The UK’s Early Tax Treaties with European Countries

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ABSTRACT

Following on from my chapter for the third volume of this series on the 1945 US–UK treaty, this chapter explores the tax treaties made by the UK in the following ten years, a period which is chosen because it was before the OEEC started work on a Model on which treaties could be based. It will concentrate on the treaties with European countries (comprising those with Sweden, Denmark, the Netherlands, France, Norway, Belgium, Switzerland, Germany and Austria) rather than the treaties with the Dominions (Australia–UK (1946) having been dealt with by John Taylor in the fourth volume of this series) or with the colonies, as these are special cases. The European treaties set up new challenges for our treaty policy and exhibited additional problems such as dealing with civil law concepts and negotiating with countries who had been making treaties amongst themselves for some time and therefore were far more experienced in treaty negotiation than we were.

Aspects to be considered include: the development of the definitions of ‘person’, ‘company’ and ‘resident’ (the use of the term resident in treaties derives from its use in UK and US treaties, and HMRC recently announced a change of interpretation of the residence article in 16 surviving treaties); the development of the permanent establishment concept; how we obtained a reduction in withholding taxes on dividends from the treaty partner.
when we had virtually nothing to offer in return; the development of the employment and professional services article; the development of the non-discrimination article including the introduction of a non-discrimination provision based on ownership to counter discrimination by Denmark on this ground; and the extension of these treaties with European countries to our, and their, colonies.

INTRODUCTION

This chapter continues the history of the UK’s double taxation agreements following the 1945 treaty with the US described in my paper for the 2006 Conference. After that treaty, negotiations with the Dominions (except Australia) were relatively straightforward as we had done the unthinkable in giving the US a better deal, which we obviously had to extend to them. The negotiations with Australia were more difficult as the UK wanted as little source taxation as possible, and Australia the opposite, each reflecting their economic interests. The next target was mainland European countries where we had for many years stood out for something to which they could never agree—no source taxation—with the result that nobody made any comprehensive treaties with us, even though we had started unsuccessful negotiations with Belgium, Germany, Italy, the Netherlands, Sweden and Switzerland before the War, and had the War not intervened we would have had a non-standard treaty with France which we needed to prevent UK companies being liable to extra-territorial French taxation.

2 The lengthy negotiations with Australia are described in J Taylor, “I suppose I must have more discussion on this dreary subject”: the Negotiation and Drafting of the UK–Australia Double Taxation treaty of 1946’, in J Tiley (ed), Studies in the History of Tax Law, vol 4 (Oxford, Hart Publishing, 2010), which are particularly interesting in comparing the official records in both countries.
3 This was essentially self-interest. Because UK outward investment was far greater than inward investment if the other state imposed tax we had to give relief for more tax than we would collect from domestic income of residents of that state.
4 There were a number of pre-War limited treaties dealing with shipping and air transport profits (with Denmark, Norway, Sweden, Finland, Netherlands, Germany; Iceland, Greece, Japan, Canada and France), and with agency profits (with Sweden, Switzerland, Finland, Canada, Newfoundland, Netherlands, Greece, Norway, South Africa and New Zealand).
5 The National Archives (TNA) IR 40/3419 Pt 3 (League of Nations), and IR 40/4307 (Sweden).
6 TNA IR 40/16897. This treaty was eventually signed in 1945 and given effect to in 1947 with the Protocol providing that one item was retrospective to 1931: IR 40/16897, SR&O 1947 No 164. It was subsequently replaced by a more normal treaty (1950) to which reference herein to the treaty with France applies.
Now, having conceded some source taxation to the US and extended it to the Dominions, we were in a position to talk to European countries on a different basis. We started from the disadvantage that they had been making treaties among themselves for many years and the format of treaties reflected their tax systems. Their taxes started out as impersonal taxes or impôts réels: a series of separate taxes imposed on different types of income on a source basis, such as a tax on land, a tax on business profits etc, which for the most part no longer existed but they left the legacy of the types of income dealt with separately in treaties. In addition, for the first time we had to deal with the effects of civil law. However, we had fully participated in the international negotiations for a model treaty under the auspices of the League of Nations and would have been aware of some of the differences. We were therefore in the position of joining a club where most of the rules had already been agreed. This article explores the problems that we encountered, and considers what influence these treaties had on the OEEC and OECD Model tax conventions. The focus will be on the UK side rather than treaty provisions required by the other state's tax law or policy.

This article covers the period from the US treaty (1945) until the OEEC (the predecessor of the OECD, whose members were European states only) started work on a model treaty in 1956, on the basis that such
treaties were negotiated in the absence of an internationally-agreed framework. The latest League of Nations Mexico (1943) and London (1946) drafts suffered from the wartime domination of the Mexico Model by the South Americans, with the Europeans merely doing what they could in the London Model to reverse some of the worst excesses, and earlier League of Nations drafts were out of date. The treaties being considered comprise, in addition to Agreements with the Dominions and Arrangements with the Colonies, those with Sweden, Denmark, the Netherlands, France, Norway, Finland, Greece (which, unusually, is still in force), Belgium, Switzerland, Germany and Austria. Because of the number of treaties a selection of topics will be considered. The period under consideration was an active one for treaties by the US and the Dominions, but relatively quiet for European countries.

One of the problems of knowing in which treaty a particular provision originated is that there can be a considerable time between a treaty being initialised at the end of negotiations and its being signed and a further time before ratification and its being brought into force by Statutory Instrument. The order can be determined only from the National Archives. The treaty

<www.taxtreatieshistory.org/> C(56)49(Final) (19 March 1956). References in this form are to this website containing the historical records of the OEEC and OECD Models, which is organised by the Institute for Austrian and International Tax Law, Vienna, IBFD, Università Cattolica del Sacro Cuore, Piacenza, Italy, IFA Canadian Branch and the Canadian Tax Foundation.

11 The UN Fiscal Commission continued until it was dissolved in 1954. The limited value of the Mexico and London drafts was recognised in the OEEC Secretary-General’s note of 12 November 1954 to the Council at the start of its work: ‘... not, in particular, does it seem likely that agreement could be reached in the Council that the “London Draft” should be the standard form of bilateral convention between Member and associated countries, since the draft itself is not, as it stands at present, fully acceptable to every Member.’ C(54)294 (12 November 1954) para 8.

12 See the heading Treaty parties and nomenclature for the significance of these terms.

13 Contemporary comment on these treaties is found in a series of booklets about treaties of the time published by the IBFD with authors from each of the states, including No 3 The Anglo-Dutch Double Taxation Conventions by FE Koch and HJ Blok, 1950 (plus a Supplement, No 9, 1956), No 6 Le Convention Fiscale Franco-Britannique by FE Koch and HH Rothstein, 1954, and No 8 Tax Relations between the UK and Sweden by FE Koch and O Ekenberg, 1956 (all IBFD, Amsterdam).

14 During this period the US entered into 18 treaties, Australia 3 (see J Taylor, ‘The Negotiation and Drafting of the First Australia–US Double Tax Treaty of 1953’, in P Harris and D de Cogan (eds), Studies in the History of Tax Law, vol 7 (Oxford, Hart Publishing, 2015)), Canada 10, New Zealand 4 and South Africa 3 (because the numbers are of treaties to which the state is a party there is double counting for the number of treaties). The treaties between only European countries were Austria–Germany (1954), Belgium–Sweden (1953), France–Norway (1953), Germany–Greece (1952), Indonesia–Netherlands (1954), Italy–Sweden (1956), Japan–Sweden (1956), Netherlands–Norway (1950), Netherlands–Sweden (1952), Norway–Sweden (1947), Norway–Switzerland (1956) and Sweden–Switzerland (1948).

15 The order of negotiations was: The Netherlands—first approach by the Netherlands November 1945, heads of proposals sent by the UK November 1946 after a delay caused by changes in Dutch tax law, negotiations February and March 1948, draft agreed 28 January 1948,
with the Netherlands (1948) was the first one to be negotiated. The Dutch treaty made a surprisingly easy start. Their representatives announced at the first meeting that they were in general content with a treaty in the form of the US–UK treaty, which meant that negotiations were relatively short and simple and were completed about ten days later. A driving force seems to have been that British contractors working on the reconstruction of Rotterdam harbour, which had been badly damaged in the War, were pressing for a treaty. The standard of record keeping about negotiations of these treaties is variable and improved over time.

**UK Taxation at the Time**

To set the scene we need to remind ourselves of the UK tax system of the time. A company paid income tax (plus profits tax, until 1947 called national defence contribution) on its profits. Dividends were paid out of taxed profits and so it looked as if tax at the standard rate of income tax had been deducted from the dividends. Interest and patent and some...
Copyright royalties were paid under deduction of tax but were not deductible in computing profits: the payer obtained relief by deducting and retaining the tax. Profits tax was, until 1951–52, deductible in computing profits for income tax, after which it became an additional tax. From 1947 until 1958 profits tax was at a higher rate on distributed profits than undistributed profits to encourage reinvestment but, as the 1955 Royal Commission pointed out, it merely encouraged retention.

TREATY PARTIES AND NOMENCLATURE

Traditionally treaties were made between heads of state through plenipotentiaries appointed to represent them. This was frequently the form of World War II tax treaties but a variety of other methods were also adopted, often with the same state adopting more than one method presumably to suit the other party. These included: treaties between states but with the heads of state still appointing plenipotentiaries, treaties between states through plenipotentiaries not appointed by the heads of state, a treaty between states through Ministers of Finance, and treaties between Governments. International practice was changing after World War II towards treaties

22 Film royalties were excluded from deduction of tax at source, on the basis that they were more like trading receipts, which is how they were dealt with in many of these treaties, see under Dividends, interest and royalties below.

23 Royal Commission on the Taxation of Profits and Income: Final Report (Cmd. 9474, 1955) [536]. The relief was also complicated. The calculation of the charge was based on total profits from January 1947 but such profits included sums paid as profits tax; Royal Commission at [527]. Since the relief for undistributed profits was withdrawn on subsequent distribution companies built up a deferred tax charge which could bite on liquidation. This differential rate was abolished in 1958 following criticisms of it by the Royal Commission.

24 For example, Belgium–Luxembourg (1931), Belgium–France (1931), Belgium–Germany (1938), Belgium–Italy (1931), Belgium–Netherlands (1933), Czechoslovakia–Italy (1924), Czechoslovakia–Poland (1925), France–Italy (1930, 1931), France–Sweden (1936), Germany–Italy (1925), Hungary–Italy (1927), Hungary–Netherlands (1938), Hungary–Poland (1928), Hungary–Romania (1932, 1937), Hungary–Sweden (1936), Hungary–Yugoslavia (1928), Iceland–Sweden (1937), Netherlands–Sweden (1935), Italy–Romania (1938), Romania–Yugoslavia (1933) and Sweden–US (1939).

