eJournal of Tax Research (2024) vol. 22, no. 2, pp. 222-256

New Zealand’s first double tax agreement: the United Kingdom–New Zealand treaty of 1947

Ella Griffiths*

Abstract

The 1947 United Kingdom–New Zealand double taxation agreement was New Zealand’s first comprehensive double tax treaty and one of the United Kingdom’s earliest tax treaties. Initiated by the United Kingdom only two years after the landmark negotiation of the 1945 United States–United Kingdom treaty, the agreement largely reflected its contemporary tax policy toward its Dominions. It was concluded before the OECD produced the first version of its influential model treaty in 1963, and its drafting was influenced by other United Kingdom treaties. Although rudimentary compared to modern tax treaties, the agreement contained most of the provisions found in standard double tax agreements, albeit in an embryonic form. This article examines the provisions of the 1947 treaty and compares them to the articles of the OECD Model Convention, the basis for almost all modern double tax treaties. The 1947 treaty was a significant moment in the development of New Zealand’s network of double tax treaties and is also a reminder of New Zealand’s close ties to the United Kingdom at the time.

Keywords: double tax agreement, double taxation, OECD Model Convention, New Zealand, United Kingdom, tax treaty, DTA, tax history

* Senior Policy Advisor, Office of the Privacy Commissioner, New Zealand. Email: ellavaleriegriff@gmail.com. I am indebted to Professor C John Taylor who kindly sent me archival material on the 1966 treaty negotiations from London, making the topic of historic tax treaties come alive. To Professor Michael Littlewood of the University of Auckland, my wholehearted thanks for your support and persistence. I am very grateful to my family and friends for all their love, tolerance and referencing skills.

1. INTRODUCTION

There are more than 3,000 double tax agreements (DTAs) in operation today, providing relief from double taxation to the residents of the contracting states. New Zealand is party to 40 DTAs in this extensive network.[1] By removing the impediment of double taxation, DTAs foster cross-border trade and investment, and facilitate the movement of people and capital between countries.

The Model Convention on Income and Capital developed by the Organisation for Economic Co-operation and Development (OECD) has been enormously influential in the development of tax treaties; almost all modern DTAs are closely based on it. The OECD first published a draft model to aid harmonisation of tax treaties in 1963 (the OECD Draft Convention)[2] and later released the first version of the OECD Model Tax Convention on Income and on Capital (the OECD Model) in 1977, which has since been revised regularly.[3]

New Zealand's foray into the domain of international tax agreements began in 1947 with the conclusion of the agreement with the United Kingdom (UK) (the 1947 treaty).[4] This is not surprising considering the dominant role the United Kingdom played in New Zealand's economy and the global economy for most of the 20th century. Although some limited forms of unilateral relief had been implemented by each country before 1947, it was New Zealand's first comprehensive DTA, dealing with most major classes of income and requiring full tax credits for tax paid in the other country.

The 1947 treaty is notable also in that it is to date the only DTA that has been unilaterally terminated by New Zealand (in 1964).[5] The parties negotiated and entered into subsequent DTAs, in 1966 (the 1966 treaty)[6] and in 1984 (the 1984 treaty).[7] That third treaty remains in force and largely follows the prevailing OECD Model.

This article examines the 1947 treaty and places it within the international context of double tax treaties. As well as being New Zealand's first DTA, it was also one of the United Kingdom's earliest DTAs and formed part of that country's rapidly expanding treaty network after the negotiation of the landmark United States–United Kingdom

---

[1] Inland Revenue Department, New Zealand, 'Tax Treaties', *Tax Policy* (Web Page, 27 November 2023) <www.taxpolicy.ird.govt.nz/tax-treaties>.

[2] OECD, *Draft Double Taxation Convention on Income and Capital* (OECD Publishing, 1963) ('OECD Draft Convention').

[3] OECD, *Model Tax Convention on Income and on Capital 2017* (OECD Publishing, 2019) ('OECD Model Tax Convention'). The original version was published in 1977, which was then updated in 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2014 and most recently 2017.

[4] *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) ('1947 UK–New Zealand treaty').

[5] Terminated by notification of 1 July 1964, effective 1 July 1965.

[6] *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland 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 13 June 1966, 598 UNTS 121 (entered into force 11 August 1966) ('1966 UK–New Zealand treaty').

[7] *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*, signed 4 August 1983, 1416 UNTS 129 (entered into force 16 March 1984) ('1984 UK–New Zealand treaty').

treaty of 1945 (1945 US–UK treaty).[8] Concluded before the OECD produced their influential Model, the 1947 treaty was heavily shaped by contemporary British policy on tax treaties, as well as the recently concluded agreement with the United States. Although rudimentary compared to modern DTAs, many of the provisions of the 1947 treaty would be recognisable to those familiar with the current OECD Model.

First, it may be helpful to explain how DTAs operate and describe the relevant features of the two countries' tax systems at the time the 1947 treaty was negotiated. Then, in section 2, the study outlines the historical context leading up to the conclusion of the 1947 treaty, and in particular, the impact of the 1945 US–UK treaty. Section 3 considers the treaty itself and the terms of its 19 articles. The 19 articles fall broadly into the following categories: (1) scope provisions; (2) definitions; (3) provisions dealing with particular types of income; (4) provisions for the elimination of double tax; (5) anti-avoidance provisions, and (6) miscellaneous provisions. The study examines the terms of each article and compares them to the formulae used in the current version of the OECD Model and to contemporary tax treaties of the time. The development of the provisions in the two subsequent DTAs between New Zealand and the UK, the 1966 treaty and the current 1984 treaty, is also useful for understanding the articles of the first treaty. In section 4, the study sets out some conclusions.

1.1 The operation and impacts of double tax agreements

DTAs are concerned with juridical double tax; where two countries impose taxes on the same taxpayer in respect of the same income. The taxpayer's income is subject to tax in the country where it was sourced (the source country) and in the state where the taxpayer is resident (the residence state). A DTA allocates the taxing rights of the two participating governments by imposing obligations on each to restrict their taxing rights under domestic law in certain circumstances.

The 1947 treaty relieved the burden of double taxation by two methods, both reflected in the present OECD Model. First, the exclusive right to tax some classes of income was conferred upon the state of residence. Double taxation was eliminated because the *source country* agreed to exempt this income from tax. Second, where other classes of income were still subject to double tax because both states had the right to tax, the state of residence was obliged to relieve double taxation, by giving credit for tax paid in the other state.

Tax treaties are reciprocal; therefore, between countries with equal income flows, any contraction of revenue suffered by a country in its 'source' capacity would be balanced by its ability to tax residents on income sourced in the other country.[9] However, income flows are rarely equal between countries, especially when one is developed and the other is less developed. For a capital-exporting country, outward investment exceeds inward investment; therefore, it will be protective of its right to tax on a residence basis because its residents will be deriving income in other countries. In contrast, capital-importing

---

[8] *Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*, signed 16 April 1945, 6 UNTS 189 (entered into force 25 July 1946) ('1945 US–UK treaty').

[9] Oladiwura Ayeyemi Eyitayo-Oyesode, 'Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform' (2020) 13(1) *Law and Development Review* 193.

countries are generally concerned with protecting their right to tax on the basis of source to preserve their right to tax income derived by non-residents, such as business profits and investment income (dividends, interest and royalties).

Early DTAs tended to allocate taxing rights in favour of the *residence* country and restrict the *source* country's rights to tax. This allocation thereby benefited *capital-exporting* countries seeking to retain taxing rights over their residents who had derived income in overseas jurisdictions.

New Zealand, in relation to the United Kingdom, is a net capital importer and has been since 1840. United Kingdom investment into New Zealand generally exceeds investment flowing the other way and was even more one-sided in 1947 than it is now. Therefore, New Zealand expected to give up more revenue under the 1947 treaty than it gained, due to the priority given to residence taxation. However, revenue is not the only consideration for a country concluding a treaty. DTAs encourage inward investment and trade by reducing or eliminating double taxation and although New Zealand may concede tax revenue, it might gain from the increased foreign investment and trade.

1.2 Relevant features of the countries' tax systems

1.2.1 United Kingdom's tax system

At the time of treaty negotiations, the financially sapped United Kingdom levied substantial rates of income tax and additional wartime taxes. A company was taxed on its total profits at the standard rate (50 per cent in 1945).[10] Distributed profits (dividends) were assumed to have already been subject to income tax, and a further surtax liability arose only for natural-person shareholders in higher income brackets than the standard rate. There was no withholding tax for dividends paid to non-residents and it was difficult to collect this surtax from them.[11]

A national defence contribution, introduced to finance the United Kingdom's involvement in World War II, was imposed upon company profits. Post-war, the national defence contribution was renamed profits tax, a tax covered by the 1947 treaty.

1.2.2 New Zealand's tax system

In the 1940s, New Zealand had a steep progressive income tax system driven by New Zealand's costly involvement in World War II and the Labour Party's welfare state agenda.[12] A progressive tax regime operates when higher tax rates are imposed on the taxpayer as their taxable income increases. On top of income tax, an additional 5 per cent social security charge was levied, funding a superannuation scheme.

---

[10] C John Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946' [2009] (2) *British Tax Review* 201, 204 ('The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946').

[11] Ibid.

[12] Paul Goldsmith, *We Won, You Lost, Eat That! A Political History of Tax in New Zealand Since 1840* (David Ling Publishing, 2008).

The company tax rate was also high and progressive, with the top bracket rate at 43.75 per cent in 1940.[13] At this time, the company tax regime was structured in a slightly unusual way. Companies were taxed on their profits, but dividends were exempt in the hands of shareholders, the rationale being that the income had already been taxed in the hands of the company.[14] However, exempting dividends from tax resulted in revenue loss as shareholders' income rates were higher than company tax rates.[15] The 'average-rate' system was used to mitigate this; income from dividends were included in the shareholder's assessable income to determine the shareholder's rate of tax to apply to their income, excluding the dividends which remained untaxed.[16] The average-rate system is reflected in several provisions in the 1947 treaty; specifically the dividends article, the credit provision and the article handling assessable income for New Zealand tax-setting purposes.[17]

2. Background to the 1947 UK–New Zealand treaty

2.1 The problem of double tax

Double tax became a problem from 1916 when New Zealand, mirroring the United Kingdom, moved to a worldwide model of taxation.[18] Income tax had previously been imposed exclusively on a *source* basis; tax was imposed on income derived in New Zealand (regardless of whether the taxpayer was a resident). From 1916 onwards, however, income tax was also levied on the worldwide income of persons and companies resident in New Zealand, on the basis of *residence*.[19] The United Kingdom had been taxing on a residence and source basis since 1803.[20] With both countries operating a worldwide taxation model, the issue of double taxation arose. Where a taxpayer engaged in cross-border income earning activities, they would generally be liable for tax on the same income in their country of residence *and* the country the income was sourced.

Such double taxation was a serious problem. In a 1916 issue, *The Economist* said:[21]

> The real difficulty is to answer the following question – 'which government, Downing Street or the Dominion, shall sacrifice its claim to the tax income sent from the colonies to England?'

