 January 1995, 1938 UNTS 207 (entered into force 29 March 1995).

international taxation,[111] changes were, in practice, minimal.[112] Besides, as members of the OECD, both countries were expected to follow the OECD Model Convention.[113]

New Zealand politicians have tended to avoid direct involvement with DTA negotiations, leaving these to public officials. However, in the 1990s there was some political involvement with trans-Tasman double taxation issues arising out of each country's adoption of domestic dividend imputation regimes. These undermined foreign tax credits when foreign-sourced income was distributed. Pressures from the corporate sector for the benefit of these imputation regimes to be extended to shareholders in the other country were dismissed by politicians from both countries on arguably spurious grounds.[114] Some agreement was reached on addressing double tax issues arising from 'triangular' trans-Tasman taxation, but these have limited practical effects.[115]

Once negotiations began in 2008 for a revised DTA, in a novel initiative, the IRD sought public submissions. Extensive economic ties had developed between the two countries and many taxpayers could be expected to hold views on the negotiations, based on their trans-Tasman business, work or investment experiences. Whether public input influenced final outcomes is, however, a matter of speculation.

In mid-2008 negotiations with Australia began and led to a new DTA being concluded in 2009.[116] New Zealand agreed to substantial reductions in NRWT on interest, dividends, and royalties after resisting for nearly 60 years in its DTA negotiations. Certain cross-border payments of interest became exempt from NRWT. Royalties

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[111] See David White, 'New Zealand Double Tax Treaty Policy and Practice, 1987-2004: A Preliminary Assessment' in Rodney Fisher and Michael Walpole (eds), *Global Challenges in Tax Administration* (Fiscal Publications, 2005) 45.

[112] White concludes that the 1995 DTA is an improvement over the 1972 agreement in respect of several matters identified by him: see ibid 55.

[113] For an analysis of how Australia has gradually adopted the provisions of the OECD Model Convention, see C John Taylor, 'Some Distinctive Features of Australian Tax Treaty Practice: An Examination of Their Origins and Interpretation' (2011) 9(3) *eJournal of Tax Research* 294.

[114] The basic issues standing in the way of mutual recognition of each other's imputation (franking) credits were potential revenue cost (especially in the short term) and likely flow-on effects if third countries demanded similar treatment. See David Barber 'We Must Share Blame for Huge Tasman Tax Losses' *National Business Review* (28 May 1993) 8. In addition, politicians sought to argue that progress could only be made on the issue if the other country made significant changes to its domestic tax rules, knowing that such changes were unlikely or politically unpalatable. For example, Prime Minister Paul Keating argued that New Zealand needed to introduce a comprehensive capital gains tax before Australia could consider recognition of New Zealand imputation credits. See Hon Paul Keating (Prime Minister), Transcript of Press Conference, Wellington (21 May 1993) <https://pmtranscripts.pmc.gov.au/release/transcript-8869> and Peter Lloyd, 'The Future of Trans-Tasman Closer Economic Relations' (1995) 2(3) *Agenda* 267, 273. In addition, New Zealand's CFC and FIF rules enacted from the 1992 Budget would have been at variance with Australia's equivalent rules. See Income Tax Act 1994 (NZ) Subpart CG.

[115] See *Income Tax Act 2007* (NZ) subpt OB. Companies facing a triangular tax problem can elect to pay dividends with both Australian and New Zealand imputation credits attached. Shareholders may only use the credits of their country of residence. No streaming of one country's credits is permitted only to shareholders resident in the same country. See David G Dunbar, 'Trans-Tasman Taxation Reform: Will It Be Third Time Lucky or Will History Repeat Itself? – Part One' (2002) 8(1) *New Zealand Journal of Taxation Law and Policy* 93 and David G Dunbar, 'A Critical Evaluation of the New Zealand and Australian Governments' Solution to Triangular Taxation Relief: Part Two' (2003) 9(2) *New Zealand Journal of Taxation Law and Policy* 183.

[116] New Zealand–Australia DTA 2009, above n 57. See also a contemporaneous protocol signed on 1 December 2008 to the 1983 New Zealand–US DTA. For an analysis, see Andrew MC Smith, 'New Protocol to the 1982 New Zealand-United States Treaty' (2009) 63(7) *Bulletin for International Taxation* 289, 291-293.

became liable to NRWT at a maximum of 5 per cent (the previous rates were 10 per cent to 15 per cent) and dividends paid to corporate shareholders with interests of 10 per cent or more became liable to 5 per cent NRWT.[117] Furthermore, when a corporate shareholding interest was 80 per cent or more, dividends were exempted from NRWT, subject to a limitation of benefit provision.[118]

It is not obvious why New Zealand agreed to lower NRWT rates on passive income. Perhaps, in pursuit of competitiveness, the country sought to obtain the same reductions in NRWT in its US DTA as Australia had obtained when it renegotiated its US DTA in 2002. This concern was expressed in an IRD discussion document: 'It is important that New Zealand's tax system is not out of line with systems in comparable jurisdictions, particularly Australia'.[119] Once these reductions in NRWT had been agreed with the US in 2008, New Zealand became practically obliged to negotiate similar changes with other DTA partners, most obviously Australia.

4. CONCLUSION

John Taylor accessed, collated, and analysed a remarkable trove of primary resources to bring an especial richness to his research into the history of Australia's DTAs. His revelation that Australia, rather than relying on technical expertise, sent 'a strong man' to negotiate the DITR, and titling an article 'I suppose I must have more discussion on this dreary subject' are instances of welcome relief from the dryness of much of the research in this field. Despite an archetypal Antipodean piercing of pomposity, his research was always meticulous. He set a 'Jolene' standard,[120] which, in this article, we do not pretend to match.

In this article, we have focused on themes that have characterised New Zealand's engagement with international juridical taxation, which, at least before joining the OECD, were distinguished by recalcitrance in the face of developing cross-border tax norms, but ultimate concession, albeit with some small victories.

As Dominions of the British Empire, Australia and New Zealand – distant territories of the Angloworld[121] – shared much in common, including complex relationships with the motherland, but this commonality not only generated comity, it also led to competition in trade, investment, and taxing rights. In some ways, Australia faced similar problems to New Zealand but on a greater scale. If, for example, the UK granted concessions to New Zealand, extending the same indulgence to Australia would be far more economically significant. But overall, when the historical approaches of Australia and New Zealand are compared, we conclude that a significant distinction lay with Australia taking broad political considerations to the DTA negotiating table, whereas New Zealand for many decades focused on a relatively unsophisticated tax-trade calculus. An important lesson we can learn from Taylor's research is that DTAs are as political

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[117] New Zealand–Australia DTA 2009, above n 57, Art 10(2).
[118] Ibid Art 10(3).
[119] See Inland Revenue Department, *New Zealand's International Tax Review: A Direction for Change*, above n 82, [1.3].
[120] See Dolly Parton, *Jolene* (1973).
[121] See generally James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939* (Oxford University Press, 2009).

as the development of domestic tax laws – we are well advised to consider their broadest context, without losing sight of the particular.