25 For example, Denmark–Sweden (1932), Finland–Sweden (1931) and France–US (1932, 1939).

26 For example, Austria–Czechoslovakia (1922), Austria–Germany (1922), Austria–Hungary (1924), Austria–Poland (1932), Austria–Switzerland (1927), Czechoslovakia–Germany (1921), Czechoslovakia–Hungary (1923), Denmark–Germany (1928), Hungary–Germany (1923), Germany–Poland (1923), Germany–Romania (1927), Germany–Sweden (1928) and Germany–Switzerland (1923).

27 For example, Canada–US (1942), Denmark–Germany (1928), Denmark–Iceland (1927), France–Romania (1942) and Germany–Poland (1922).
being made by governments. This culminated in the Vienna Convention on the Law of Treaties stating that the persons who did not need to produce evidence of their full powers to conclude treaties included Heads of State, Heads of Government and Ministers for Foreign Affairs.

The same pattern continued in our early post-World War II treaties with European states. But since the enabling legislation, written with the US treaty in mind, applied where ‘arrangements ... have been made with the Government of any territory outside the United Kingdom,’ which is recited in the Statutory Instrument giving effect to a treaty, it was presumably realised at some point that anything other than a treaty between governments was incorrect for a tax treaty. This was generally adopted from about 1953, the last between heads of state being that with Austria (1956), which was done at their request.

Making treaties between monarchs as heads of state gave rise to a problem with the self-governing Dominions sharing the same monarch because one cannot make a treaty with oneself and so the term used was ‘Agreement’, which was necessarily between governments; and ‘Arrangement’ for those with the Colonies, which is even less of a treaty because we were negotiating for ourselves on one side and on behalf of the colony, for whose foreign affairs we were responsible, on the other—indeed they are not even signed or dated. Parliament was informed about the early Agreements with the Dominions in British State Papers rather than as Command Papers, presumably on the basis that they were not regarded as proper treaties; this was in addition, of course, to the laying of the treaty before Parliament for scrutiny as a Statutory Instrument in accordance with the statutory provisions for giving effect to the treaty for tax purposes in domestic law. The practice changed in the early 1960s, following which Agreements

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31 Treaties with heads of state were those with: The Netherlands (1948), Sweden (1949), Belgium (1953), France (1950; the earlier (1945) treaty was with the Head of the Provisional Government of the French Republic) and Austria (1956). Those between governments were with: Denmark (1950), Finland (1951), Norway (1951), Greece (1953), Switzerland (1954), Germany (1954) and the US (1945).

32 Originally F (No 2) A 1945 s 51. The wording was changed by FA 2002, s 88 to read ‘arrangements have been made in relation to any territory outside the UK ...’ (TIOPA 2010, s 2(1)(a)) in order to make a treaty with Taiwan when we did not recognise its government.

33 TNA IR 40/17255, and IR 40/17256.

34 I am using the normal term to include Canada, Australia, New Zealand and South Africa, although in their titles Australia was a ‘Commonwealth,’ and South Africa a ‘Union.’ Their full status in international law derives from the Statute of Westminster 1931.

35 The British State Papers (also known as the British and Foreign State Papers) which were produced by the Foreign and Commonwealth Office and published by HMSO from 1810 until 1968. This publication includes a number of agreements not published in the UK Treaty Series as well as some Orders in Council and diplomatic correspondence.
with the Dominions followed the same procedure as other countries with the Agreement being laid before Parliament for information as a Command Paper in the Treaty Series, in addition to the procedure for giving effect to it in tax law by Statutory Instrument, but the change does not seem to have been brought about by any specific reason.

THE DEFINITION OF PERSON AND COMPANY

The central treaty definitions of ‘person’ and ‘company’, which are important to the scope of residence, and therefore to most of the treaty provisions, and the latter to dividend taxation, were developing during this period. The US treaty was atypical because it contained no definition of person, presumably because this was not thought to be necessary, and the definition of company catered for the US taxation of corporations on the basis of incorporation. Later treaties generally contained the following definitions with some variations required by the other country:

The term ‘person’ includes any body of persons, corporate or not corporate.

The term ‘company’ means any body corporate.

This definition of ‘person’ followed that in the Interpretation Act 1889 but modernising ‘unincorporate’ to ‘not corporate’. In a few treaties the definition that company means was changed to includes, presumably because there were other entities charged to tax as companies, as indeed there were in the UK from 1965 when unincorporated associations were charged to

36 For example, the Agreements with Australia (1967), Canada (1966) and New Zealand (1966) were all presented to Parliament as Command Papers (in addition to the Statutory Instruments). The Convention with the South Africa (1962) is not an example because it was by then a Republic.

37 I am grateful to the Treaty Enquiry Service, Legal Advisers Directorate, Foreign and Commonwealth Office for confirming that they had no record of any specific change or reason leading to the change in practice.

38 For example, in the Netherlands treaty “company” means any body corporate and any partnership the capital of which is wholly or partly represented by shares in order to differentiate it from a Dutch partnership. The French treaty defined person to mean (i) any physical person, (ii) any unincorporated body of physical persons, and (iii) any body corporate. The Swiss treaty defined person to include ‘any individual, company, unincorporated body of persons, and any other entity with or without juridical personality’, and company to mean ‘in relation to the UK any body corporate, and in relation to Switzerland any entity with juridical personality’.

39 Section 19. The definition in the Interpretation Act 1978, Sch 1 is the same.

40 Canada and South Africa. There was no definition of ‘company’ in the Australian treaty; see Taylor, above n 2, 261–62. The same variation is found in a few other states’ treaties, eg Canada–Ireland (1954) and Canada–Sweden (1951).
corporation tax.\textsuperscript{41} An important development was made in the German treaty which defined company to mean ‘any body corporate and any entity which is treated as a body corporate for tax purposes’, thus covering the same ground as the change to includes but with more clarity.\textsuperscript{42} It therefore covers any non-corporate entities that are taxed in the same way as companies, which later became more of an issue; however, it fails to deal with the converse: a body corporate not being taxed as a company, a defect that continues today. This definition was included in the 1963 OECD Draft. That draft contained a different definition that ‘the term “person” comprises an individual, a company and any other body of persons’, which is a small development on the approach in UK treaties.\textsuperscript{43} ‘Comprises’ was changed to ‘includes’ in the 1977 Model.

THE DEFINITION OF RESIDENT

It may seem surprising today that ‘resident’ was not a term generally used by other countries in tax treaties of this time, as can be seen from a later OEEC Working Party minute of 5 November 1957 which says:

... the Working Party thought it should find a brief term as stated and endeavour to make its meaning clear by means of a definition. Consequently the Working Party has fixed upon the term ‘resident,’ which is used in Conventions concluded by the United Kingdom and by the United States of America. In the Convention between the United Kingdom and France the term ‘un resident’ is used in the French text.\textsuperscript{44}

\textsuperscript{41} FA 1965, s 46(5)(a), currently CTA 2010, s 1121(1).
\textsuperscript{42} This wording was also used in Canada–Germany (1956).
\textsuperscript{43} This had some similarities to the Swiss treaty (see above n 38).
\textsuperscript{44} FC/WP2(57)3 (5 November 1957) [9]. Since the original minutes are in English it does not appear that the Committee was referring only to the French term. The treaty with France (1950) defined resident of France as ‘... any person whose fiscal domicile for the purposes of French tax is in France and who is not resident in the United Kingdom for the purposes of United Kingdom tax’ demonstrating that resident was an unfamiliar term in France. The earlier (1945) treaty which was negotiated before the War (see above n 6) used the expression ‘fiscal domicile’ in relation to companies for both countries, defining it to mean ‘the place where a company manages and controls its business and a company is to be deemed to be resident at the place where its fiscal domicile is situated’. The term ‘resident’ was used instead in certain provisions. In the treaty with Belgium ‘residence’ in relation to Belgium was defined ‘as having his fiscal domicile or as having a house available for his use in Belgium’ (and not resident in the UK for the purposes of UK tax). The treaty with Switzerland used ‘resident (by reason of domicile or sojourn) in Switzerland’ (and not resident in the UK for the purposes of UK tax). In the Austrian treaty ‘resident’ was explained (in brackets in the English text) as ‘Wohnsitz oder gewöhnlicher Aufenthalt’ [civil law residence or 6 months’ presence] and ‘resident’ was used in brackets in the German text, suggesting that there was then doubt about the meaning of resident [ansässige Person] in German too (although it was used without explanation in the German treaty).
The use of the term ‘resident’, which would have been natural to use within most of the Dominions\textsuperscript{45} and Colonies since their tax systems were derived from ours, was therefore pioneering when used in our European treaties.\textsuperscript{46} These European treaties (as well as the Agreements with the Dominions and the Arrangements with the Colonies) contained a similar definition of resident, subject to variations in some of the European treaties:\textsuperscript{47}

The terms ‘resident of the United Kingdom’ and ‘resident of [\_]’ mean respectively any person who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in [\_] for the purposes of [\_] tax and any person who is resident in [\_] for the purposes of [\_] tax and not resident in the United Kingdom for the purposes of United Kingdom tax; and a company shall be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom and as resident in [\_] if its business is managed and controlled in [\_].

Defining residence to mean resident in the UK for the purposes of UK tax and not resident in the other state for the purposes of its tax (and vice versa), meant that dual residents (residents of both states by virtue of different domestic laws) were specifically excluded from treaty benefits. They had to rely on domestic credit provisions, which in the UK gave relief only for tax in the state in which the income arose, although some relief was extended to third state income of dual residents in three European treaties.\textsuperscript{48} Resolution of dual residence was not covered in UK treaties until the next treaty with Sweden (1960), after it had been dealt with in the OEEC First Report (1958)\textsuperscript{49} which was not therefore influenced by UK treaties.

The reason for the last part of this definition stating that residence of a company depended on its management and control was to eliminate

\textsuperscript{45} The South African Agreement used ‘ordinary residence’ because, although their tax system was territorial, it treated income as having a South African source if received by (or accruing to) an individual ordinarily resident, or carrying on business, there from a neighbouring country, or from another country where it was not chargeable to tax because the person was not domiciled nor ordinarily resident there (Income Tax (Consolidation) Act 1917, s 6). It seems that while expressed as a source rule one could just as well regard it as a residence rule. One possible advantage of it is that ordinary residence is less likely to be in more than one country. I am grateful to Professor Johann Hattingh for this information.