In a 1918 issue, a letter to the editor discussed a hypothetical example of a company that traded in New Zealand and had it head office located in London to demonstrate the injustice of double taxation.[22] This theoretical company had profits of £15,000 to be

---

[13] Annie Cho, 'The Five Phases of Company Taxation in New Zealand: 1840–2008' (2008) 14(1) *Auckland University Law Review* 150, 163.
[14] Ibid 150, 155.
[15] Ibid 151.
[16] Ibid.
[17] 1947 UK–New Zealand treaty, above n 4, Arts VI, XIII and XIV.
[18] *Land and Income Tax Act 1916* (NZ).
[19] Craig Elliffe, *International and Cross-Border Taxation in New Zealand* (Thomson Reuters, 2nd ed, 2018) 7.
[20] 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, 34 ('"Send a Strong Man to England"').
[21] 'Double Income-Tax' (1916) 082 *The Economist* 451, 451.
[22] Merchant, 'Double Income Tax' (1918) 087 *The Economist* at 398, 398.

distributed among United Kingdom shareholders. The imposition of both New Zealand and United Kingdom taxes on the profits, the writer explained, resulted in a total tax of at least 50 per cent and 'so penalised the men whose energies are devoted to the development of internal trade of the British Empire'.[23]

Some international firms sought to mitigate their tax burden by restructuring, changing domicile or incorporating subsidies in overseas territories.[24] For instance, the United Kingdom firm Joseph Nathan and Co incorporated separate companies in Australia and New Zealand to avoid double taxation of their 'Glaxo' milk powder factories operating there.[25]

2.2 Early forms of double tax relief

2.2.1 Domestic relief for tax within the British Dominion

In 1916, when New Zealand started taxing residents on their offshore income, it also provided for the unilateral relief from tax of income which had been derived from and had borne tax in, other jurisdictions in the British Empire, including the United Kingdom.[26] Relief was provided by simply exempting the income from New Zealand tax. However, the exemption was not absolute and British-sourced income was subject to social security taxes.[27] This unilateral domestic relief continued to operate until 1962 when foreign tax credits were finally introduced.[28]

2.2.2 Orders in Council

Reflecting its status as a capital-importing country, New Zealand sought to protect and even extend source taxing rights, evident in two provisions dating back to the 1920s.[29] One provision deemed the profits of non-resident traders operating through independent agents in New Zealand as New Zealand-sourced income, ensuring the same tax treatment as non-resident traders operating through a branch. Another provision deemed any income derived by non-resident shipping countries from the carriage of goods from New Zealand as New Zealand-sourced. The established approach promoted by the League of Nations to tax shipping enterprises based on residence (where their 'real centre of management is situated') disadvantaged New Zealand which was dependent on foreign shipping companies for trade and it was felt that these companies should have to pay some New Zealand tax on profits derived from business there.[30]

New Zealand's protection over source taxing rights led to a clash with Belgium which was not happy with New Zealand taxing Belgian exporters on orders obtained in New Zealand through local agents.[31] As a result, in 1935, Parliament amended the *Land and Income Tax Act 1923* to give the Governor-General the power by Order in Council to

---

[23] Ibid.
[24] Simon Mollan and Kevin D Tennent, 'International Taxation and Corporate Strategy: Evidence from British Overseas Business, Circa 1900–1965' (2015) 57(7) *Business History* 1054, 1062.
[25] Ibid.
[26] *Land and Income Tax Act 1916* (NZ) s 92.
[27] Andrew MC Smith, 'A History of New Zealand's Double Tax Agreements' (2010) 16 *New Zealand Journal of Taxation Law and Policy* 105, 106.
[28] *Land and Income Tax Amendment Act (No 2) 1962* (NZ) s 14.
[29] Smith, above n 27, 106.
[30] Ibid.
[31] Ibid 107.

exempt profits of non-resident traders from New Zealand tax if satisfied that the foreign country provided reciprocal relief.[32] In the period 1936-1946, seven such Orders in Council were made, one covering the United Kingdom (in 1942).[33] These Orders were limited compared to modern DTAs and generally only exempted the profits of the non-resident traders from New Zealand tax.[34]

The Order in Council relating to the United Kingdom was broader in scope than the others, likely as it was made pursuant to a treaty, and had retrospective effect (dated back five years to 1937).[35] As well as exempting profits of non-resident traders, it also exempted income derived from orders obtained by New Zealand agents of non-resident traders, including where the order was filled from a warehouse in the country as long as the warehouse was for delivery, not display, purposes.

2.2.3 Dominion tax relief

From the late 1880s, other British Dominions,[36] including Australia, South Africa and Canada also introduced income taxes and they exerted a growing pressure on the United Kingdom to provide relief from double taxation.[37] Various commercial societies such as the London Chamber of Commerce rallied to protest against double tax.[38] The United Kingdom responded with the introduction of the Dominion Relief system in 1920.[39]

Dominion Relief was a limited unilateral concession implemented by the United Kingdom, applying where income tax had been paid in the Dominion.[40] The United Kingdom gave credit for the lesser of the amount of tax paid in the Dominion or one-half of the amount payable in the United Kingdom. The aim of this mechanism was that the total tax paid should not exceed the greater of the tax calculated at the United Kingdom rate or the relevant Dominion rate. Where the Dominion tax rate was more than half the United Kingdom rate this was not the result because the credit given by the United Kingdom (of up to only one-half the amount payable in the United Kingdom) would not account for the full amount of tax paid in the Dominion. The final tax burden would be the United Kingdom tax plus the amount of Dominion tax not covered by the credit.

The expectation was that the Dominion would provide any relief required in excess of half the United Kingdom tax rate, but this was not expressly required under the Dominion system. However, while a list of reciprocating countries in 1925 showed that many Dominions did so, New Zealand was not among them.[41] A 1945 *Economist* article noted that this system did not require an undertaking by the Dominions to give mutual

---

[32] *Land and Income Tax Amendment Act 1935* (NZ) s 11.
[33] These included Belgium (1936), Switzerland (1936), the Netherlands East Indies (1938), Japan (1938), Czechoslovakia (1938), the United Kingdom (1942) and Canada (1946): Smith, above n 27, 107.
[34] Smith, above n 27, 108.
[35] Ibid.
[36] The term 'Dominion' was used in the period 1907 to 1948 to refer to the self-governing countries within the British Empire, namely, Canada, Australia, New Zealand, Newfoundland, South Africa and the Irish Free State.
[37] Peter Harris, 'An Historic View of the Principle and Options for Double Tax Relief' [1999] (6) *British Tax Review* 469, 473.
[38] Ibid.
[39] *Finance Act 1916* (UK) s 43; *Finance Act 1920* (UK) s 27; Harris, above n 37.
[40] Harris, above n 37, 476; See generally Taylor, '"Send a Strong Man to England"', above n 20.
[41] HE Seed and AW Rawlinson, *Double Income Tax Relief: The Law and Practice Regarding the Relief from Double Taxation* (Pitman & Sons, 1925) 116.

relief and consequently 'very high' rates of tax were being paid by United Kingdom investors and businesses within the Empire, especially on profits derived from New Zealand and Australia.[42] Nevertheless, Dominion tax relief remained essentially unchanged as the double tax relief mechanism used throughout the British Empire for the next 25 years.[43]

2.3 The international context

High taxation levels in industrial countries led some countries to initiate a coordinated response to double taxation in the 1920s.[44] In 1920, the Brussels International Financial Conference asked the League of Nations to investigate the problem of double taxation.[45] The resulting report formed the basis for draft tax agreements authored by the League of Nation's Fiscal Committee in 1928; the inception of the modern DTA.[46] A handful of European countries and the United States started concluding DTAs based on these drafts which the Fiscal Committee continued to revise through the 1930s and 1940s. Britain, however, lagged behind and apart from a treaty with Ireland in 1926, did not conclude any comprehensive DTAs until the end of World War II.[47] The allocation rules adopted by the League's Fiscal Committee into their draft treaties divided taxing rights to classes of income between source and residence countries.[48] By contrast, the United Kingdom advocated for taxation on the basis of residence which benefited its position as a capital exporter and refused to enter into any DTAs due to its strong objection to source country taxation.[49] Moreover, the United Kingdom was reluctant to enter DTAs which gave other countries more favourable arrangements than within the British Empire under Dominion Relief.[50] Eventually, financially sapped by the War and heavily indebted to the United States, the United Kingdom agreed to a treaty in 1945. The 1945 US–UK treaty was a significant landmark in the history of DTAs, both as the United Kingdom's first comprehensive DTA and due to its enduring influence on treaty development.[51]

The 1945 US–UK treaty marked the start of a rapidly proliferating United Kingdom treaty network and was a key development leading to its agreement with New Zealand. Even before negotiations with the United States, the United Kingdom realised they would need to reform the existing Dominion Relief.[52] Under the 1945 US–UK treaty with the United States, the United Kingdom had agreed to allow a foreign tax credit for United States tax paid up to the *full* amount of United Kingdom tax the taxpayer was

---

[42] 'Double Taxation' (1945) 148 *The Economist* 601.
[43] Harris, above n 37, 477.
[44] Mollan and Tennent, above n 24, 1059.
[45] Kevin Holmes, *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application* (IBFD Publications, 2nd ed, 2014) [3.4.1].
[46] Ibid.
[47] Mollan and Tennent, above n 24, 1059.
[48] Harris, above n 37, 477.
[49] Ibid.
[50] Ibid.
[51] John F Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement' [2007] (3) *British Tax Review* 211, 254 ('The History of the United Kingdom's First Comprehensive Double Taxation Agreement').
[52] Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 207.

liable for and therefore was more generous than Dominion Relief (where credit was given only up to *half* the United Kingdom tax).

Not wishing to treat the United States more favourably than its Dominions, the United Kingdom initiated negotiations and concluded agreements with Canada (1946), Australia (1947), South Africa (1947) and New Zealand (1947).[53] The implementation of the United States treaty also opened the United Kingdom to DTAs with non-Empire countries, including France (1947), Sweden (1949), and Israel (1950). By 1951, Britain had concluded 50 DTAs, a large proportion of these with countries within the British Commonwealth.[54]

In 1947, New Zealand's economic ties to the United Kingdom were extensive. The United Kingdom was New Zealand's principal market for trade and it was a major source of capital; the relationship 'resembled that of a colony rather than independent dominion'.[55] In addition, the policies adopted by the United Kingdom were highly influential, and in light of this, it is not surprising that New Zealand accepted the offer to negotiate a DTA.

The draft treaty that the United Kingdom sent to New Zealand was very likely the same draft sent to initiate negotiations with other British Dominions, including Canada and Australia.[56] This 'colonial model' developed by the United Kingdom generally provided for taxation of dividends on a residence basis and had distinctive structural features. Australia and New Zealand negotiated their treaty with the United Kingdom at the same time and the final DTAs of each country were quite similar.

3. THE 1947 UK–NEW ZEALAND TREATY

The UK–New Zealand treaty was signed on 27 May 1947 by the countries' respective finance ministers, Walter Nash for New Zealand and Hugh Dalton for the United Kingdom.

With only 19 articles, the treaty is short compared with modern DTAs which typically have around 30 articles. This section covers each article organised into the following categories: scope provisions, definitions, substantive provisions, double tax relief, anti-avoidance and miscellaneous.[57]

3.1 Scope provisions

Setting the parameters for the treaty's operation, the scope provisions included the title and preamble, Article I (taxes covered), Article XVII (entry into force), Article XVIII (succession of previous agreement) and Article XIX (termination).

---

[53] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 236.

[54] Harris, above n 37, 477.

[55] David Hall, *Emerging from an Entrenched Colonial Economy: New Zealand Primary Production, Britain and the EEC, 1945–1975* (Palgrave Macmillan, 2017) 23-24.

[56] Ibid 277; Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 238.

[57] Philip Baker, *Double Taxation Conventions: A Manual on the OECD Model Tax Convention on Income and on Capital* (Sweet & Maxwell, 3rd ed, 2001) [D.01] ('*Double Taxation Conventions*').

3.1.1 *Title and preamble*

The title and preamble outlined the twin purposes of the DTA which were 'the avoidance of double taxation' and 'the prevention of fiscal evasion'. The principal focus of early DTAs was the problem of double tax, although the inclusion of articles on 'associated enterprises' and 'exchange of information' demonstrates that tax avoidance and evasion were also issues of interest at this time.