\textsuperscript{46} ‘Resident’ was beginning to be used in other states’ treaties, eg Indonesia–Netherlands (1954) and Japan–Sweden (1956) (the same wording as in UK treaties, without the last sentence, presumably derived from our treaty with Sweden), although its use is difficult to determine using translations.

\textsuperscript{47} See text above around n 61.

\textsuperscript{48} The treaties with Sweden, Denmark and Norway provided in addition for a proportionate credit for the other state’s tax on third state income of dual residents, as was also the case in the treaties with Australia (which was the source for Sweden’s request for this (TNA IR 40/8872 f 56C)) and Ceylon. Such a rule was originally included in the 1945 death duties treaty with the US (and is currently contained in unilateral relief for inheritance tax in IHTA 1984, s 159). It became unnecessary when dual residence provisions were adopted.

the possibility of residence on another basis applying to the treaty, as was wrongly thought to have been decided in *Swedish Central Railway*. This was that the company was resident because of UK incorporation plus (depending on the judge) ‘performing some of the vital organic operations incidental to the existence of the company’, or ‘certain other comparatively trifling circumstances’, or possibly even without anything else. In relation to a UK incorporated company having sufficient activities in the UK to make it resident in the UK in accordance with the then misunderstanding of *Swedish Railway* which was managed and controlled in the treaty partner state, one had to read the treaty as meaning that, for determining whether the company was resident in the treaty partner state under domestic law and not resident in the UK under domestic law, one must assume that the only domestic law test of residence is management and control. This gives rise to problems when incorporation became the only test of residence of UK incorporated companies in 1988. Now domestic law specifically tells one to ignore management and control (‘even if a different place of residence is given by a rule of law [case law management and control], the company is not resident in that place for the purposes of the Corporation Tax Acts’). There is an irreconcilable conflict between the two; the treaty

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50 [1925] 1 AC 495 (HL). The misconception was that for a UK incorporated company a place of business plus some activities (other than merely complying with the Companies Act, as in *Egyptian Delta Land and Investment Co Ltd v Todd* [1929] 1 AC 1) constituted residence. That this was thought to be the case is demonstrated by the draft Bill attached to the Codification Committee’s Report defining ‘residence’ to mean (in addition to management and control): ‘... if it maintains in that year an established place of business in the United Kingdom and any substantial part of the activities of the company, whether administrative or other, is conducted in the United Kingdom, but a company shall not be treated as so resident by reason only of the fact that it has a registered office in the United Kingdom at which is transacted such administrative business only as is necessary to comply with the requirements of the Companies Act 1929.’ Possibly in error, this was not limited to UK incorporated companies as their Report had suggested. See Income Tax Codification Committee: Report (Cmd. 5131, 1936) cl 7.

51 *Per* Rowlatt J at 353. These were that ‘three Members of the said Board were appointed to be a Committee under Article 45a of the amended Articles of Association to deal with transfers of shares in the United Kingdom, attach the seal of the Company to share and stock certificates, and to sign cheques on the London Banking Account of the Company.’

52 In *Egyptian Delta* [1928] 1 KB 152, 169 Sargent LJ in the Court of Appeal said: ‘and though on appeal to the House of Lords the Lord Chancellor, in an opinion concurred in by the majority of the House, preferred to base his decision on the view that the fact of registration together with certain other comparatively trifling circumstances entitled the Commissioners to find that the Swedish Railway Company had a residence here, I do not think that he intended to cast any doubt on the views of Warrington LJ and Atkin LJ [in *Swedish Railway* that a company registered under the Companies Act must necessarily have a residence here for the purposes on Income Tax]. …’ In fact, Atkin LJ was dissenting and he should have referred to Pollock MR.

53 CTA 2009, s 14(1) ‘A company which is incorporated in the United Kingdom is UK resident for the purposes of the Corporation Tax Acts. (2) Accordingly, even if a different place of residence is given by a rule of law, the company is not resident in that place for the purposes of the Corporation Tax Acts.’
tells one to apply only management and control when determining whether the company is not resident in the UK under domestic law, while domestic law tells one to ignore management and control with the result that incorporation on its own causes residence under domestic law. Management and control in say Greece is fine for making the company resident in Greece for the purposes of Greek tax, but it does not help to make it not resident in the United Kingdom for the purposes of United Kingdom tax. It would need something on the lines of the variation applicable to Sweden for it to work.

HMRC’s earlier view was that the treaty did nothing to prevent dual residence in these circumstances but it has recently announced a change in its interpretation in the 16 surviving treaties still containing this definition (including Greece (1953)), saying that, for the purpose of the treaty, it is now understood to override residence in the UK on the basis of incorporation in favour of residence in the treaty partner on the basis of management and control. They do not explain how one can use management and control to determine that a UK incorporated company managed and controlled in the other state is not resident in the UK under domestic law if in fact it is so resident and domestic law tells you to ignore management and control. While not denying that the result is sensible since it removes the dual residence that prevents the treaty from applying, the writer prefers their original interpretation.

Surprisingly, most other states went along with this part of the definition even though ‘managed and controlled’ probably meant something different to them. It was even included in the treaty with the Netherlands, which taxed on the basis of both incorporation and management, which is added evidence that the Netherlands were under pressure from British contractors

54 The treaty with Greece is still in force.
55 See below n 61.
56 ‘Change of view on the interpretation of the residence articles in sixteen Double Taxation Agreements’, HMRC Policy Paper, 30 November 2015, available at www.gov.uk/government/publications/double-taxation-agreements-developments-and-planned-negotiations/change-of-view-on-the-interpretation-of-the-residence-articles-in-sixteen-double-taxation-agreements. The agreements are those (all made before 1955) with: Antigua, Belize, Brunei, Burma, Greece, Grenada, Guernsey, Isle of Man, Jersey, Kiribati, Malawi, Monserrat, St Kitts & Nevis, Sierra Leone, Solomon Islands and Tuvalu. The writer examined the history of this provision in J Avery Jones, ‘The Definition of Company Residence in early UK Tax Treaties’, [2008] BTR 556, concluding in favour of HMRC’s original view that this part of the definition was intended to prevent the use of definitions of residence in addition to management and control, so that when management and control became irrelevant to UK incorporated companies it could no longer be applied. There is nothing new about differences in view within HMRC. As summarised in that article at 572, TNA IR 40/11356 sets out three different and firmly-held views.
58 See text below at n 64.
engaged in reconstruction of Rotterdam harbour to have a treaty. However, Sweden and Finland, which taxed on the basis of incorporation and management, and Switzerland, which taxed on the basis of incorporation, did insist on a change to the definition in their treaties. Under this, a company incorporated in Sweden (or Finland) but managed and controlled in the UK is excluded from being a Swedish (or Finnish) resident for treaty purposes, and would be a UK resident for treaty purposes. The Swiss treaty lists the bodies organised under Swiss law which are resident for treaty purposes if they are not managed and controlled in the UK. There was a variation in the New Zealand agreement that ‘a company shall be regarded as resident in the UK and not in New Zealand if its business is managed and controlled in the UK’ (emphasis added) (and vice versa). HMRC’s revised interpretation would be supported by this formula, and the difficulty is knowing whether this is a change or a clarification: the latter seems more likely. There was a special provision in the US treaty as the US taxes on the basis of incorporation. This part of the definition is not contained in the Australian Agreement, which does not use the term ‘company’.

Because of the use of management and control in the UK’s numerous treaties of the time, the OEEC almost adopted it, although the Working Party was unclear about whether it referred to the managers, the board of directors or the shareholders, which is strange as they could have asked the UK. They decided instead to use ‘place of effective management’ to

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59 It may also have been influenced by the Dutch wanting an estate duty concession, see text below at n 105. The usual wording for this provision was in the first draft and is never mentioned in the negotiations in TNA IR 40/17127. Incorporation was adopted by the Netherlands for the first time in 1942. The author is grateful to Prof. Kees van Raad for this information. It is interesting that the Netherlands agreed this wording in the agency profits treaty of 1936, which was before this change. Might they have been following the existing precedent?

60 In relation to Sweden a note in the National Archive file says ‘Sweden wished to retain semblance of “place of incorporation” test for company residence. This form still gives us the substance of the management and control test.’ (TNA IR 40/8872 f 63B)

61 The treaty provided: ‘a company shall be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom and as resident in Sweden if it is incorporated under the laws of Sweden and its business is not managed and controlled in the United Kingdom, or if it is not so incorporated but its business is managed and controlled in Sweden.’ (emphasis added) The treaty with Finland is similar.

62 The treaty provided: ‘The term “resident of Switzerland” means—(i) any company or partnership (société simple, société en nom collectif or société en commandite) created or organised under Swiss law if its business is not managed and controlled in the United Kingdom; ...’ (emphasis added). The profits tax treaty with Ireland (The Double Taxation Relief (Profits Tax) (Ireland) Order, 1949, SI 1949/1434), also treats a company incorporated in one state and managed in the other as not being a treaty resident of either state (Irish profits tax, being a continuation of the UK corporation profits tax (FA 1920, s 52, repealed in the UK in 1924), was charged on the basis of incorporation only).

63 See above n 40.

64 FC/WP2(57)1 (27 May 1957).
harmonise it with the wording of the shipping article,\textsuperscript{65} with the UK stating that it had the same meaning as management and control, a view which we later disowned.\textsuperscript{66}

\textbf{PERMANENT ESTABLISHMENT}

The treaty threshold for taxing a non-resident carrying on business is the existence of a ‘permanent establishment’. Our European treaty partners used the term, deriving from German law, in their domestic law for earlier \textit{impôts réels}, this being the definition of a source of business income.\textsuperscript{67} The UK was out of line in taxing trades, professions and vocations rather than business; and exercising a trade in the UK had a wider meaning than permanent establishment. We had to adopt the permanent establishment concept in treaties in line with international practice. Related to this was a definition of industrial or commercial profits which in the European treaties normally included film royalties,\textsuperscript{68} and in the Dominion Agreements (and also the Belgian treaty) excluded dividends, interest, royalties and remuneration for labour or personal services.\textsuperscript{69}

\textsuperscript{65} Fourth Report of Working Party 2, FC/WP2(57)3 (5 November 1957).
\textsuperscript{66} Final Report of Working Party 2, FC/WP2(58)1 (10 January 1958). The Revenue’s statement was first made in connection with the shipping article, see FC/WP5(57)2 (6 May 1957). It was disowned in SP6/83 (now SP1/90) and deleted from the OECD Commentary in 1992.
\textsuperscript{67} See J Hattingh, ‘On the Origins of Model Tax Conventions: Nineteenth-Century German Tax Treaties and Law Concerned with the Avoidance of Double Tax’ in J Tiley (ed), \textit{Studies in the History of Tax Law}, vol 6 (Oxford, Hart Publishing, 2013) 31. He gives an example at 68 of an early definition in the treaty between Austria–Hungary and Prussia (1899) which has considerable similarity to the later League of Nations drafts: ‘Branches, factories, depots, counting houses, places of buying and selling, and other business facilities maintained for the exercise of a fixed trade by a proprietor himself, business partners, attorneys or other permanent representatives are to be regarded as permanent establishments.’ He notes at 61 that the expression ‘permanent establishment’ was first used in the 1885 Prussian municipal tax law, and that its meaning was derived from cases decided under the 1870 Imperial Double Taxation Law.
\textsuperscript{68} See the Colonial Arrangements, and the treaties with: Sweden, Denmark, the Netherlands, Norway, Finland, Germany and Switzerland (but not France). Film royalties are dealt with under the heading ‘Royalties’ below.
\textsuperscript{69} This exclusion gave rise to a claim by a Canadian bank with a permanent establishment in the UK to which was attributable interest on UK government securities which was free of tax to non-residents (TNA IR 40/9102). For some securities the exemption applies to trading profits (\textit{Hughes v Bank of New Zealand} [1938] AC 366), although for others, which were in issue, it does not apply; the file ends with the Board ordering the assessment to be defended. The Swiss treaty excluded dividends, interest and royalties (except film royalties) unless attributable to a permanent establishment. Other variations existed, including the inclusion of mining and life insurance (Australia, New Zealand and Switzerland (all insurance, and also farming)), the inclusion of banking and insurance (France, Switzerland) and the exclusion of insurance (Belgium). There was no definition in the treaties with the US and Austria.
The List of Items Constituting a Permanent Establishment

The definition was well developed by the time of the League of Nations Mexico (1943) and London (1946) Model Conventions, the initial part of which listed various items followed by general words (fixed place of business):

The term ‘permanent establishment’ includes, head offices, branches, mines and oil wells, plantations, factories, workshops, warehouses, offices, agencies, installations, professional premises and other fixed places of business having a productive character.\(^70\)

We followed this approach. The definition in the US treaty started:

The term ‘permanent establishment’ when used with respect to an enterprise of one of the Contracting Parties means a branch, management, factory or other fixed place of business …\(^71\)

The definition in the Dominion Agreements, the Colonial Arrangements and the early European treaties were all extremely similar to the US treaty but with further items being added in individual treaties presumably at the request of the treaty partner, which suggests that we were insisting on using the definition in the US treaty.\(^72\) The German treaty (1954) is the culmination of this process containing a confusion of various items listed both before and after ‘other fixed place of business,’ which did not improve the logical construction of the provision:\(^73\)

(l) (aa) the term ‘permanent establishment’ means a branch, management, factory, office or other fixed place of business, such as a mine, quarry or other place of natural resources subject to exploitation, a permanent sales exhibition, or a construction project, assembly project or the like, the duration of which has exceeded or is likely to exceed 12 months. …\(^74\)

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70 Protocol art 5.
71 Art 2(1)(l). The quotation is continued in the text at n 80.
72 However, other countries were using similar definitions at this time, eg (excluding those to which the US or a Dominion were a party which have been derived from the US treaty) Netherlands–Norway (1950), Netherlands–Sweden (1952), Denmark–Netherlands (1957) and Italy–Sweden (1956).
73 The additions in the German treaty can be traced to the following treaties: mine (Southern Rhodesia, Australia, Belgium), ‘a mine, quarry or any other place of natural resources subject to exploitation’ (Sweden, Norway, Finland, Switzerland, Austria), office (Finland, Switzerland, Austria), workshop, permanent sales exhibition (Austria), construction project lasting 12 months (Sweden, Finland, Switzerland, Austria). Other items not included in the German treaty are: agricultural or pastoral activities (Australia); farm (Southern Rhodesia, New Zealand, Finland, Greece, Switzerland), workshop, warehouse, installation (Belgium), oil well (Austria), and adding after fixed place of business ’in which is exercised, in whole or in part, the activity of the enterprise’ (France).
74 Art II(1)(l). The Austrian treaty is similar with the addition of ‘oil well’ after ‘mine.’
The German treaty is of particular interest because the OEEC Working Party on permanent establishment comprised representatives from Germany and the UK\textsuperscript{75} who made their first report on 17 September 1956, two years after the German treaty. Fortunately the Working Party redrafted this part of the definition in a more logical way, explaining:

The general view of members of Working Group No. 1 is that it is preferable to have a general definition of the concept of ‘permanent establishment’ in a separate paragraph and not one which is almost hidden in a list of a number of agreed examples, as is the case in Article V, paragraph 1, of the London and Mexico Drafts of the Model Tax Convention published by the League of Nations.\textsuperscript{76}

The result was a great improvement in separating the general principle from the examples:\textsuperscript{77}

1. The term ‘permanent establishment’ means a fixed place of business in one of the territories in which the business of the enterprise is wholly or partly carried on.

2. A permanent establishment shall include:
   (a) a place of management;
   (b) a branch;
   (c) an office;
   (d) a factory;
   (e) a workshop;
   (f) a warehouse;
   (g) a mine, quarry or other place of extraction natural resources;
   (h) a construction or assembly project which has existed or is likely to exist for more than twelve months.\textsuperscript{78}

According to the Commentary by the Working Party the second paragraph ‘contains a list of examples each of which can be regarded \textit{a priori} as constituting a “permanent establishment”’ and in making the list they ‘have

\textsuperscript{75} The representatives were Mr Mersmann who had led the German negotiating team for the UK–Germany treaty and Mr Norman Leach who had not been involved with that treaty.
\textsuperscript{76} FC/WP1(56)1 App 2 Commentary [1].
\textsuperscript{77} One can find precedents for this approach such as Sweden–Switzerland (1948): ‘For the purposes of this Convention, a permanent establishment means permanent premises of the undertaking in which its business is carried on wholly or partly. The following are therefore to be regarded as permanent establishments: the head office of the undertaking, the place of management, branches, factories and workshops, purchasing and selling offices, mines and other mineral deposits in production, permanent agencies, and installations for the construction of buildings when the period of building operations exceeds twelve months.’ Canada also made some earlier treaties (with the UK (1946), New Zealand (1948) and Ireland (1954)), containing just the general principle (‘branch or other fixed place of business’) without examples.
\textsuperscript{78} This is anomalous as an example of attachment because it may not be fixed spatially (for example the construction of a road) and is subject to a specific (and presumably longer than normal) temporal limit, and so cannot be an example of the general principle. In the 1977 Model it was more logically put in a separate paragraph. The principle of including construction projects had appeared as listed items in some of our treaties, see above n 73.
attempted to produce a list of examples which, they hope, will represent common ground on which member will be able to agree.\footnote{FC/WP1(56)1 App 2 Commentary [6].} This first draft, with some minor variations became the OEEC definition and that in the 1963 OECD Draft which mostly survives today.

**Agents**

The US treaty contained a fairly standard agency provision extending the permanent establishment concept beyond a fixed place of business:

... but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf. An enterprise of one of the Contracting Parties shall not be deemed to have a permanent establishment in the territory of the other Contracting Party merely because it carries on business dealings in the territory of such other Contracting Party through a bona fide commission agent, broker or custodian acting in the ordinary course of his business as such.\footnote{Art 2(1)(l). The quotation is continued from the text at above n 71 and is continued in the text at below n 89.}

The UK can claim a far greater influence here which is surprising in relation to a part of the permanent establishment concept originating in Germany. The wording ‘the agent has and habitually exercises a general authority to negotiate and conclude contracts’ was used in ten UK treaties on agency profits made in the 1930s (as was the provision about an agent holding a stock of goods);\footnote{Pursuant to enabling legislation in FA 1930, s 17, the UK made treaties with: Sweden (1931), Switzerland (1932) (the only one of the countries which were the cause of this legislation, see below), Finland (1935), Canada (1936), Newfoundland (1936), Netherlands (1936), Greece (1937), Norway (1939), South Africa (1939) and New Zealand (1942). Their purpose was recorded in the 1930 League of Nations report (C.340.M.140.1930.II, <setis.library.usyd.edu.au/oztexts/parsons.html> under Legislative History of US Tax Conventions vol 4 Part 1 (League of Nations) and Part 2 (OEEC) at 4206; the clause is set out at 4212) as being to enable the UK to conclude double taxation agreements to avoid double taxation resulting from the divergent definitions of the term autonomous agent The Revenue’s note to Ministers on the clause, however, disclosed that Germany, Switzerland and Belgium had started to retaliate for the UK legislation that had been changed in 1915 to tax the principal even when the UK agent did not receive the proceeds from the transaction (even though little tax was collected because contracts were made abroad) and to tax UK residents doing business through agents in those countries, so the treaties were really made on account of self-interest (TNA IR 63/125 f 189).} and the exception for bona fide brokers and general commission agents derives from UK tax law,\footnote{F (No 2) A 1915, s 31(6).} as does ‘ordinary course of business’.\footnote{FA 1925, s 17 (which is probably derived from the Factors Act 1889).}
As before, the German treaty is the most detailed of the treaties of that time in specifying the German names for the types of agent concerned.\(^8^4\) In spite of the detail, the author has argued elsewhere that neither side ever understood the difference between the common law and civil law of agency.\(^8^5\) The essence of the difference is that civil law distinguishes between direct agency, described as contracting in the name of the principal (such as a \textit{Handelsvertreter}) which creates a legal relationship between the principal and the third party purchaser, and indirect agency (such as a \textit{Kommissionär/commissionnaire}) who creates legal relations only between the agent and the third party, and a \textit{Handelsmakler/courtier}, who merely introduces the parties without contracting. The distinction between direct and indirect agency creates a natural dividing line for tax treaty purposes in civil law between agents who create a permanent establishment for their principal and those who do not, with those who do not contract being mentioned for clarity. Unfortunately, common law makes no such distinction and, what is worse, uses extremely similar expressions, commission agent and broker,\(^8^6\) who do create legal relations between the principal and the third party, but who are excluded on the ground of being independent agents. Therefore, in common law brokers and general commission agents need excluding, whereas in civil law they are not caught anyway as they do not conclude contracts binding on the principal.