Today, the prevention of fiscal evasion is a significant motivation for entering tax treaties. Globalisation trends over the last few decades combined with the complexity of international tax rules have created opportunities for the tax planning industry to exploit and have led to the proliferation of avoidance and evasion.[58] Provisions in tax treaties like the exchange of information mechanism in tax treaties empower governments to fight avoidance and evasion activities by circumventing strict confidentiality laws which would otherwise protect tax administration information. Amendments made to the current UK–New Zealand treaty in the last two decades were primarily to counter tax avoidance and evasion.[59]

3.1.2 *Entry into force*

As with modern DTAs, the entry into force provision stipulated the agreement would come into force after each country had completed its domestic ratification process, usually signalled by the exchange of diplomatic notes.[60] In 1946, at the time of the negotiations, New Zealand law did not contain any provision enabling the government to enter bilateral tax treaties. The *Land and Income Tax Act 1923* was accordingly amended to give the government authority to negotiate an agreement with the United Kingdom.[61] The 1947 agreement was ratified by the *Double Taxation Relief (United Kingdom) Order 1947* which enabled it to override domestic law to, in some circumstances, waive tax that would otherwise have been payable, which is in fact an integral function of DTAs. Article XVII (entry into force) also lists the date of *effect* for each tax covered by the DTA to mark the tax period from which the agreement will have practical impact on tax liabilities.

To avoid conflicts and inconsistencies and ensure legal clarity, Article XVIII of the 1947 treaty deemed the previous 1942 Order in Council made by New Zealand with respect to the United Kingdom to be superseded. In modern tax treaties, any previous agreements are terminated under the 'entry into force' article.[62]

3.1.3 *Termination*

The termination article provided that either country could give notice to terminate the treaty just one year after it had come into force.[63] This is a notably short time period. By contrast, the concurrent 1946 UK–Australian agreement was not able to be terminated

---

[58] Graham Hunt, 'New Zealand's Evolving Approach to Tax Treaties' (2008) 14 *New Zealand Journal of Taxation Law and Policy* 131, 137.
[59] The 1984 UK–New Zealand treaty, above n 7, was amended by protocols to the agreement in 2003 and 2007 to reflect updates to the OECD Model and by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting in 2017.
[60] 1947 UK–New Zealand treaty, above n 4, Art XVII.
[61] *Land and Income Tax Amendment Act 1946* (NZ) s 5, amending *Land and Income Tax Act 1923* (NZ).
[62] OECD Model Tax Convention, above n 3, Art 31.
[63] 1947 UK–New Zealand treaty, above n 4, Art XIX.

before March 1954, ensuring its application for at least eight years. This difference perhaps indicates a level of uncertainty the New Zealand government may have felt about the agreement. Eventually, after 17 years of operation, New Zealand gave notice to terminate in 1964,[64] the only time New Zealand has one-sidedly ended a tax treaty.[65]

Changes to the New Zealand tax system, namely the introduction of non-resident withholding tax (NRWT), were a major impetus for the termination. The government was also paying closer attention to the increase of foreign investment in New Zealand over the previous two decades and was concerned that the treaty was costing New Zealand considerable revenue.[66]

It is usual to negotiate a successor treaty before ending one; however, no treaty had been negotiated when New Zealand terminated the 1947 treaty. Two years after the notice of termination, a second treaty was signed in 1966 following negotiations conducted in Wellington (1966 UK–New Zealand treaty) and had retrospective effect to ensure continuity between the two treaties.[67]

The 1966 UK–New Zealand treaty was developed after the OECD published its Draft Convention in 1963 providing a standard template for countries concluding DTAs. The 1966 treaty is an amalgamation of the previous treaty and the OECD Draft Convention; it largely followed the wording used in the Draft Convention but had the same structure as the 1947 treaty. It had several substantial differences in taxing rights, for instance allowing dividends and royalties to be taxed based on source. A third treaty with the United Kingdom was concluded in 1984 to succeed the second one.[68] This treaty remains in force currently and closely follows the provisions in the influential OECD Model which had been released by a few years prior, in 1977. The 1984 treaty has been amended several times. Protocols in 2003 and 2007 made changes to reflect updates to the OECD Model and to deal with schemes designed to avoid the UK capital gains tax. Both the United Kingdom and New Zealand signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) in 2017 and so the current treaty is accordingly modified by the MLI.

3.1.4 Taxes covered

The first article of the 1947 treaty listed the taxes the treaty was to apply to.[69] For New Zealand these were the income tax and the social security charge and for the United Kingdom, the income tax, including the surtax, and the profits tax.[70] As outlined above, the surtax was a further tax on dividends paid to natural-person shareholders. Neither New Zealand nor the United Kingdom taxed capital gains at this time; in 1965 the United Kingdom introduced a capital gains tax which is subject to the current treaty.[71]

Any future modification to either country's tax system was captured by providing that the treaty also applied to any taxes of a 'substantially similar character' imposed by

[64] Notified 1 July 1964, termination effective 1 April 1965.
[65] Smith, above n 27, 113.
[66] Ibid.
[67] Signed 13 June 1966.
[68] 1966 UK–New Zealand treaty, above n 6.
[69] 1947 UK–New Zealand treaty, above n 4, Art I.
[70] Ibid Art I(1).
[71] 1984 UK–New Zealand treaty, above n 7, Art 2(1)(a)(iii).

either country after the date of signature.[72] Under the OECD Model, each state is required to notify the other if it makes significant changes to its taxation laws.[73]

3.2 Definitions

Most of the significant terms used in the treaty were defined in Article II. Several terms still used in the OECD Model are relatively unchanged and uncontroversial, including 'person' and 'company'.[74] In contrast, the definitions for 'resident' and 'permanent establishment' have been considerably developed since 1947 and are the subject of their own articles in the OECD Model, reflecting the importance of these concepts.[75]

Terms not defined were captured by the definitional rule, which instructed that undefined terms were to be given meaning by reference to the domestic law of the state applying the provision, and where possible the domestic tax law, which was to take precedence over a definition proposed by other law.[76] The modern counterpart is similar.[77]

3.2.1 Country definitions

The definitions of 'United Kingdom' and 'New Zealand' designated the territorial application of the treaty.[78] 'New Zealand' included 'all islands and territories' within its limits and specifically included the Cook Islands. The other territories within New Zealand limits at this time were Niue, Samoa and Tokelau.[79] New Zealand's current treaty practice is to specifically exclude the now self-governing territories of Samoa, Niue and the Cook Islands as well as the dependent territory of Tokelau.[80]

The subsequent 1966 UK–New Zealand treaty included the continental shelf in the definitions of each country, reflecting developments in international law which established the right of coastal states to the large area of shallow seafloor off their shoreline.[81] Including the continental shelf in the country definitions allowed income from oil drilling and other activities to come within the application of the treaty and was especially included in the 1966 agreement because offshore exploration for oil had begun.[82]

3.2.2 Taxation authorities

The term 'taxation authorities' referred to New Zealand and the United Kingdom's respective Commissioner of Taxes and Commissioners of Inland Revenue, their

---

[72] 1947 UK–New Zealand treaty, above n 4, Art I(2).
[73] OECD Model Tax Convention, above n 3, Art 2(4).
[74] 1947 UK–New Zealand treaty, above n 4, Arts II(1)(e) and (f); OECD Model Tax Convention, above n 3, Arts 3(1)(a) and (b).
[75] OECD Model Tax Convention, above n 3, Arts 5 and 7.
[76] 1947 UK–New Zealand treaty, above n 4, Art II(3).
[77] OECD Model Tax Convention, above n 3, Art 3(2).
[78] 1947 UK–New Zealand treaty, above n 4, Art II(1)(a) and (b).
[79] Jon Fraenkel, 'Pacific Islands and New Zealand', *Te Ara – The Encyclopedia of New Zealand* (Web Page) <https://teara.govt.nz/mi/pacific-islands-and-new-zealand/print> (accessed 23 December 2023).
[80] Hunt, above n 58, 154.
[81] Ibid 155.
[82] Ibid; unknown author, 'Notes of Meeting in Wellington February 1966', The National Archives (UK), IR40/17246 (Inland Revenue) ('1966 Meeting Notes').

authorised representatives, and the competent authority of any territory to which the agreement was extended.[83]

3.2.3 Residence

The concept of residence is central to the operation of DTAs. Only taxpayers who are residents of the two contracting countries obtain the benefits of the agreement. Further, residence is one of the factors used to allocate taxing rights (the other factor being the source of the income); for certain types of income only the taxpayer's country of residence is permitted to tax that income. DTAs typically do not dictate rules for determining who is a tax resident, but instead defer to the domestic law of each contracting country.[84] This holds in the 1947 treaty where a 'New Zealand resident' was 'any person who was resident in New Zealand for the purposes of New Zealand tax and not resident of the United Kingdom' for its tax purposes, and the same applied for 'United Kingdom resident'.[85]

However, the residence provision in the 1947 treaty was notable because it did not include a mechanism to determine the treaty residence of dual-resident taxpayers, that is, natural person taxpayers who are considered a resident of both contracting countries under the respective domestic laws. In fact, the definition of residence was structured to exclude taxpayers who were dual residents and hence excluded these taxpayers from treaty benefits.

Resolution of dual residence was not covered in the United Kingdom's tax treaties until after it had been dealt with in a 1958 report by the Organisation for European Economic Co-operation (the predecessor organisation to the OECD).[86] The residence clause in the successive 1966 UK–New Zealand treaty included a dual resident 'tie-breaker' test that was almost identical to the one in the current OECD Model.

Today, the 'tie-breaker' test set out in Article 4 of the OECD Model is one of the most invoked provisions in modern DTAs. Globalisation has facilitated the mobility of people across borders and it is not uncommon for individuals to find themselves considered resident for tax purposes in more than one country. The tie-breaker test deems a dual resident taxpayer the resident of one of the contracting countries by applying several criteria to determine the taxpayer's connection to that country, such as where the taxpayer has their permanent home.[87]

For companies, the residence rule in the 1947 treaty had an additional limb: 'a company shall be regarded as resident in the United Kingdom and not resident in New Zealand if its business is managed and controlled in the United Kingdom' and vice versa. The effect of this limb was that in the case of dual residency, primacy was to be given to management and control. Under New Zealand domestic law at the time, the test of company residence was incorporation or centre of administrative management in New Zealand; under United Kingdom law, the test was management and control in the United

---

[83] 1947 UK–New Zealand treaty, above n 4, Art XV(2).
[84] OECD, Model Tax Convention, above n 3, Commentary on Article 4, paras 4-7.
[85] 1947 UK–New Zealand treaty, above n 4, Art II(1)(g).
[86] John F Avery Jones, 'The Definition of Company Residence in Early UK Tax Treaties' [2008] (5) *British Tax Review* 556, 556, n 1 ('The Definition of Company Residence').
[87] OECD Model Tax Convention, above n 3, Art 4(2).