One of the other changes made by the OEEC was that the final version of the agency provision read ‘... has and habitually exercises a general authority to negotiate and enter into contracts \textit{in the name of} the enterprise’, (emphasis added) thus adopting civil law terminology for direct agency which has no meaning in common law and is misleading in English as suggesting literally acting in the principal’s name.\(^8^7\) Another change made later by the OEEC Working Party was to delete the provision that an agent maintaining a stock of goods created a permanent establishment.\(^8^8\)

\(^8^4\) In relation to concluding contracts a \textit{Handelsvertreter} or other \textit{selbständiger Vertreter}; for the exception corresponding to brokers and general commission agents a \textit{Handelsmakler}, \textit{Handelsvertreter} (unless he is a \textit{Handelsvertreter} of the type concluding contracts) or a \textit{Kommissionär}. Art II(1)(l).
\(^8^5\) See JF Avery Jones and J Lüdicke, ‘The Origins of Article 5(5) and 5(6) of the OECD Model’, (2014) 6 World Tax Journal 203. Part of this section is based on that article.
\(^8^6\) ‘Broker’ is used here in the sense of someone who creates legal relations, such as a commodity broker who is available to act for either party on a commodities exchange; the equivalent of \textit{Handelsmakler}, or \textit{courtier}, as a person who introduces the parties, also exists in common law, such as a mortgage broker.
\(^8^7\) C(58)118 (22 May 1958).
\(^8^8\) It is not in FC/WP1(57)2 (29 August 1957). The Fiscal Committee added an explanation to the Commentary merely saying that for a number of reasons the matter was not pursued and they wanted concluding contracts to be the sole criterion, see FC(58)1 (31 January 1958). The Swiss treaty omits the stock of goods provision. It still survives in Art 5(5)(b) of the United Nations Model Double Taxation Convention between Developed and Developing Countries (currently 2011).
Exclusions

The US treaty, and all the other early treaties, contained two exclusions:

The fact that an enterprise of one of the Contracting Parties maintains in the territory of the other Contracting Party a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute such fixed place of business a permanent establishment of such enterprise.

The fact that a corporation of one Contracting Party has a subsidiary corporation which is a corporation of the other Contracting Party or which is engaged in trade or business in the territory of such other Contracting Party (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation. 89

A purchasing office is probably excluded for economic reasons so as not to discourage exports, and reflects UK domestic law: ‘It would be most impolitic thus to tax those who come here as customers.’ 90 These treaties also provided that even if there were a permanent establishment no profits would be attributed to the mere purchase of goods. 91 These had not been included in a previous League of Nations Model but were later included in the OEEC Draft. The last paragraph excluding a subsidiary from being a permanent establishment reflects German and Italian law (and French law, but only in relation to income from securities), and had previously been included in the League of Nations Models from 1933. In some of the early UK cases the subsidiary was factually an agent of the parent, 92 but gradually the separate business of the subsidiary became accepted, first for holdings of less than 100 per cent, 93 and ultimately in 1908 for a 100 per cent subsidiary so by the time we entered into tax treaties this was no longer an issue. 94

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89 Art 2(1)(l). The quotation is continued from above n 80. In our other treaties ‘corporation of the other Contracting Party’ was changed to ‘resident of the other Contracting Party’.

90 Sulley v A-G (1860), abstract in 2 TC 149 (misleadingly not in the index to that volume), per Cockburn CJ.

91 This is not included in the Austrian treaty. The Belgian treaty also specified that no expenses relating to purchasing were deductible.

92 Apthorpe v Peter Schoenhofen Brewing Co Ltd (1899) 4 TC 41 where a US subsidiary that had formerly carried on the trade continued merely to hold real property as required by local law, and there was a finding of fact that the business carried on in the United States was in fact carried on by, and was the business of, the UK parent company; and St Louis Breweries v Apthorpe (1898) 4 TC 111 where the same finding of fact was made, and also that the US company was the agent of the UK parent company.

93 Kodak Ltd v Clark (1903) 4 TC 549 concerning a UK company that owned 98% of the shares in the American Kodak Company, reversing the Commissioners’ finding that the business of the subsidiary was carried on by the parent (or the subsidiary was an agent for the parent); the outside-held 2% was significant to the decision. Even then Phillimore J wondered whether 98% of the profits of the subsidiary should not have been taxed in the hands of the parent (p 588), but the point had not been argued. UK holding companies seem to have been surprisingly common at the time (see also next note).

94 Stanley v The Gramophone and Typewriter Co [1906] 2 KB 856, [1908] 2 KB 89 CA, (1908) 5 TC 358, relating to its wholly owned (earlier it had been 54% owned) subsidiary
In most of the European treaties, though not in the Dominion Agreements (except for New Zealand) or the Colonial Arrangements, no profits were attributed to sales pursuant to contracts made in the residence state\textsuperscript{95} from a warehouse in the other state maintained for the convenience of delivery and not for display, even when the purchase offer was obtained by an agent in that state and transmitted to the enterprise.\textsuperscript{96} From the German treaty, as had been the case in a few other countries’ treaties,\textsuperscript{97} this became a further exclusion from the definition of permanent establishment of a warehouse maintained for the purpose of delivery:

\begin{enumerate}[\textit{(dd)}]
\item The fact that an enterprise of one of the territories maintains in the other territory a warehouse or storage room exclusively for the purpose of delivery, and not for the purpose of display, of goods or merchandise shall not of itself constitute that warehouse or storage room a permanent establishment of the enterprise ... 
\end{enumerate}

This caused an apparent conflict with the provision that an agent who maintains a stock of goods but who does not conclude contracts does cause a permanent establishment for his principal. This was resolved in the Model by the removal of this rule for agents.

**DIVIDENDS, INTEREST AND ROYALTIES**

One of the mysteries of treaties of that time and the OEEC and OECD Drafts that followed them, and indeed many of today’s treaties, is why they provided for a 15 per cent (or 5 per cent for corporate holdings of 25 per cent plus) withholding tax on dividends, which are not deductible in computing the company’s profits, and so the income suffers tax both at the company level and the shareholder level; and at the same time a lower rate

\textit{Deutsche Grammophon AG}, with all the courts reversing the Commissioners’ finding that the directing power of the German subsidiary was in the United Kingdom and the entire business of the subsidiary was carried on by the parent. It was pointed out that German law did not forbid all the shares being held by one person; [1908] 2 KB 89, 99.

\textsuperscript{95} The place of contracting was important to whether profits were made in the UK, see the Champagne cases: for contracts made in the UK: \textit{Werle \& Co v Colquhoun} (1888) 2 TC 402 (Veuve Clicquot), \textit{Pommery \& Greno v Apthorpe} (1886) 2 TC 182 (Pommery) and \textit{Tischler v Apthorop} (1885) 2 TC 89 (claret); and contract made outside the UK: \textit{Grainger \& Son v Gough} (1896) 3 TC 462 (Louis Roederer) (acceptance by conduct in France by fulfilling the order).

\textsuperscript{96} Not contained in the Belgian treaty but there is no explanation about this in the TNA file. An agent having a stock of goods would have been a permanent establishment but this had the effect of not attributing any profit to it, thus avoiding any conflict. The reference to offers being obtained by an agent is not in the Swedish treaty, and was described as involving ‘no change of substance’; TNA IR 40/8872 f 63D.

\textsuperscript{97} For example, Sweden–Switzerland (1948), Switzerland–US (1951), France–Norway (1953), Germany–US (1954), Austria–Germany (1954) and Austria–US (1956). Austria refused to include it in our treaty with them.
of withholding tax of 10 per cent for interest and 0 per cent for royalties, which are deductible and so represent the only tax that the paying state receives, was provided in the OEEC Fourth Report\(^8\) and the OECD 1963 Draft.\(^9\) Perhaps this reflects the remnant of impôts réels thinking which makes a clear distinction between tax on the company and tax on the shareholder,\(^10\) or perhaps it reflects the economic reality that a lender can find many alternative sources of interest of equal security so that taxing it is likely to deprive the residents of the state of funds, and that taxing royalties deters the import of technology, whereas the investment producing dividends is unique to which the shareholder is locked-in and has no option but to bear any tax charges. Whatever the reason, this was not the way we thought in the UK where companies had since 1803 effectively been transparent except that dividends are not taxed until distribution but when they are distributed they are treated as franked by the tax that the company has paid on the same profits.\(^11\) That way of thinking regards profits and dividends as the same and so there is no reason to tax both of them. The surprising thing is that we had greater difficulty in persuading states to reduce withholding tax on dividends than on interest and royalties, which lends credence to the economic reality argument. Table 1 shows the withholding tax rates in our early treaties.

### Table 1: Rates of Withholding tax on Dividends, Interest and Royalties (per cent)

<table>
<thead>
<tr>
<th>Country</th>
<th>Dividends % (Normal/Direct Investment)</th>
<th>Interest %</th>
<th>Royalties % (Excluding Film and Mining Royalties)</th>
</tr>
</thead>
<tbody>
<tr>
<td>US (1945)</td>
<td>15/5</td>
<td>0</td>
<td>0 (includes film)</td>
</tr>
<tr>
<td>Canada (1946)</td>
<td>0§</td>
<td>15</td>
<td>0 (copyright only)</td>
</tr>
<tr>
<td>South Africa (1946)</td>
<td>0^</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Australia (1946)</td>
<td>0§</td>
<td>–</td>
<td>0</td>
</tr>
<tr>
<td>New Zealand (1947)</td>
<td>0</td>
<td>–</td>
<td>0</td>
</tr>
<tr>
<td>Colonial Arrangements</td>
<td>0</td>
<td>–</td>
<td>0</td>
</tr>
<tr>
<td>The Netherlands (1948)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Sweden (1949)</td>
<td>5/0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

(continued)

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\(^10\) Hattingh, above n 67, 57 refers to German decisions on this point from 1883.