Kingdom.[88] Dual residence could arise when a company was incorporated in New Zealand but managed and controlled in the United Kingdom. In these cases, with priority given to management and control, the company would be regarded as a United Kingdom resident for the purposes of the treaty.[89]

Many of the United Kingdom's early tax treaties had a similar formulation where the other contracting country had an incorporation residence test.[90] These countries, including New Zealand, were willing to give up incorporation as the basis for corporate residence, presumably acknowledging that the United Kingdom had the better right to tax on a factual rather than legal test, as jurisdiction of incorporation is easy to manipulate.[91] In contrast, the United States was not willing to give up the incorporation test, leaving a company incorporated in the United States but controlled and managed in the United Kingdom as a dual resident and outside the ambit of the treaty benefits.[92]

Instead of 'management and control', the OECD has preferred the phrase 'place of effective management' as the tie-breaker test for dual resident companies and has used this test in its model tax conventions since the 1963 Draft Convention.[93] In 2017 however, the OECD Model was revised, and the test was replaced with an alternative formula where contracting countries must resolve a dual residency of a company by mutual agreement on a case-by-case basis.[94] The OECD considered that although dual-resident companies are relatively rare, cases involving dual-resident companies often involve tax avoidance arrangements, and are best solved on an individual approach.[95]

3.2.4 Enterprise, and industrial or commercial profits

The definitions of 'enterprise' and 'industrial or commercial profits' were important for the operation of Article III which allocates the right to tax the industrial or commercial profits of an enterprise to the resident country, unless the enterprise is operating through a fixed place of business (a permanent establishment).[96] Under the slightly convoluted definition in the 1947 treaty, 'enterprise' was defined to mean an 'industrial or commercial enterprise or undertaking' carried on by a resident of one of the countries[97] and 'industrial or commercial enterprise or undertaking' was further defined to expressly include activities in mining, agriculture and pastoral farming, and the business of banking, insurance, life insurance and dealing in investments.[98] These areas likely formed the bulk of the economic activity between the two countries and the two governments presumably wanted to ensure application of the relevant article to them.

---

[88] *Land and Income Tax Act 1923* (NZ) s 86; Avery Jones, 'The Definition of Company Residence', above n 86, 573.
[89] John F Avery Jones, 'Corporate Residence in Common Law: The Origins and Current Issues' in Guglielmo Maisto (ed), *Residence of Companies Under Tax Treaties and EC Law* (IBFD Publications, 2009) 121, 165 and 169.
[90] Ibid 168.
[91] Ibid 167.
[92] Ibid 166.
[93] Avery Jones, 'The Definition of Company Residence', above n 86, 576.
[94] Ibid.
[95] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, 2015) 72.
[96] The modern equivalent is Article 7 of the OECD Model Tax Convention which deals with business profits.
[97] 1947 UK–New Zealand treaty, above n 4, Art II(1)(i).
[98] Ibid Art II(1)(j).

The archaic term 'industrial or commercial profits' immediately betrays the age of the agreement. Unsurprisingly, industrial or commercial profits were the profits derived from the activities of industrial or commercial enterprises or undertakings. However, several types of income were expressly excluded from the definition: dividends, interest, rents, royalties, management charges or remuneration for personal services.[99] Some of these types of income were dealt with elsewhere in the treaty under specific provisions (dividends, royalties) and excluding them from the definition of industrial and commercial profits was intended to ensure that Article III did not apply to them. Where a form of income was not addressed elsewhere in the treaty (interest, rents and management charges), the intention was that the taxation of that income would be subject to the domestic laws of each respective country.[100] Where double taxation arose from domestic taxation, Article XIV of the 1947 treaty would direct the residence state to give relief in the form of a credit, thereby ensuring that the *source* country retained full taxation rights to interest, rents and management charges.

By contrast, the OECD Model defines 'enterprise' simply and broadly as 'the carrying on of any business' and omits a definition of the term 'business profits'.[101]

Defining industrial or commercial profits in a way that excluded some types of income was a distinctive structural feature of the United Kingdom's treaties with other Dominions, such as the 1946 UK–Australia agreement. This structure has been described as the 'colonial model' as it appears to have been present in the United Kingdom draft agreement sent to all British Dominions to initiate negotiations but was not a feature in other treaties such as the 1945 US–UK treaty.[102] This arrangement appears unnecessarily complicated compared to the more straightforward way enterprises and business profits are dealt with in modern treaties. It was evidently influential, and features in New Zealand's subsequent treaties with the United States (1948), Canada (1948) and Australia (1960). It also remained in New Zealand's 1966 treaty with the United Kingdom, despite the British doubting whether a definition of industrial or commercial profits was 'really necessary'.[103]

3.2.5 Permanent establishment

The right of a contracting country to tax the industrial or commercial profits of an enterprise of the other contracting country was decided by reference to the permanent establishment (PE) concept.[104] The PE concept was likely already the international norm by the time of negotiating the 1947 treaty through the work of the League of Nations.[105] The concept reflects a basic principle developed in this work; taxation on the basis of economic allegiance. Under this principle, the source country should be able to tax a foreign enterprise with a real and substantial economic nexus with the country where

[99] Ibid.
[100] Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 238.
[101] OECD Model Tax Convention, above n 3, Art 3(1)(c).
[102] C John Taylor, 'Some Distinctive Features of Australian Treaty Practice: An Examination of Their Origins and Interpretation' (2011) 9(3) *eJournal of Tax Research* 294, 294 n 1.
[103] 1966 Meeting Notes, above n 82.
[104] 1947 UK–New Zealand treaty, above n 4, Art III.
[105] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 240.

the profits are sourced. Whether a foreign company has such a connection to the source country is established through the concept of PE.

The definition of PE in the 1947 treaty was rudimentary by modern standards, although all of its elements are still found in some form in the OECD Model definition.[106] The essential test of a PE was the physical 'situs' test: an enterprise had a PE in the other contracting country if it had a 'branch, management, factory, mine, farm, or other fixed place of business' there.[107] There were several exceptions to this rule, for purchase of goods, business dealings and subsidiaries. Under these exceptions, simply having a fixed place of business to purchase goods, doing business through a legitimate broker or general commission agent, or having a subsidiary in the other contracting country would not of itself mean that the enterprise was deemed to have a PE in a contracting state. On the other hand, an enterprise would be deemed to have a PE where it used an agent in the other contracting country who 'has, and habitually exercises, a general authority to negotiate and conclude contracts' in the other country, or who 'regularly fills orders' on behalf of the enterprise from stock in that other country. This latter provision was a fairly basic precursor of the now elaborate dependent agent test set out in Article 5(5) of the OECD Model.

With the proliferation of companies operating internationally, the PE concept is one of the most important provisions in all DTAs based on the OECD Model. The definition of PE is an attempt to divide the taxing rights of business profits of a company where it operates across borders. Naturally, where the line should be drawn is contentious and the PE definition has evolved significantly since early DTAs where the focus was on a bricks-and-mortar nexus.[108] The definition has also undergone significant further revisions to deal with issues raised by its practical application and the artificial avoidance of PE status by multinational enterprises. Most recently, the 2017 MLI amended Article 5(5) to capture schemes where a dependent agent in one contracting country habitually negotiates contracts for its non-resident parents but leaves the formalities of offer and acceptance to the parent enterprise to avoid tax in that country.[109]

Now the extensive definition of PE is outlined in a standalone article in the OECD Model and includes a list of passive and preparatory activities that will not constitute a PE. By contrast, the definition was not regarded as a particularly important concept by the United Kingdom in their 1945 negotiations with the United States and, in 1965, the Deputy Chairman of the United Kingdom Inland Revenue wrote that those negotiating the treaty 'might be surprised to see the highly sophisticated definition which now appears in the model convention of the OECD'.[110]

3.3 Substantive articles

The substantive articles in a DTA allocate the right to tax particular categories of income to either the country where the income is derived (the source country) or the country

[106] 1947 UK–New Zealand treaty, above n 4, Art II(1)(k); OECD Model Tax Convention, above n 3, Art 5; C John Taylor, 'Twilight of the Neanderthals, or Are Bilateral Double Taxation Treaty Networks Sustainable?' (2010) 34(1) *Melbourne University Law Review* 268, 272 ('Twilight of the Neanderthals').
[107] 1947 UK–New Zealand treaty, above n 4, Art II(1)(k); OECD Model Tax Convention, above n 3, Art 5.
[108] Julia Bellemare, 'Evolution of the Permanent Establishment Concept' (2017) 65(3) *Canadian Tax Journal* 725, 728.
[109] Ibid 740.
[110] Robert Willis, 'Great Britain's Part in the Development of Double Taxation Relief' [1965] (4) *British Tax Review* 270, 278.

where the person or company receiving the income is resident (the resident country). Substantive articles usually allocate taxing rights in one of three ways, namely: (1) the source country may tax without limit; (2) the source country may tax up to a maximum, or (3) the source country may not tax the income at all, the residence country has the exclusive right to tax.[111]

In the 1947 treaty, all apart from one of the substantive articles were in the third form, where the jurisdiction to tax the income was allocated exclusively to the residence state. Otherwise, these articles (concerning income from shipping, dividends, royalties, government remuneration, employment income, pensions and annuities, and income of visiting professors and teachers, and students and apprentices)[112] stipulated that the income 'shall be *exempt from*' tax in the other territory, ie, the source country, whereas equivalent provisions in the OECD Model read 'shall be *taxable only* that other State [the residence country]'.[113]

The substantive provision that took a different form was the article dealing with industrial or commercial profits which permitted exclusive *source* taxation of profits derived from a PE in the source country.[114] The equivalent article in the OECD Model that deals with business profits also confers exclusive taxing rights on the source country.[115]

None of the substantive articles in the 1947 agreement assigned taxing rights according to the second method, where the source country is given taxing rights up to a maximum. In modern DTAs, as reflected in the OECD Model, income arising in the form of dividends and interest is generally taxed in this way.[116] For instance, in the current UK–New Zealand treaty the source country has the right to tax dividends up to a maximum rate of 15 per cent.[117]

An analysis of the substantive articles in the 1947 treaty reveals a tendency to prioritize the taxing rights of the residence country over the country where the income originated. As discussed earlier, in cases where capital flows are balanced between the two contracting countries, this approach results in a fair division of taxable revenue. However, when capital flows are unequal, the capital-exporting country (in this case, the United Kingdom, both in 1947 and presently) stands to benefit. This is because its residents are likely to generate more income from investments in the capital-importing country that is party to the treaty (New Zealand in this case) than residents of the capital-importing country would in the reverse scenario.

3.3.1 *Industrial or commercial profits*

Article III governed the right of a country to tax the profits of a foreign enterprise and was the precursor of the business profits article in the OECD Model.[118]

---

[111] Baker, *Double Taxation Conventions*, above n 57, [D.06].
[112] 1947 UK–New Zealand treaty, above n 4, Arts V, VI(1), VII(1), VIII(1), IX, X(1), XI(1) and XII(1).
[113] Ibid (emphasis added).
[114] Ibid Art III.
[115] OECD Model Tax Convention, above n 3, Art 7.
[116] Ibid Arts 10 and 11.
[117] 1984 UK–New Zealand treaty, above n 7, Art 11.
[118] OECD Model Tax Convention, above n 3, Art 7.

The PE concept was fundamental to the operation of Article III. The profits of a United Kingdom or New Zealand enterprise operating in the other country were *only* taxable in that country if the enterprise operated its business there through a PE. If the business of the enterprise did not constitute a PE, the source country could not tax the profits of the foreign enterprise; taxing rights were conferred exclusively on the residence state.

The profits that were permitted to be taxed by the source country were those profits that could be *attributed* to the PE of the foreign enterprise. To determine 'attributable' profits, the PE was to be treated as a separate entity and the profits that attached to the PE were the profits it would expect to derive in the source country if it were an independent enterprise engaged in the same activities, holding arm's length contracts with the main enterprise or an independent enterprise.[119]

This attribution method in the 1947 treaty can be contrasted with the 'force of attraction' method adopted in the contemporaneous 1945 US–UK treaty, originating from a domestic United States policy.[120] Under the 'force of attraction' method, the source country had the right to tax all of the foreign enterprise's profits derived there, even those unrelated to the activity of the PE. This rule considerably expanded the rights of a source country to tax the profits of a non-resident enterprise. Nevertheless, it was the attribution method that became standard in modern DTAs.[121]

The attribution method provision in the 1947 treaty contained an unusual clause for a United Kingdom DTA at the time; a savings clause that permitted the domestic tax authority to exercise discretion in determining the income attributable to the permanent establishment where there was insufficient information to apply the arm's length principle.[122] This clause originates from the United Kingdom's DTA with Australia concluded in 1946.[123] Australia pushed for the inclusion of a savings clause to ensure the treaty did not affect a provision in domestic law that empowered the taxation authority to determine the taxable income of a business but did not require the assessment to be in accordance with arm's length principles.[124] Evidently, New Zealand also wanted to include the clause in its treaty with the United Kingdom which, at the very least, provided some leeway in the application of the arm's length principle in some cases. It remained in the 1966 treaty but is not found in the current UK–New Zealand treaty or the OECD Model.

Consistent with New Zealand's longstanding policy of protecting its right to tax non-resident insurers, any business of insurance carried on in New Zealand by a United Kingdom resident was excluded from Article III thus allowing New Zealand to tax these insurers in the absence of a PE, based its domestic rules.[125] Almost all of New Zealand's current DTAs provide a similar carve-out for income from insurance from the equivalent business profits article, for example, Article 8(6) of New Zealand's present

---

[119] 1947 UK–New Zealand treaty, above n 4, Art III(3).
[120] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 242 n 198.
[121] OECD Model Tax Convention, above n 3, Art 7(2).
[122] 1947 UK–New Zealand treaty, above n 4, Art III(3).
[123] See Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 201 for a discussion of the negotiation leading to the inclusion of this savings clause.
[124] Ibid 226-227.
[125] Smith, above n 27, 109 and 1947 UK–New Zealand treaty, above n 4, Art III(1).

treaty with the United Kingdom.[126] This is likely to arise from a concern about tax avoidance as deductions for offshore insurance premiums can be manipulated to artificially lower business profits thereby avoiding New Zealand's jurisdiction to tax such income.[127]

Article III(4) provided that profits arising from the sale of goods were excluded from being attributed to a PE if the goods were stocked in a warehouse in the PE country 'for convenience of delivery'. An equivalent provision does not exist in the OECD Model business profits article, possibly because it is partially redundant in light of Article 5(4)(a) which provides that the use of facilities in the other country solely for the delivery of goods will not trigger the threshold for a PE.

The last provision in Article III stated no profits shall be attributed to a PE solely due to its purchase of goods for the enterprise.[128] An equivalent provision was removed from the OECD Model in 2010. The reason for removing the provision was that it would be inconsistent and administratively difficult to exempt profits from purchasing activities when profits from the PE's other activities are attributable to the PE under the arm's length principle.[129]

The equivalent OECD Model Article 7 dealing with business profits contains the same general rule as the industrial or commercial profits article in the 1947 treaty; the portion of a non-resident enterprise's profits attributable to a PE are taxable in the country where the PE is located. One provision not found in the 1947 treaty is the priority rule in Article 7(4) of the OECD Model, stipulating that articles addressing specific types of income take precedence over Article 7.[130] Business profits could include several different types of income and it could be unclear which article was to apply; the priority rule thereby removes any uncertainty.[131] An equivalent priority rule was not needed in the 1947 treaty because the definition of profits expressly excluded types of income covered by separate articles in the treaty (a feature of the so-called 'colonial model') so there was no doubt as to whether Article III would apply.

3.3.2 Shipping and aircraft profits

The shortest article in the 1947 treaty provided that profits from operating ships and aircraft were to be taxed by the taxpayer's country of residence.[132] Resident taxation would apply even if the shipping operator had a PE in the other country. For example, a United Kingdom company operating a shipping company between the United Kingdom and New Zealand with a branch office in New Zealand was exempt from tax there despite having a PE in New Zealand.

The present rule on shipping and aircraft income in the OECD Model also provides for taxation on a residence basis, which has been the case since the League of Nations' early

[126] Hunt, above n 58, 161.
[127] Ibid.
[128] 1947 UK–New Zealand treaty, above n 4, Art III(5).
[129] OECD Model Tax Convention, above n 3, Commentary on Article 7, para 43.
[130] John F Avery Jones, 'Understanding the OECD Model Tax Convention: The Lesson of History' (2009) 10(1) *Florida Tax Review* 1, 27.
[131] Peter Hongler, *International Law of Taxation* (Oxford University Press, 2021) [2.3.5.3](c).
[132] 1947 UK–New Zealand treaty, above n 4, Art V.

drafts.[133] It was hotly contested at the time; however, the League of Nations experts drafting the 1928 model tax treaties eventually agreed that income from shipping should be taxable only in the country where the 'real centre of management' was situated.[134] This policy suited the interests of the United Kingdom which was the undisputed world maritime power at the beginning of the 20th century, owning 45 per cent of the international fleet, and still had the third largest flagged fleet in 1967.[135] Without exception, the United Kingdom's early double tax agreements provided that profits derived by United Kingdom residents from the international operation of ships would be exempt from tax in the other country.[136]

Nevertheless, the right to tax shipping profits was also a sensitive issue for New Zealand, a remote island country dependent on international shipping for freight and passenger transport. New Zealand had previously enacted legislation deeming income derived by non-resident shipping companies from the carriage of goods from New Zealand as New Zealand-sourced income and thus subject to tax.[137] However, the United Kingdom's position on shipping was unyielding. It refused to enter DTAs without a provision to exempt shipping income in the source country, this being the reason why the United Kingdom did not have an agreement with India, and evidently New Zealand conceded to the exemption.[138] When the recently signed treaty was discussed in the New Zealand Parliament in 1947, the shipping article was noted in particular.[139] Mr Bowden MP observed that the New Zealand Shipping Company, registered in the United Kingdom, which had been previously taxed on its income derived in New Zealand by New Zealand, would now only be levied tax in the United Kingdom. The Union Steam Shipping Company, on the other hand, if trading between the two countries and earning income from freight in the United Kingdom, would only be subject to income tax in New Zealand. As the example demonstrates, the source taxation exemption was reciprocal; however, the shipping provision was likely in the United Kingdom's favour because of its dominance in the industry. To illustrate, 'across the ditch', Australia was reluctant to agree to residence taxation of shipping because it would effectively mean it surrendered the whole of its revenue received from United Kingdom–Australia shipping and transport.[140]

3.3.3 Dividends

Under the 1947 treaty, the source country gave up the right to tax income from dividends; dividend payments were taxable only by the residence country.[141] In the first half of the 20th century, New Zealand was heavily reliant on United Kingdom

---

[133] OECD Model Tax Convention, above n 3, Art 8; see generally Sunita Jogarajan, *Double Taxation and the League of Nations* (Cambridge University Press, 2018) ch 7.
[134] Jogarajan, above n 133, 216-218.
[135] SG Sturmey, *British Shipping and World Competition* (Oxford University Press, 2017 [1962]) 1; Sarah Palmer, 'Government and the British Shipping Industry in the Later Twentieth Century' in Gelina Harlaftis, Stig Tenold and Jesús M Valdaliso (eds), *The World's Key Industry: History and Economics of International Shipping* (Palgrave Macmillan, 2012) 124, 124.
[136] Inland Revenue (UK), 'Letter to Chancellor of the Exchequer on Double Taxation Negotiations, 13 November 1964', The National Archives (UK) TNA IR 40/15565, 4.
[137] Smith, above n 27, 106.
[138] Ibid 116.
[139] New Zealand, *Parliamentary Debates*, 19 August 1947, vol 277, 423 (Mr Bowden MP).
[140] Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 211.
[141] 1947 UK–New Zealand treaty, above n 4, Art VI.

investment and it was likely that more dividend payments were flowing to the United Kingdom than the other way.[142] Therefore, on first examination, giving up taxing rights to dividends would appear to be a large concession of source taxation on New Zealand's part. However, due to New Zealand's prevailing system of company-shareholder taxation, it was not really a concession, as all dividends were exempt from income tax under the average-rate system.[143]

In line with the average-rate system, the 1947 dividends article provided that the income from the dividend could be taken into account for rate-setting purposes in New Zealand. The dividend itself would not be taxed, but the dividend amount received by a United Kingdom shareholder from a New Zealand company was considered part of the United Kingdom resident's total assessable income.[144] This was to determine the rate of New Zealand tax to apply to the resident's income if the United Kingdom resident had other taxable income in New Zealand (excluding dividends).[145]

In respect of dividends paid by a United Kingdom company, the United Kingdom gave up the right to levy its surtax on the payment received by a New Zealand shareholder. This did not amount to a great concession either; as the surtax was not a withholding tax, there were considerable difficulties associated with collecting it from non-residents anyway.[146]

As a rule, the United Kingdom was firmly against source taxation of dividends and other investment income, as expounded by Sir Percy Thompson in the discussions on the League of Nations drafts.[147] As a large exporter of capital, the United Kingdom stood to lose more revenue by giving relief for foreign taxes than it would gain by taxing income derived from the United Kingdom.[148] In the tax treaties with its Dominions, the United Kingdom negotiated for residence taxation of dividends, and largely achieved either a nil rate of withholding tax or full exemption by the source country (as in the 1947 UK–New Zealand treaty).[149] In the subsequent 1966 treaty with New Zealand, the United Kingdom conceded to source taxation of dividends up to a maximum rate of 15 per cent, but only because New Zealand agreed to continue to exempt income from international shipping.[150]

Taxation of dividends exclusively in the country of the taxpayer's residence would be uncommon in modern DTAs today; as the OECD Commentary states, 'it would be unrealistic to suppose that there is any prospect of it being agreed that all taxation of dividends at the source should be relinquished'.[151]

The 1947 dividends article contained a PE proviso; the dividend exemption did not apply if the recipient was 'engaged in trade or business' through a PE in the source

---

[142] New Zealand Treasury, *International Investment for Growth* (New Zealand Government, 2015) 8.
[143] Cho, above n 13, 151.
[144] Ibid 159.
[145] 1947 UK–New Zealand treaty, above n 4, Art VI(1).
[146] Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 204.
[147] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 226.
[148] Ibid 213.
[149] Ibid 227.
[150] 1966 Meeting Notes, above n 82.
[151] OECD Model Tax Convention, above n 3, Commentary on Article 10, para 6.

country.[152] The PE proviso is also part of the dividend article in the OECD Model and stipulates that the exemption does not apply if the shareholding is 'effectively connected' to the PE. Instead, Article 7 shall apply with the dividend forming part of the business profits attributable to the PE. The idea behind the PE proviso is that the source country 'should not be obliged to refrain from exercising its taxing rights in the case of a domestic investment by a local PE'.[153] The dividend article in the 1947 treaty and DTAs today are concerned with true cross-border situations and not where a dividend is paid to a PE in the same country as the payer.[154]

The second paragraph of the dividends article in the 1947 treaty was concerned with the extraterritorial taxation of dividends. It prohibited each country from taxing dividends paid by a non-resident company merely because the underlying profits arose in the first state. Neither New Zealand nor the United Kingdom had such a tax.[155] However, the United States imposed such 'secondary withholding taxes' and an equivalent provision was in the 1945 US–UK treaty, which likely explains its inclusion in the 1947 UK–New Zealand agreement.[156] Article VI(2) also prevented special taxes being imposed on the undistributed profits of non-resident companies, such as a branch profits tax. Both provisions are in the OECD Model.[157]

In 1958, New Zealand moved to a classical system of company taxation and for the first time, dividends were taxable in the hands of shareholders under domestic law.[158] Later, in 1964, New Zealand introduced a non-resident withholding tax (NRWT) at a flat rate of 15 per cent on dividends, interest and royalties.[159] This change in tax policy was one reason for the need to renegotiate the treaty with the United Kingdom. In the next treaty, New Zealand negotiated for source taxation of dividends (and royalties) up to a maximum rate of 15 per cent. This was advantageous for a capital-importing country which had a large proportion of inward direct foreign investment. Source taxation up to a maximum of 15 per cent is also the current position for dividend taxation in the present UK–New Zealand treaty.[160]

Due to differences in the systems of company-shareholder taxation between countries, the dividends article often varies across treaties. For instance, the major divergence between the 1947 UK–New Zealand treaty and the 1946 UK–Australia treaty was the dividends article, due to Australia having a classical system of company taxation at the time (as well as negotiating for some source taxation of dividends).[161]

---

[152] 1947 UK–New Zealand treaty, above n 4, Art VI(1).
[153] Hongler, above n 131, [2.3.5.7](c).
[154] Baker, *Double Taxation Conventions*, above n 57, [10B.24].
[155] John Prebble, 'The General Principles, Effects and Structure of Tax Treaties' (1992) 10 *Asian Pacific Tax and Research Centre Bulletin* 555, 570.
[156] Mitchell B Carroll, 'Evolution of US Treaties to Avoid Double Taxation of Income Part II' (1968) 3(1) *International Lawyer* 129, 134.
[157] OECD Model Tax Convention, above n 3, Art 10(4).
[158] Cho, above n 13, 164.
[159] *Land and Income Amendment Act 1964* (NZ) s 17.
[160] 1984 UK–New Zealand treaty, above n 7, Art 11(1).
[161] Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 202 and 222.