\(^11\) See above n 21.
Table 1: (Continued)

<table>
<thead>
<tr>
<th>Country</th>
<th>Dividends % (Normal/Direct Investment)</th>
<th>Interest %</th>
<th>Royalties % (Excluding Film and Mining Royalties)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark (1950)</td>
<td>5/0</td>
<td>0#</td>
<td>0</td>
</tr>
<tr>
<td>France (1950)</td>
<td>–/10</td>
<td>–</td>
<td>0 (includes film)</td>
</tr>
<tr>
<td>Norway (1951)</td>
<td>5/0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Finland (1951)</td>
<td>5/0</td>
<td>0#</td>
<td>0</td>
</tr>
<tr>
<td>Belgium (1953)</td>
<td>–º</td>
<td>0</td>
<td>0 (includes film)</td>
</tr>
<tr>
<td>Greece (1953)</td>
<td>–</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Switzerland (1954)</td>
<td>(Formula†)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Germany (1954)</td>
<td>15</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Austria (1956)</td>
<td>10 (individuals only)/10</td>
<td>0#</td>
<td>0 (films half rate Austria, 0 UK)</td>
</tr>
</tbody>
</table>

Notes to Table

– No treaty provision.
^ Only from a private company whose income is apportioned to a UK resident public company.
§ Only dividends paid to UK company by wholly-owned subsidiary in those countries.
# Not for interest paid to a controlling company.
– Greece did not tax distributed profits (see OECD 1963 Comm Art 10 para 6), which was the same as the UK system under income tax and so no dividend article was included.
º Belgium did not charge tax on the company on its distributed profits so that the only tax was on the dividend, which was not reduced under the treaty. The treaty provided for a nil rate of complementary personal tax which was not in fact then charged.
† The rate on dividends for Switzerland for individual shareholders was between nil and the effective rate of UK tax, and for companies depended on the size of the shareholding and varied between a reduction in the Swiss rate of 10 to 20 per cent of the dividend.

The principal reason for our difficulty over dividends was that almost everyone else had a classical system under which the company paid tax on its profits and in addition deducted a withholding tax from dividends so that there was a clear separation between tax on the company and tax on the dividend, whereas for us it was the same tax. Our problem was that while it looked as if income tax had been deducted from UK dividends we could not reduce this as it represented tax on the company’s profits. The most we could offer is to exempt the dividend from surtax but it was generally known that since we could not obtain a return of total income from a non-resident we could not in practice collect this. However, giving non-resident individuals a proportion of personal allowances could be presented as a reduction in the corporate tax to the extent that the individual’s income consisted of dividends, and this argument was used to obtain a reduction
from the other state. We were particularly keen to reduce the other state’s withholding tax on dividends because we obtained no additional tax on dividends paid to non-residents while having to give relief (unilateral relief from 1950) for their withholding tax in taxing our residents. Dividend withholding tax was thus a complete loss to us, and withholding tax on interest and royalties was a loss to the extent—which was then considerable—that outward investment exceeded inward investment.

102 The UK’s (and Ireland’s) position on dividends was explained in the OEEC Fourth Report (Art XX Comm para 49) and later in the OECD 1963 Draft (Art 10 Comm para 47).

103 US treaties with: Australia (1953), Denmark (1948), Finland (1951), Ireland (1949), Netherlands (1948), Switzerland (1951), Italy (1955) and New Zealand (1948). Other rates were: Australia (1953) no further reduction for subsidiaries, Austria (1956) half normal rate, 5% for companies holding 95%, Belgium (1948) 5% from subsidiaries, no other reduction, Germany (1954) 10% for companies holding 10%, no other reduction, and Pakistan (1957) 15% from subsidiaries, no other reduction.

104 Uniquely the treaty reduction applied even to unremitted remittance-basis income.

105 National Archief, Den Haag, Ministerie van Financiën: Directie Internationale Fiscale Zaken, nummer toegang 2.08.5229, inventarisnummer 459. I am grateful to Professor Henk Vording for this material. The reference to Great Britain is because Northern Ireland then had its own death duty.

106 TNA IR40/9988. The concession was applicable to deaths between 10 May 1940 and 1 July 1948. The concession was contained in a letter from the Foreign Office of 15 October 1948 and acknowledged by the Dutch Embassy on the same date. It is not contained in the
such property so that this concession was important to the Dutch which may have accounted for their willingness to give up dividend withholding tax. Sweden also said initially that they could not go below 10 per cent which they had agreed in other treaties but at the last minute agreed to 5 per cent. In spite of our having agreed the same with Denmark and Norway, Finland held out on the basis that the flow of income was entirely in the direction of the UK but agreed the same as the other Nordic countries in the end. France and Germany made no reductions but these may be special cases after the War. Austria was particularly reluctant to agree any reduction but in the end agreed to reduce the withholding tax from 15 per cent to 10 per cent for individuals, but no further reduction for dividends from subsidiaries, and no reduction at all for minority corporate holdings.

The fact that we managed to persuade the treaty partner state to reduce its dividend withholding tax may in part reflect more the desire of the other state to have a treaty with us than our negotiating skills.

Something which seems strange reading these treaties today is that no European state protected itself against our changing our system for taxing companies, as indeed we did on the introduction of corporation tax in 1965. Although these treaties were renegotiated before the 1955 Royal Commission debated the merits of a corporation tax it should have been clear that just because we had a system of taxing companies for 150 years there was no certainty that this would continue for ever. The US had protected itself by a provision enabling the dividend article alone to be terminated, which they activated when we introduced corporation tax. But in order to avoid seeming to take unfair advantage of our treaty partners.

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107 TNA IR 40/8872. There were negotiations on dividends on 8, 10, 13, 17 and 20 September 1948.
108 Negotiations on dividends took place on 20, 21, 23, and 24 November 1950 before Finland agreed on 27 November 1950: TNA IR 40/14102. Part of the problem was the unfamiliarity of our system; the Finns suggested that profits tax corresponded to their corporation tax and income tax to their dividend withholding tax, until it was pointed out that the income tax was the same even if there were no dividends.
109 Other than the Netherlands where their protection was automatic as both parties agreed to no taxation on dividends in addition to the tax on profits.
110 Royal Commission, above n 24. The majority concluded at [56] against introducing a corporation tax, but the minority, who had the political influence in 1965, were in favour, see [106] of the minority report.
111 By Exchange of Notes, Treaty Series No 34 (Cmd.3010, 30 June 1965). The US then realised that they did not mean to terminate the article in respect of the territories to which the treaty had been extended and had to make an addition to their notice of termination: see the heading Extension of our treaties to dependent territories below.
The UK’s Early Tax Treaties with European Countries

we unilaterally reduced the withholding tax rate on dividends from the standard rate, which was likely to be considerably higher than the domestic law rate of withholding tax in the other country, to the rate applicable in the converse case of dividends paid from the other state to UK residents in a list of treaties with 11 countries (plus two territorial extensions) for a period of two years (subsequently extended for another two) in order to give time for renegotiation of those treaties. We did manage to renegotiate all of these, mainly in the form of new treaties, before the extended deadline, except that the extension to South West Africa of the treaty with South Africa was never renegotiated.

All these reductions in withholding tax were subject to the dividends being subject to tax in the other state and the recipient not being engaged in trade or business in the source state through a permanent establishment (an advance on the US provision, that they had first used with Canada, that applied to any trade or business), which was further refined in the treaty with Switzerland which required the dividend not to be attributed to the permanent establishment. The subject-to-tax provision was necessary to prevent a UK resident nominee (or trustee) for a resident of a third

\[112\] Then 8s 3d (41.25%) from 1965–66 to 1970–71.

\[113\] See the heading Extension to Dependent Territories below for extensions generally.

\[114\] FA 1966, s 31 applying to 1966–67 and 1967–68; and extended by The Non-Residents’ Transitional Relief from Income Tax on Dividends (Extension of Period) Order 1968, SI 1968 No 454 and ditto 1969, SI 1969 No 319. The applicable treaties listed in Sch 9 are with: Australia, Austria, Denmark (including the extension to the Faroe Islands), Germany, Finland, France, Japan, Norway, Pakistan, South Africa (including the extension to South West Africa) and Sweden. Some of these were subject to qualifications, such as with Germany ignoring the difference in rates between distributed and undistributed profits which determined the rate of withholding tax on dividends on direct investments. The US was not included in the list for the reasons given in the text. A new treaty with Canada of 12 December 1966 contained dividend provisions specifically applicable from 6 April 1966 (substituting one signed on 6 December 1965 which was silent on dividends), and similarly a new treaty with New Zealand of 13 June 1966 contained dividend provisions applicable from 6 April 1966. Presumably in both cases negotiations were sufficiently far advanced when the Bill that became FA 1966 was going through Parliament that it was not thought necessary, particularly with the Dominions, to provide for the transition by legislation. A new treaty with Australia was signed on 7 December 1967 (taking effect from 1967–68), and one with South Africa on 21 November 1968 (taking effect from 1968–69); their inclusion in this legislation suggests that negotiations with them were taking longer than those with Canada and New Zealand and they wanted to have their transitional position secured by legislation. Transitional provisions relating to interest and royalties becoming a distribution on the introduction of corporation tax, which was far less foreseeable than a change in the treatment of dividends, were also dealt with by a two-year transition, also extended for a further two years.

\[115\] The extension (see previous note) covered the new treaty with Austria, applying from 1969–70, and the second the new treaty with Japan applying from 1970–71. The others were all renegotiated within the original time limit.

\[116\] See below n 178.

state, who was taxable on domestic income as a person receiving income, although not taxable on foreign income, from benefiting from the treaty.\textsuperscript{118} It was also necessary to deal with income taxed on the remittance basis but not remitted because the standard treaty provision dealt only with exemption and not reduction in withholding tax, and if the treaty did not contain a remittance provision.\textsuperscript{119}

**Profits Tax**

The dual rate of profits tax on distributed and undistributed profits gave the treaty partner something to negotiate about even though the effect was to preserve domestic law from changing to the detriment of the other state. The differential rates were substantial, rising over time to 22.5 per cent on distributed profits and 2.5 per cent on undistributed profits so obtaining the lower rate became important.\textsuperscript{120} The treaties with Sweden, Denmark, Finland, Switzerland, and Austria secured that the lower rate would apply to profits of a treaty-partner resident company trading in the UK (which was a guarantee that the present law would continue so long as undistributed profits were taxed at a lower rate).\textsuperscript{121} Secondly, that the lower rate would apply where a treaty-partner resident company owned at least half of the voting power of a UK resident company,\textsuperscript{122} which the Swiss treaty extended to cases where more than one Swiss company owned this percentage so long as each company owned at least 10 per cent of the entire share capital.\textsuperscript{123} It is unclear how important this was in practice. In the Swiss treaty the continuation of the 20 percentage points differential in tax rates was also covered by a provision that if it changed the parties would consult, followed by the right of either party to terminate the profits tax provisions together with the reduction in Swiss anticipatory tax on dividends from Swiss companies.

\textsuperscript{118} This was before the introduction of the second sentence of art 4(1) of the OECD Model which was not introduced until 1977. A fuller explanation of this point is contained in J F Avery Jones, ‘The Beneficial Ownership Concept was never Necessary in the Model’, in M Lang, P Pistone, J Schuch, C Staringer and A Storck (eds), *Beneficial Ownership: Recent Trends* (Amsterdam, IBFD, 2013) 333. The OEEC Fourth Report (Art XX Comm para 32) and the OECD 1963 Draft (Art 10 Comm para 32) say that it had not been determined whether the relief should be given only when the income was subject to tax in the other state.

\textsuperscript{119} There was no remittance provision in the treaties with the US, the Dominions, Southern Rhodesia, the Netherlands or Belgium. Reduction in withholding tax and remittances was first dealt with in the Swiss treaty.

\textsuperscript{120} FA 1952, s 33(2). Previous differential rates were 7.5/12.5\% (FA 1947, s 30); 10/25\%; 10/30\% (Profits Tax Act 1949, s 1(1)); 10/50\% (FA 1951, s 28).

\textsuperscript{121} FA 1947, s 39(1); Art VI(2).

\textsuperscript{122} FA 1947, s 39(2).

\textsuperscript{123} Art VI(3). In addition Art VII(5) provided for deduction for profits tax of related-party interest or royalties that was exempt from withholding tax, see text below at n 131.
The differential in profits tax rates was abolished in 1958 following criticisms by the Royal Commission.\textsuperscript{124}

**Interest**

Most sources of UK income, including interest, annuities and other annual payments, were subject to deduction of tax at source at the high\textsuperscript{125} standard rate for both residents and non-residents, which meant that we had a better negotiation position than we had for dividends. We pressed for, and achieved, a nil rate of withholding tax on interest that was subject to tax in the UK so long as the recipient was not engaged in a trade or business in the other state. The relief was reciprocal. A factor that influenced the US treaty was that interest on government securities, which presumably also accounted for much of the interest paid to treaty-partner residents, was free of tax to non-ordinary residents.\textsuperscript{126} We preserved this result in all our European treaties\textsuperscript{127} although with much less of a case in principle since the source state was taxing only once since the interest was deductible in determining profits in the other state\textsuperscript{128} but we pointed out that an investor looks for a net return and so the effect of imposing a withholding tax was to increase the cost of borrowing by residents of that state. As with dividends, these treaties refined the trade or business exception to the case where this was carried on through a permanent establishment, and the treaty with Switzerland further refined this to the case where the interest

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\textsuperscript{124} Royal Commission, above n 24, [531].

\textsuperscript{125} See above n 20.

\textsuperscript{126} This exemption was initially introduced in 1915, that during World War I and for one year after, the Treasury had the power to issue securities, free of both income and capital taxes when in the beneficial ownership of persons not ordinarily resident in the UK and not domiciled; F (No.2) A 1915, s 47 (the non-domiciled condition was repealed by FA 1916, s 44); ITA 1918, s 46; ITA 1952, s 195; ICTA 1970, s 99; ICTA 1988, s 47, repealed FA 1996.

\textsuperscript{127} The treaties with the Dominions did not contain an interest article. Not all the European countries imposed a withholding tax on interest.

\textsuperscript{128} So far as the UK was concerned, obtaining relief through the mechanism of deducting and retaining tax on payment was unaffected by the nil rate under the treaty: Double Taxation Relief (Taxes on Income) (General) Regulations 1946, SI 1946/ 466, para 3(1), amended by Double Taxation Relief (Taxes on Income) (General) No 3 Regulations 1954, SI 1954/1366. There was a limited relief for interest paid by UK companies on loans raised abroad where tax deduction was not possible: FA 1949, s 23 reversing Alexandria Water Co Ltd v Musgrave (1883) 1 TC 521. This required that the interest was secured on trading assets abroad, the interest was required to be, and was, paid abroad, it was paid to a non-resident without deduction of tax, but not where the recipient controls the payer (being a body of persons), or the payer controls the recipient (being a body of persons) or both are bodies of persons controlled by the same person. The first and third of the last-mentioned restrictions would later be included in the definition of distribution (having the effect of disallowing the interest as a deduction) for corporation tax (FA 1965, Sch 11, para 1(1)(d)(iv), later TA 1970, s 233(2)(d)(iv); TA 1988, s 209(2)(e)(iv), repealed by FA 1995, s 87(2)).
was attributable to the permanent establishment. The European treaties (except for France) also restricted the relief for cases where because of the special relationship between the parties the interest was paid at a greater rate than the arm's length one. The treaties with Denmark, Finland and Austria included a provision, first contained in the US treaty, that the nil rate of withholding tax did not apply if the interest was paid to a company controlling 50 per cent of the voting power of the paying company, presumably on the basis of treating a subsidiary like a branch.\footnote{Subsidiaries and branches were then effectively treated in the same way in domestic law in the UK.} It also has the effect of removing the advantage of the parent company financing the subsidiary in the treaty partner state by debt rather than equity, particularly when there were no provisions against thin capitalisation.\footnote{A similar but wider provision is found in domestic law for interest paid abroad for which no deduction of tax is possible: FA 1949, s 23(4), see above n 128.} The Swiss treaty also provided that interest within the article was deductible for profits tax purposes whatever the relationship between the parties.\footnote{Of minor historical note is that the removal of this relief retrospectively to the start of corporation tax by the subsequent (1966) treaty required legislation in FA 1966, s 33. Although this is drafted in general terms the only treaty to which it could apply was the 1954 Swiss treaty. Treaty provisions relating to profits tax (rather than income tax) were unilaterally given effect for corporation tax; FA 1965, s 64(1). A consequence was that corporation tax adopted the profits tax double taxation relief provisions, see Legal and General Assurance Society Ltd v Thomas [2005] UKSPC SPC00461, [10].}

The OEEC did not follow this approach and had a suggested 10 per cent withholding tax on interest.

**Royalties**

In general, we had no difficulty in agreeing a nil rate of withholding tax on royalties, and the OEEC continued this. In some cases, particularly Greece, Austria and Finland, the treatment of film royalties required considerable negotiations and the results show some variations. First, in a majority of cases film royalties are included in the definition of industrial or commercial profits so that they are taxable on a net basis if there is a permanent establishment but otherwise are not taxable.\footnote{Sweden, Denmark, Norway, Finland, Netherlands, Greece, Switzerland and Germany, plus the Colonial Arrangements.} This was our preferred basis and we claimed to consider that film royalties were in the nature of trading income; it may also have been because we did not have a withholding tax on film royalties paid abroad and so we did not want them to fall in the royalty article which might mean that the other state could apply a withholding tax in case we could not negotiate a nil rate. However, it should...
be mentioned that in most of these treaties\textsuperscript{133} no profits are attributed to a permanent establishment in the other state if sales contracts are made in the UK and delivery is made from a warehouse in the other state even when made through an agent, which could apply to films.

Secondly, in a few cases, film royalties are included in the royalty article, as they were subsequently by the OEEC, and the definition of industrial or commercial profits excludes royalties generally (Belgium) or is silent about royalties (France) or there is no definition (US, Austria). In this category in the absence of a permanent establishment the rate under the royalties article applies, which is nil, except that Austria can charge at half their domestic rate.\textsuperscript{134} But if there is a permanent establishment, for example because there is an agent with a stock of films, but the royalties are not industrial or commercial profits under the treaty (certainly for Belgium, and if they are not such in domestic law for France, Austria and the US),\textsuperscript{135} domestic law applies whether it provides for taxation on a gross basis as a royalty or on a net basis as business profits. The existence of a permanent establishment has the purely negative effect of excluding the operation of the nil (or other) rate of tax under the royalties article and nothing more. Treaty provisions (such as that only profits attributable to the permanent establishment can be taxed, or the arm’s length basis of attribution of profits to the permanent establishment) that are normally associated with the existence of a permanent establishment are inapplicable because the profits are not industrial or commercial profits for treaty purposes, so that the permanent establishment state can do anything permitted by domestic law when taxing on a net basis. On the other hand, if domestic law in France, Austria or the US says that they are industrial or commercial profits (or the equivalent in domestic law) the treaty provisions following from the existence of a permanent establishment apply, as in the first category.

Thirdly, the Dominions had their own surprising arrangement that all royalties are excluded from the definition of industrial or commercial profits, and film royalties are excluded from the royalty article, thus permitting domestic law taxation even if this is on a gross basis as a royalty. Reluctantly we had to accept this because Canada was fearful that if they agreed any other treatment the US would want the same from them.\textsuperscript{136} The OEEC draft did have a nil rate of withholding tax on royalties, but it included film

\textsuperscript{133} Not Germany, and the treaty with Finland does not mention agents.
\textsuperscript{134} Austria was particularly reluctant to reduce their withholding tax on film royalties but by persisting, with the aid of the Board of Trade, in the end they agreed to reduce the rate for film royalties in the absence of a permanent establishment to half the normal rate, while the nil rate applied to the UK: IR 40/17255, and /17256.
\textsuperscript{135} Because of the operation of the treaty provision equivalent to what is now Art 3(2) of the OECD Model.
\textsuperscript{136} TNA IR 40/15639 f 46.
royalties in the royalty article, which has continued to the present day, and so in that respect these treaties did not influence the future.¹³⁷

Mining royalties were also excluded from the royalty article in our treaties in almost all cases.