3.3.4 Royalties

As in the dividends article, the article dealing with income from royalties conferred jurisdiction to tax royalty payments to the country of the recipient's residence, subject to the PE proviso.[162] To counter tax avoidance, a safeguard clause was added to deal with excessive royalty payments. No exemption was allowed for the amount of a royalty payment exceeding 'fair and reasonable consideration'.[163] This anti-avoidance measure appears in modern DTAs and protects a country's taxation revenue from being undermined by artificially inflated royalty payments.[164]

Full source country taxing rights were retained in respect of some types of royalty payments by carving them out from the definition of royalty. 'Royalty' included payments for the use of any 'copyright, patent, design, secret process or formula, trade-mark, or other like property' but did not include 'royalties paid in respect of the operation of mines or quarries, or of the extraction or removal of timber or other natural resources or rents or royalties in respect of motion picture films'.[165] Royalties or other amounts paid for natural resource extraction and films were outside the source tax exemption, the source country was permitted to tax them, and the country of the resident would be obliged to relieve double tax under the credit provision. Australia had achieved this position in their DTA, and it would have been difficult for the United Kingdom to refuse New Zealand source taxing rights having given them to Australia.[166]

Article 12 of the OECD Model provides for residence taxation of royalties, but this position is modified in many treaties. For instance, the current UK–New Zealand treaty allows the source country to tax royalties at a concessional rate of 10 per cent.[167] Echoing the split in the 1947 definition of royalty, income from the working of 'mineral deposits, sources and other natural resources' is now dealt with in the article on immovable property in the OECD treaty.[168] The immovable property article provides for source taxation in light of the close economic connection between the source of the income and the source country.

Both the articles on dividends and royalties in the 1947 treaty contain a 'subject to tax' test; that is, the exemption in the source country was conditional on the income being subject to tax in the other country to prevent abuse of treaty benefits.[169] In the 1960s, the United Kingdom began to replace the subject to tax test with the 'beneficial owner' concept in its DTAs, now part of the OECD Model articles on dividends and royalties.[170] The beneficial owner concept ensures that the recipient of treaty benefits is genuinely

---

[162] 1947 UK–New Zealand treaty, above n 4, Art VII.
[163] Ibid Art VII(1).
[164] OECD Model Tax Convention, above n 3, Art 12(4).
[165] 1947 UK–New Zealand treaty, above n 4, Art VII(2).
[166] Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946', above n 10, 222.
[167] 1984 UK–New Zealand treaty, above n 7, Art 13(2).
[168] OECD Model Tax Convention, above n 3, Art 6.
[169] 1947 UK–New Zealand treaty, above n 4, Arts VI(1) and VII(1).
[170] Philip Baker, 'The Meaning of "Beneficial Ownership" as Applied to Dividends under the OECD Model Tax Convention' in Guglielmo Maisto (ed), *Taxation of Intercompany Dividends under Tax Treaties and EU Law* (IBFD Publications, 2012) 87, 88.

the ultimate owner of the income, rather than a conduit or nominee attempting to exploit favourable tax treaty provisions.[171]

3.3.5 Government remuneration

The paying government had the sole right to tax the remuneration of government employees performing services in the other country.[172] However, the exemption did not apply if the government employee was ordinarily a resident of the country where they were resident and had not become a resident only for the purpose of government employment, for example, local staff of a high commission.[173] Nor would the exemption apply if the individual's services were in connection with trade or business for profit undertaken by either the New Zealand or British government, such as state-owned companies, ie, employees of a state-owned company.[174]

Similar government remuneration rules are found in the OECD Model.[175] An additional article in the Model preserves the fiscal privileges of diplomats and consular officials to which they are entitled under international law.[176]

3.3.6 Pensions and annuities

Double taxation of pensions arises when a pensioner relocates and both the country from which the pension is paid and the pensioner's new country of residence subject the pension to tax. Under the 1947 treaty, pensions and annuities were taxed on a residence basis; that is, a pensioner who relocated would only be subject to tax on their pension in their new country of residence.[177]

In the negotiations for the subsequent 1966 treaty, the British noted that New Zealand attached 'considerable importance' to residence taxation of pensions insofar as the outcome would affect New Zealand's attitude as to whether a new agreement 'was worthwhile having at all'.[178] The pension provision was also specially mentioned by Mr MacDermot, the UK's Financial Secretary to the Treasury, when the 1966 treaty was tabled in the House of Commons: 'As under the former Agreement, pensioners who are residents of New Zealand are exempted from United Kingdom tax on their pensions'.[179] One can infer that there was likely a number of pensioners from the United Kingdom now living in New Zealand, causing this provision to be of significance to both countries. Nevertheless, the substance of Article X of the 1947 treaty was not changed by the 1966 treaty.

The equivalent OECD Model article also provides for taxation of pensions on a residence basis, the rationale being that the residence country is better placed to assess

[171] Louisa Boyd, 'Double Taxation Agreements: New Zealand's Approach to Treaty Shopping' (2007) 13 *Auckland University Law Review* 63, 76.
[172] 1947 UK–New Zealand treaty, above n 4, Art VIII.
[173] Ibid.
[174] Ibid Art VIII(2); Holmes, above n 45, [17.6].
[175] OECD Model Tax Convention, above n 3, Art 19.
[176] Ibid Art 28; Baker, *Double Taxation Conventions*, above n 57, [28B.01].
[177] 1947 UK–New Zealand treaty, above n 4, Art X(1).
[178] 1966 Meeting Notes, above n 83.
[179] United Kingdom, *Parliamentary Debates*, House of Commons, 21 July 1966, vol 732, col 144W.

the recipients' overall ability to pay tax and the residence basis is simpler from an administrative perspective.[180]

International taxation of pension payments has become more contentious since the increased mobility of individuals from the 1980s gave rise to increasing numbers of people working and retiring in different countries.[181] Many tax treaties distinguish between pensions from state social security schemes, pensions from government employment, and pensions from non-government employment, allowing the source country to tax the former two and the residence state to tax the latter.[182] As a popular retirement destination, residence taxation of pensions suits New Zealand.[183] Rather than exclude some pensions from residence taxation, New Zealand often seeks to extend residence taxation rights by including all pensions, including government service pensions and pensions paid under social security legislation, in its pension provision.[184]

3.3.7 *Personal and professional remuneration of individuals*

Article IX governed income from employment. The jurisdiction to tax employment income, including payment for professional services, was given to the country where the work was performed (the source country) unless the taxpayer was only working there for a short time (the 183-day exception). Under the 183-day exception in the treaty, employment income was exempt in the source country if the taxpayer was there for less than 183 days (about six months), the services were performed for or on behalf of an employer residing in the other country, and the income was subject to tax in the other country.

The provisions on employment taxation are similar in the OECD Model, albeit more nuanced.[185] The 183-day exception is standard but includes a third condition, which is different to the one in the 1947 treaty. The third condition required to meet the 183-day exception is that the remuneration is not 'borne by' a PE in the country where the work was performed.[186] The objective is to avoid exempting employment income from source taxation where the income has given rise to a deduction by the PE (thereby reducing the amount of the PE's taxable income that can be taxed by the source country).[187] This condition was not part of the 183-day exception test in the 1947 treaty. The OECD Model also contains two additional articles to govern remuneration for personal services: an article covering directors' fees and an article on the income of entertainers and sportspersons.[188]

Under the 1947 treaty, the income of public entertainers ('such as stage, motion picture or radio artists, musicians and athletes') was dealt with by excluding it from the rules on employment income; the general rule providing for source taxation along with the 183-day exception.[189] The intention was that the country where the entertainers performed – the source country – should tax their income, regardless of the time spent

[180] OECD Model Tax Convention, above n 3, Commentary on Article 18, para 1.
[181] Holmes, above n 45, [18.2].
[182] Ibid; OECD Model Tax Convention, above n 3, Art 19(2).
[183] Hunt, above n 58, 164.
[184] Ibid.
[185] OECD Model Tax Convention, above n 3, Art 15.
[186] Ibid Art 15(2)(c).
[187] Ibid Commentary on Article 15, para 7.
[188] Ibid Arts 16 and 17.
[189] 1947 UK–New Zealand treaty, above n 4, Art IX(3).

in the country. A source taxation rule reflected the fact that artists and athletes often receive considerable compensation for brief visits to the country of performance.[190]

However, entertainers are often self-employed or 'loaned-out' under personal service corporations and income ascribed to such a corporation would therefore fall under Article III as profits arising from a commercial enterprise.[191] To recall the operation of this article, non-resident enterprises were exempt from source country taxation on their industrial or commercial profits unless they operated business through a PE. Due to the itinerant nature of the entertainment business, it is unlikely the activities of a self-employed entertainer or personal service corporation would constitute a PE and therefore income received from performances or games would be taxed only in the country of residence of the performer or the enterprise (ie, the corporation) which employs them.

New Zealand was concerned about the revenue cost in respect of non-resident entertainers, and it was a factor in the eventual termination of the treaty in 1964.[192] Notably, the Beatles toured New Zealand in June 1964; and two days after they left the country, New Zealand gave notice to terminate the 1947 agreement.[193]

The subsequent 1966 treaty with the United Kingdom included a separate article on the taxation of public entertainers.[194] It provided that, notwithstanding other provisions on personal and professional remuneration, the country of performance could tax the income earned by public entertainers. Further, to capture the income of the entertainer furnished through a personal service corporation, the definition of PE in the 1966 treaty provided that an enterprise was deemed to have a PE if it 'carries on the activity of providing the services … of public entertainers or athletes' in the other country.[195] This ensured the profits of a personal service corporation attributable to the PE were taxed under Article III (industrial or commercial profits).

Today, Article 17(2) of the OECD Model addresses this issue. It permits source taxation of an entertainer's income where it accrues to another person (such as a personal service corporation) and overrides the articles pertaining to business profits, employment and independent services.

3.3.8 Visiting professors and teachers

A special provision was included in the 1947 treaty for visiting professors or teachers.[196] It stipulated that income earned by professors or teachers teaching in one country was exempt from tax in that source country, provided they only resided there for two years or less. The exemption was not contingent on a subject to tax test; it applied even where the academic's income was not taxed in the other country, if for example, they had not

[190] Stephanie C Evans, 'United States Taxation of International Athletes: A Reexamination of the Artiste and Athlete Article in Tax Treaties' (1995) 29(1) *George Washington Journal of International Law and Economics* 297, 311.
[191] Dick Molenaar, 'New Options to Restrict Article 17 for Artistes and Sportsmen' (2016) 44(12) *Intertax* 972.
[192] Smith, above n 27, 113.
[193] Manatū Taonga – Ministry for Culture and Heritage, New Zealand, 'The Beatles in New Zealand', *New Zealand History* (Web Page, updated 28 April 2023) <https://nzhistory.govt.nz/culture/beatles>.
[194] 1947 UK–New Zealand treaty, above n 4, Art XIV.
[195] 1966 UK–New Zealand treaty, above n 6, Art II(1)(p)(iv)(bb).
[196] 1947 UK–New Zealand treaty, above n 4, Art XI.

maintained residence status in the country of usual residence. Its purpose was less to allocate tax jurisdiction and more to foster cross-border research and teaching and attract the services of foreign educators.[197] An exemption for visiting professors first appeared in the 1945 US–UK treaty, and subsequently was included in many early tax treaties.[198]

This provision is not found in the current OECD Model. Remuneration received by visiting educators may now be covered by the employment provisions if the educator is employed by the host university or other relevant educational institution, or the business profits article if the educator is self-employed.

3.3.9 Students and apprentices

Payments made to students or apprentices visiting one country for full-time education or training were exempt from tax on the payments in that host state made for the purpose of the student's maintenance, education or training.[199] The OECD Model provides the same without the stipulation that the student or apprentice be full-time.[200]

3.4 Elimination of double tax

The OECD Model gives a choice of two methods for the elimination of juridical double tax, the exemption method and the credit method.[201] Each contracting country is free to choose between the two methods. The provisions are not highly prescriptive, and the details are left for the contracting countries to work out in accordance with their domestic laws and policies.[202] In the 1947 treaty, provision of credit was the method used to relieve double tax.[203]

3.4.1 Provision of credit

Mr Bowden MP rightly called the credit article 'the dominant article' when the agreement was explained to the New Zealand Parliament in 1947.[204] The object of the credit article was to eliminate double taxation where this had not been achieved under the other articles in the treaty.

Operation of the credit article

As has been shown in this study, most of the substantive provisions in the 1947 treaty eliminated double tax by requiring the source country to exempt a particular class of income from tax and therefore conferring on the residence state the exclusive right to tax that income. However, where the source country retained the right to tax a class of income, or where the income fell outside the provisions of the treaty, double taxation was not eliminated because both states had the right to tax. For instance, the source country retained to the right to tax the profits of a foreign enterprise attributable to a PE and employment income not falling within the 183-day exception. The treaty was silent

---

[197] Baker, *Double Taxation Conventions*, above n 57, [20B.07].
[198] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 253.
[199] 1947 UK–New Zealand treaty, above n 4, Art XII.
[200] OECD Model Tax Convention, above n 3, Art 20.
[201] Ibid Arts 23A and 23B.
[202] Ibid Commentary on Article 23, para 32.
[203] 1947 UK–New Zealand treaty, above n 4, Art XIV.
[204] New Zealand, *Parliamentary Debates*, 19 August 1947, vol 277, 423.

on the tax treatment of interest and payments for natural resource exploitation or film royalties were outside the scope of the royalty article. In these cases, the credit provision operated to eliminate double tax.

The credit provision obliged the residence country to give relief from double taxation in the form of a credit. The United Kingdom would allow a credit against United Kingdom tax liability for New Zealand tax paid on income sourced in New Zealand.[205] The converse also applied; where United Kingdom tax had been imposed upon income that had its source in the United Kingdom, New Zealand was required to give a credit for the tax paid to offset New Zealand tax liable on that income.[206]

Compared to Dominion Relief, the credit provision was a great improvement toward relieving the burden of double tax. The United Kingdom gave full credit for taxes paid in New Zealand, instead of the half-credit given under the previous system.[207]

Domestic laws providing for foreign tax credits

The provision of credit was subject to each country's domestic laws regarding the allowance of foreign tax credits, which generally related to the timing and amount of credit granted.[208]

The granting of United Kingdom credits was subject to the rules contained in the *Finance (No 2) Act 1945*. The *Finance (No 2) Act* was enacted as a direct result of the 1945 US–UK treaty. Prior to this treaty, the United Kingdom did not have a foreign tax credit regime, only providing a deduction for United States tax and limited credit for Dominion tax.[209] By contrast, the United States had provided foreign tax credits since 1919.[210] Providing foreign tax credits conflicted with the United Kingdom's ardent stance against tax at source and was only reluctantly accepted as a practical solution during the negotiation of the US treaty.[211]

New Zealand did not provide for foreign tax credits in its domestic law at the time of negotiations. Therefore, the provision of New Zealand credits was 'subject to such provisions … as may be enacted in New Zealand' in anticipation of New Zealand providing for foreign tax credits in its domestic law.[212]

Strangely, however, New Zealand did not enact the legislation envisaged until 1962.[213] Instead, New Zealand continued to exempt the income under its domestic law provisions which provided income derived in the Dominions and subject to tax there was exempt in New Zealand.[214] Therefore, the domestic Dominion tax exemption which had

[205] 1947 UK–New Zealand treaty, above n 4, Art XIV(1).
[206] Ibid Art XIV(2).
[207] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 236; Harris, above n 37, 477.
[208] Elliffe, above n 19, 176-177.
[209] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 233.
[210] Ibid 232.
[211] Ibid 233.
[212] 1947 UK–New Zealand treaty, above n 4, Art XIV(2).
[213] Section 14 of the *Land and Income Tax Amendment Act (No 2) 1962* (NZ) repealed and amended section 170 of the *Land and Income Tax Act 1954* (NZ), the then provision providing for the exemption of income subject to tax in the Commonwealth.
[214] Smith, above n 27, 110 and 113.

operated since 1916 continued to operate, so that no obligation to grant foreign tax credits would arise. From the United Kingdom's perspective, it would have made little difference for New Zealand to use the Dominion exemption method to eliminate double tax (unless the New Zealand tax rate was higher than the United Kingdom rate).

Source rules

The credit article in the 1947 treaty contained several source rules deeming income to be 'sourced' in one country or the other. Source rules were necessary to deal with potential conflict between domestic law credit provisions and the treaty provisions.[215] Generally, domestic law credit provisions require income to have a source in the other state as a condition for granting relief (such as granting credit). In the absence of a treaty definition of source, the residence state may use its domestic definition of source which may not align with the treaty provisions. In addition, at this time countries had less sophisticated source rules and therefore the source of some types of income was doubtful.

Countries address this in their tax treaties by specifying the source of various types of income to avoid conflicts.[216] In the 1947 credit provision, income from personal and professional services (employment) was deemed to be sourced where the services were performed. Income from employment onboard ships and aircraft was deemed sourced where the operator was resident. Income from insurance taxable under New Zealand law was deemed to be sourced in New Zealand. The provisions of the 1947 treaty preserved New Zealand's right to tax insurance premiums and this source rule ensured the United Kingdom would grant credits for any double tax that arose. There were two other source rules in other articles in the 1947 treaty; business profits attributed to a PE were deemed sourced in the country where the PE was situated, and adjusted profits under the associated enterprises article were deemed sourced in the relevant state post-adjustment.[217]

From about 1967, the United Kingdom inserted a general source rule in their DTAs.[218] It appears in the credit provision of the current UK–New Zealand treaty and deems all income which may be taxed in the other country in accordance with the treaty to have a source there for the purpose of giving relief under the treaty.[219]

Under the OECD Model, the credit provision is drafted to eliminate any consideration of source.[220] However, it may be necessary to refer to source in the relief article if the treaty gives relief following domestic law relief provisions.[221]

Underlying tax credits

The credit article provided for 'underlying tax' credits. When a taxpayer received a dividend payment, underlying tax credits took into account the tax paid by the company

---

[215] John F Avery Jones, 'Tax Treaty Problems Relating to Source' [1998] (3) *British Tax Review* 222, 240 ('Tax Treaty Problems Relating to Source').
[216] Ibid 239.
[217] See section 3.5.2 below.
[218] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 235.
[219] 1984 UK–New Zealand treaty, above n 4, Art 22(3).
[220] Avery Jones, 'Tax Treaty Problems Relating to Source', above n 215, 250.
[221] Ibid 239.

on its profits, from which the dividend was distributed. Underlying tax credits were important to United Kingdom-resident shareholders of New Zealand companies for granting credit for New Zealand tax paid on the profits out of which dividends were paid.[222] Under its system of company taxation at the time, New Zealand did not impose tax on dividends therefore there was no direct tax for the United Kingdom credit to compute, only the underlying corporate tax.

3.5 Anti-avoidance

Two articles in the 1947 treaty, exchange of information and associated enterprises, were related to the second purpose of the agreement – the prevention of fiscal evasion.[223]

3.5.1 Exchange of information

The exchange of information provision remains one of the most powerful anti-avoidance and anti-evasion mechanisms in double tax treaties.[224] As the international tax community has increasingly focused its attention on widespread avoidance and evasion, the article has been similarly enhanced and is comprehensive compared to the limited formula in the 1947 treaty. Broadly, the exchange of information article requires the two countries to exchange information about respective residents and their taxable activities.

The 1947 article was almost identical to the provision in the 1945 US–UK treaty and was likely drawn from it. It permitted the taxation authority of each country to exchange information necessary for carrying out the agreement, for prevention of fraud and 'for the administration of statutory provisions against legal avoidance' in relation to the taxes covered by the treaty. The unusual wording 'statutory provisions against legal avoidance' refers to domestic tax avoidance provisions.

At the time, the United Kingdom did not have a general anti-avoidance rule (GAAR), only some targeted anti-avoidance provisions that had been introduced primarily in the late 1930s.[225] By contrast, New Zealand did have a GAAR dating to 1878 (possibly the oldest in the world) but it was rarely invoked until the 1960s.[226] The widely drafted provision is likely due the importance that the United States attached to the equivalent article in the 1945 US–UK treaty.[227] The United Kingdom readily agreed to a provision requiring sharing of information for fraud and avoidance purposes, having themselves encountered issues with avoidance through formation of foreign companies.[228]

The initial exchange of information article in the 1984 treaty was quite similar to the 1947 version. However, it has been updated twice in the last 20 years under the 2003 and 2008 protocols to align with changes in the OECD Model which reflect the

---

[222] 1947 UK–New Zealand treaty, above n 4, Arts XIV(1) and (2).
[223] Ibid Arts XV and IV.
[224] Xavier Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2nd ed, 2018) ch 3.
[225] Peter Scott, 'A Fiscal Constitutional Crisis: Tax Avoidance and Evasion in Inter-War Britain' (2022) 137(584) *The English Historical Review* 170.
[226] Craig Elliffe, 'New Zealand's General Anti-Avoidance Rule – A Triumph of Flexibility over Certainty' (2014) 62(1) *Canadian Tax Journal* 147, 148.
[227] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 237-239.
[228] Ibid.

movement of strengthening anti-avoidance provisions. The current version is highly permissive, it provides that the competent authorities shall exchange information 'as is foreseeably relevant' and the provision is not restricted by the scope articles outlining residence and taxes covered. As a result, the exchange of information is not strictly limited to that necessary for the implementation of the agreement, the residents of the two countries or the taxes covered by the agreement.[229] Further, each country cannot deny information solely because it has no domestic interest in it and domestic rules such as bank secrecy must not prevent information exchange.[230]

Amendments to the information exchange provision have been driven by the goal of facilitating the exchange of tax information between jurisdictions to the widest extent to counter avoidance and evasion. The developments are connected to several global initiatives and events, including the Global Forum on Transparency and Exchange of Information created in 2000, the OECD model tax information exchange agreements and the 2008 global financial crisis.[231]

3.5.2 Associated enterprises

An associated enterprises article was an expected feature of bilateral tax treaties by 1947. The rules had been part of UK tax policy since 1915 and equivalent provisions were included in the 1935 League of Nations Draft Model Tax Treaty and the 1945 US–UK treaty.[232] Australia was reprimanded by the United Kingdom for attempting to reject it in its DTA as they regarded it as 'fundamental to any double taxation agreement dealing with trading profits'.[233]

The associated enterprise article was concerned with the allocation of business profits arising from transactions between related enterprises in different countries.[234] It worked in a similar way to the industrial or commercial profits article, but allocated profits between two associated enterprises instead of two divisions of one enterprise, to calculate tax liabilities.[235] If profits made by one enterprise from transactions with an associated enterprise in the other country were not at the level which might be expected if the enterprises were separate and independent, the accounts could be re-written as if they were dealing at arm's length, to calculate the tax liability of the first enterprise. The adjusted profits were included in the enterprise's income, deemed to be sourced in the country where the enterprise was situated and taxed accordingly. Enterprises were associated if one enterprise participated in the management, control or capital of the other enterprise.[236]

Adjusting profits between associated enterprises can give rise to economic double taxation where the same profits are taxed twice in the hands of each enterprise.[237] If one country makes a profit adjustment and increases the taxable income of an enterprise, the

---

[229] Baker, *Double Taxation Conventions*, above n 57, [26B.01].
[230] 1984 UK–New Zealand treaty, above n 7, Arts 25(4) and (5).
[231] Baker, *Double Taxation Conventions*, above n 57, [26B.08].
[232] Veronika Solilová and Marlies Steindl, 'OECD/Austria/Czech Republic – Tax Treaty Policy on Article 9 of the OECD Model Scrutinized' (2013) 67(3) *Bulletin for International Taxation* 128, 128.
[233] Taylor, 'Twilight of the Neanderthals', above n 106, 286 n 97, citing R Willis, then Secretary of the United Kingdom Board of Inland Revenue.
[234] 1947 UK–New Zealand treaty, above n 4, Art IV.
[235] Baker, *Double Taxation Conventions*, above n 57, [A7B.13].
[236] 1947 UK–New Zealand treaty, above n 4, Art IV(1).
[237] OECD Model Tax Convention, above n 3, Commentary on Article 9, para 5.

profits will be taxed twice if the other country does not make a corresponding adjustment. For this reason, the OECD Model includes a provision requiring a corresponding adjustment by the other country where there has been a re-writing of an enterprise's accounts in accordance with the article.[238] The 1947 article did not contain an equivalent provision. Nor has it been incorporated as part of the current UK–New Zealand treaty, but this is not uncommon, as there tends to be much disagreement over initial profit adjustments.[239]

As well as helping to achieve an appropriate allocation of taxable income in the two states, the associated enterprises article also has an anti-avoidance function to counteract the use of artificial prices between the members of multinational groups to manipulate levels of profits of its enterprises in high-tax jurisdictions. This function has become increasingly important with the steady rise of multinational enterprises in the world but is impaired by issues in the application of the arm's length principle.[240]

3.6 Miscellaneous provisions

3.6.1 Assessable income for rate-setting purposes

To recall, under New Zealand's average-rate system, dividends were exempt from tax in the hands of shareholders but counted as part of their total income to calculate their tax rate. Reflecting this system, Article XIII permitted New Zealand to use dividends paid to United Kingdom residents, exempt from source taxation under the dividends article, to make tax rate-scale adjustments to determine the amount of New Zealand tax payable on other assessable income. This article was unique to the 1947 treaty; New Zealand moved to a classical company taxation system in 1958 so the subsequent treaty did not need an equivalent provision.[241]

3.6.2 Territorial extension

The territorial extension article permitted either the contracting country to extend the application of the treaty to its colonies or other territories which imposed substantially similar taxes to that covered by the treaty.[242] The extension would become effective 60 days after notification unless the other government refused to accept the extension. Although the extension could be exercised by either country, the article could in fact only pertain to the United Kingdom as the agreement already applied to 'all islands and territories' within New Zealand's territorial limits.[243]

The extension provision was invoked by the United Kingdom in 1951, five years after the treaty was entered into.[244] The reason for this is unclear and it seems peculiar because the territories the United Kingdom requested come within the treaty framework were 18 small United Kingdom colonies, mostly in Africa and the Caribbean with little connection to New Zealand: Aden Colony, Antigua, Cyprus, Falkland Islands, Gambia, Gold Coast, Grenada, Jamaica, Mauritius, Montserrat, Nigeria, Nyasaland, St

---

[238] Ibid Art 9(2).
[239] Ramon SJ Dwarkasing, 'The Concept of Associated Enterprises' (2013) 41(8/9) *Intertax* 412.
[240] OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Publishing, 2022) 13.
[241] Cho, above n 13, 151.
[242] 1947 UK–New Zealand treaty, above n 4, Art XVI.
[243] Ibid Art II(1)(b).
[244] By notification on 12 June 1951, accepted by New Zealand 27 June 1951.

Christopher and Nevis, St Vincent, Seychelles, Sierra Leone, Trinidad and the Virgin Islands. However, it seems New Zealand was not perturbed by the extension as the request was accepted just two weeks after notification. The United Kingdom also exercised the extension in respect of its treaties with Canada, Sweden, Norway and Denmark to broadly the same territories in the early 1950s.[245]

The territorial extension provision was novel to the United Kingdom's first DTA, the US–UK 1945 treaty. The United States was initially suspicious of this provision, concerned that it would be used to extend the treaty to low-tax territories for tax avoidance purposes.[246] These concerns were countered by the idea that any extension would increase United States trade with such territories. In 1959, the United Kingdom did extend the US–UK treaty to 20 colonies, also mostly in Africa and the Caribbean.[247]

The expansion of the tax haven market between 1945 and 1970 might shed some light on this curious development.[248] Very high rates of income and corporate taxes in Europe, to finance post-war debt and the welfare state, drove demand for tax havens, particularly by returnees from Britain's 'dissolving empire' who were used to favourable tax arrangements in the colonies and dependent territories.[249] In fact, there was a view amongst some British officials that tax havens provided a way for the developing world to become self-sustaining and decrease their reliance on foreign aid.[250] The United Kingdom was at the centre of these emerging tax havens, most of which were dependent territories in the Caribbean and within the 'Sterling Area' (countries that pegged their currency to the pound).[251]

One can only speculate on the United Kingdom's intention for bringing these emerging tax havens within the framework of its tax treaties. It seems that this policy may have been driven by the Colonial Office, rather than for reasons of tax, to encourage trade between these countries and the treaty partner.[252] This would have made some sense for the Caribbean Islands and the United States, but much less sense in treaties with European countries and New Zealand.

3.7 Absent articles

Several provisions were notable by their absence from the 1947 treaty. For instance, not all major classes of income were covered. There was no provision allocating taxing rights to interest nor income from immovable property, standard provisions in the OECD Model and covered by most modern DTAs today. Leaving out some classes of income was a distinctive feature of the United Kingdom's early DTAs with its Dominions, as discussed previously. Double taxation was still avoided as the treaty's

[245] Avery Jones, 'The History of the United Kingdom's First Comprehensive Double Taxation Agreement', above n 51, 248 n 244.
[246] Ibid 249.
[247] Ibid 248.
[248] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122(5) *The American Historical Review* 1431, 1437.
[249] Ibid 1438.
[250] Ibid.
[251] Ibid 1441-1442.
[252] John F Avery Jones, 'The UK's Early Tax Treaties with European Countries' in Peter Harris and Dominic de Cogan (eds), *Studies in the History of Tax Law, Vol 8* (Hart Publishing, 2017) 295, 328-333.

credit provision would direct the taxpayer's country of residence to relieve any double tax that resulted from both countries taxing these classes of income.

There was no provision for a mutual agreement procedure nor a residence tie-breaker where individual taxpayers were considered residents by both countries, today considered essential elements of a DTA.[253] Both provisions were included in the subsequent 1966 treaty.

Lastly, the 1947 treaty did not contain a non-discrimination article. Notes from the negotiations for the 1966 treaty (which also omitted a discrimination article) indicate that this was due to the belief of United Kingdom officials that discrimination between members of the Commonwealth was so unlikely that it need not be expressly guarded against.[254]

4. Conclusion

Tax treaties have evolved significantly since their fumbling beginnings in the first half of the 20th century. The 1947 UK–New Zealand treaty was rudimentary by modern standards and contained some unusual features distinctive to the United Kingdom's early tax treaties. The definition of PE was brief and crude compared to the sophisticated version found in modern DTAs and not all types of income were covered by the treaty.

However, the majority of the provisions in the agreement can still be found in the present OECD Model. Notably, the rules for taxing business profits still apply, reflecting the principle of economic allegiance which also governed the allocation of income in the 1947 treaty. An emerging New Zealand position on tax treaties is also apparent in this early treaty, for instance, with New Zealand protecting its right to tax income from the business of insurance and ensuring pensions were taxed on a residence basis.

In the 1966 negotiations for the subsequent treaty, the British asked why New Zealand had put in a reservation to an article dealing with 'other income'. The New Zealanders admitted they had not come across this kind of article before and did not know 'what they would be letting themselves in for if they accepted it'.[255] Nevertheless, on the advice of the British, the provision was included. This interaction is revealing of the reliance New Zealand had on the United Kingdom in the formation of its early tax treaties.

The 1947 treaty was largely directed by the United Kingdom's prevailing policy on tax treaties. Many provisions were drawn from its treaty with the United States in 1945 and modified by the United Kingdom's desire for taxation on a residence basis. The 1947 treaty likely cost New Zealand a considerable amount of tax revenue. However, it did obtain more generous double tax relief than under Dominion Relief; the United Kingdom gave full credits for taxes paid in New Zealand.

The New Zealand Prime Minister, Michael Joseph Savage, summed up the prevailing attitude of New Zealand toward the United Kingdom, in his 1939 speech:

---

[253] OECD Model Tax Convention, above n 3, Arts 4 and 25.
[254] 1966 Meeting Notes, above n 82.
[255] Ibid.

> Both with gratitude for the past and confidence in the future, we range ourselves without fear beside Britain. Where she goes, we go. Where she stands, we stand. We are only a small and young nation, but we are one and all a band of brothers and we march forward with union of hearts and wills to a common destiny.[256]

While these words were uttered in the context of New Zealand entering World War II, their sentiment captured New Zealand's complete loyalty and trust toward Britain at the time. If the British thought it was a good idea to conclude a tax treaty, then so did New Zealand. Today, the OECD directs the content and structure of New Zealand's tax treaties. In 1947, it was the United Kingdom that initiated and shaped New Zealand's first comprehensive double tax treaty.

[256] Manatū Taonga — Ministry for Culture and Heritage, New Zealand, 'Prime Minister Declares New Zealand's Support for Britain, 5 September 1939', *New Zealand History* (Web Page, updated 24 July 2024) <https://nzhistory.govt.nz/pm-declares-new-zealands-support-for-britain-in-famous-radio-broadcast>.