EMPLOYMENT AND PROFESSIONAL SERVICES INCOME

Early treaties dealt with employment and professional services income in the same way. The US treaty had a fairly basic provision that a resident of one state was exempt from tax in the work state if he was present there for not more than 183 days in the taxable year,¹³⁸ and the services were performed for (or on behalf of) a resident of the employee’s residence state.¹³⁹ Later treaties added further conditions. Starting with South Africa¹⁴⁰ and the Colonial arrangements the services had to be subject to tax in the residence state. This dealt with income taxed on the remittance basis, which applied to foreign employments¹⁴¹ until 1974. Although treaties contained a provision about remittances to the effect that an exemption in the other state applied only to the extent that the income was remitted, it was drafted narrowly and required that under the treaty the income be subject to tax in the residence state.¹⁴² The addition was also necessary if the treaty did not have a remittance provision.¹⁴³ In the German and Austrian treaties a further condition was added that the employee must also be paid by the

¹³⁷ FC/WP8(58)1 (12 February 1958).
¹³⁸ This is a bad formulation that enables a continuous period of 183 days at the end of one tax year and another 183 days at the beginning of the next. The OECD changed this in 1992 to 183 days in any 12-month period.
¹³⁹ Most contemporary treaties were in this form. Later US treaties mostly added a condition of a monetary limit on the remuneration qualifying for exemption.
¹⁴⁰ The same provision was found in the treaties with Australia, New Zealand, Sweden, Denmark, the Netherlands, Norway, Finland and Germany, as well as all the Colonial treaties.
¹⁴¹ The definition of foreign employment was a matter of some doubt. The 1955 Royal Commission said: ‘...the Courts have had to treat each question as one of fact and to decide it according to the balance of what seem to be the relevant considerations. There is the nationality, domicile or residence of the employer. As the employer is normally a corporation, that test is likely to be somewhat artificial anyway. Then there is the country in which the contract of employment is made, which may or may not correspond with the national system of law by which it is to be governed. Thirdly, there is the country in which the moneys earned by the employment are paid, though it be by no means follows that the whole salary will be paid in any one country. Lastly, there is the country in which the work is to be done: again two or more countries may be involved.’ Royal Commission, above n 24, [298].
¹⁴² Later versions of the remittance article applying from about 1970 (Japan (1969) is an early example) made a specific treaty reference to income being subject to tax unnecessary as it no longer referred to the treaty providing that the income was subject to tax but merely referred to income being subject to tax on the amount remitted under the laws in force in the UK.
¹⁴³ See above n 119.
employer resident in the non-work state;\textsuperscript{144} and the treaty with Austria added that the activity must not be carried out in a permanent establishment in the work state of a resident of the other state.\textsuperscript{145} The treaty with Belgium added that the income did not reduce the profits taxable in the work state.\textsuperscript{146} Essentially the OEEC adopted all of these conditions, except for subject to tax, which was mainly only of interest to countries adopting the remittance basis, but they enlarged the scope to enable the employer to be resident anywhere other than in the work state.\textsuperscript{147}

The treaties with France, Belgium and Switzerland added that for exemption of professional services income the individual must not have an office or fixed place of business in the work state as a condition of taxation there, the German treaty using the expression ‘fixed base’ for the first time, and the Austrian treaty ‘fixed accommodation which is regularly at his disposal’. In the treaties with Germany and Austria this aspect of professional services income was dealt with in a separate paragraph of the article.

Entertainers were normally excluded from the article, although this was limited to professional services income in the German treaty.

\begin{center}
NON-DISCRIMINATION
\end{center}

The US treaty had a nationality non-discrimination provision, which was unnecessary for the Dominions whose residents were British Subjects, although this would not give protection to companies, and it was unthinkable that we would discriminate against our Dominions and colonies (and vice versa). These European treaties, in addition to preventing nationality discrimination,\textsuperscript{148} also (and unusually at the time)\textsuperscript{149} prevented discrimination against permanent establishments compared to domestic companies.

\textsuperscript{144} France–Norway (1953) required that the remuneration be borne and paid by the employer.
\textsuperscript{145} This had first been included in Austria-Germany (1954) and so must be an Austrian innovation. Its omission from other treaties is, with hindsight, surprising.
\textsuperscript{146} Belgium–Germany (1953) and Italy–Sweden (1956) are to similar effect, that the remuneration must not be paid from the proceeds of gainful activity in the work state.
\textsuperscript{147} The Elimination of Double Taxation: 2nd Report of the Fiscal Committee of the O.E.E.C. (Paris, OEEC, 1959) Art VII.
\textsuperscript{148} From the UK point of view therefore giving their nationals the benefit of the remittance basis applicable to British subjects not ordinarily resident. See below in relation to personal allowances.
\textsuperscript{149} In the period 1945 to 1956 it was included only in Belgium–Sweden (1953) and Netherlands–Sweden (1952), but had earlier been included in Belgium–Germany (1938) (referring to ‘branches or agencies’). Two other treaties of the period (Denmark–Norway (1957) and Indonesia–Netherlands (1954)), and the much earlier Czechoslovakia–Germany (1921), prevented all discrimination against companies by the state other than the residence state which would include discrimination against permanent establishments, but are obviously too wide.
The UK was the first to use a paragraph preventing discrimination against enterprises with foreign ownership compared to local ownership in the treaty with Denmark. Denmark had such a discrimination in its law in the form of a capital tax on the increase in value of companies during World War II which charged 50 per cent higher tax rates for foreign-owned companies. Such a foreign ownership non-discrimination provision was then included in all our early treaties, presumably because it was a good idea rather than that there were any known discriminations of this type by our other treaty partners.

These non-discrimination provisions related to taxation that was ‘other, higher or more burdensome’ than that of the object of comparison. ‘Higher’ would later be deleted as unnecessary in the OEEC Draft, and ‘other’ would not be applied to the permanent establishment provision on the basis that different provisions may be necessary to taxing them.

The words ‘in similar circumstances’ were contained in the Swiss treaty in the nationality and ownership paragraphs because during the negotiations Switzerland had queried whether the nationality provision required them to treat a UK national resident in the UK in the same way as a Swiss national resident in Switzerland. The UK suggested the addition of ‘in similar circumstances’ in both the nationality and the ownership provisions to meet their concerns, although it would have been better to have said that it was clear that it did not require Switzerland to do this. And ‘same’ would have been better than ‘similar’ because the comparator is hypothetical and can be

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150 Under law no 391 of 12 July 1946, of which s 5 para 5 contained the 50% increase in rates for foreign-owned companies (TNA IR 40/172).

151 Treaties with: France (one of the countries represented on OEEC Working Party (WP) 4), Norway, Finland, Greece, Belgium (ending ‘… other enterprises of the first-mentioned territory similarly carried on are or may be subjected’ and which stated that the provision was not to affect a specific treaty provision that profits distributed by a Belgian company to its UK 90% holding company were to be taxed at the lower rate normally applicable to undistributed profits), Switzerland, Germany and Austria (also ending ‘… other enterprises of the first-mentioned territory similarly carried on are or may be subjected’), but not the Netherlands or Sweden which were negotiated earlier.

152 For an example of an ‘other’ tax, which on the agreed figures was less burdensome, see Woodend (KV Ceylon) Rubber Co v Comr of Inland Revenue [1971] AC 321, 332F, PC relating to a branch profits tax (in a residence, rather than nationality, non-discrimination provision), although ultimately the discrimination was not prevented as the treaty had been overridden. The OEEC Working Party said later in an interpretative note, ‘The words “… shall not be subjected to any taxation or any requirement connected therewith which is other or more burdensome…” mean that tax may not be in another form (no different tax, no different mode of computing the taxable amount, no different rate, etc.) and that the formalities connected with the taxation (returns, payment, prescribed times, etc.) may not be more onerous.’ (FC/WP4(57)3).

153 TNA IR 40/11451 f 283J. The nationality provision was otherwise essentially the same as the current OECD Model’s. The addition of ‘in particular with respect to residence’ made in 1992 in the nationality provision only was viewed as unnecessary but intended to explain ‘in the same circumstances.’
identical except for the provision under review. The OEEC adopted ‘same’ but rather spoilt it by explaining that it meant ‘substantially similar’.\textsuperscript{154}

Unusually, starting with the US treaty, in all these treaties (except for Belgium) the non-discrimination article applied to all taxes not merely the taxes covered by the treaty.\textsuperscript{155} The rationale for this was set out in our negotiations with Germany, who were resisting its inclusion:

It is also essential to ensure—and this is primarily valuable from the taxpayer’s point of view—that the other country will not get round the provision by discriminating against him in other ways—e.g. by levying specially heavy stamp duties on his documents etc.\textsuperscript{156}

Greece wanted to exclude taxes on goods but we persuaded them that the wording of the provisions would not cover goods anyway. However, the application to taxes not covered by the treaty had no effect in the UK because the enabling provision giving effect to the treaty in domestic law was limited to income tax, excess profits tax and profits tax (and later, corporation tax and capital gains tax), which is strange as the enabling provision was drafted to give effect to the 1945 US treaty the non-discrimination article of which applied to all taxes.\textsuperscript{157} We were presumably unaware of this because, as with Germany and Greece, we were keen on their including the provision which we could not have done if we had made the other party aware of the defect in our domestic law implementation of the treaty. This defect must have been realised later because from the mid-1960s we started to limit the provision to taxes covered by the treaty, although ‘all taxes’ provisions were still being used in the 1980s presumably in some cases at the instance of the treaty partner.\textsuperscript{158}

\textsuperscript{154} The Elimination of Double Taxation: 1st Report of the Fiscal Committee of the O.E.E.C. (Paris, OEEC, 1958), Commentary to Art IV, para 2 stated that in \textit{the same circumstances} ‘refers to taxpayers placed, from the point of view of the application of the ordinary taxation laws and regulations, in substantially similar circumstances both in law and fact’ (now Art.24 Comm para 7 of the OECD Model). In French, Art 24(1) used the expression de même nature in 1963, which was changed to \textit{similaires} in 1977.
\textsuperscript{155} The US was the only other country using an ‘all taxes’ provision at the time, solely in nationality non-discrimination articles. It was included in 11 US treaties between 1945 and 1956 and not included in 2 (Ireland (1949) and South Africa (1946)). Apart from use by the US and UK it was included only in Norway-Switzerland (1956).
\textsuperscript{156} TNA IR 40/9629A f 110.
\textsuperscript{157} F (No.2) A 1945, s 51; ICTA 1988, s 788; and TIOPA 2010, s 6(3).
\textsuperscript{158} Early UK examples of the non-discrimination article applying to taxes covered by the treaty are Canada (12 December 1966), New Zealand (13 June 1966), South Africa (21 November 1968) (but not Australia (1968) which did not contain a non-discrimination article), Singapore (1 December 1966), Swaziland (26 November 1968) and Portugal (27 March 1968). Late examples of it applying to all taxes are Norway (3 October 1985) and Nigeria (9 June 1987).
PERSONAL ALLOWANCES

Domestic law gave a proportion of personal allowances to non-resident British subjects (later, Commonwealth Citizens which would include residents of the Dominions and Colonies and so no provision dealing with this was necessary in their agreements or arrangements) corresponding to the proportion of UK income to world income. Although it had not been included in the US treaty, the same treatment was extended on a reciprocal basis to residents of our European treaty partners (irrespective of their nationality), which we used as a negotiating tool in relation to dividend withholding tax. At the same time, we excluded from the non-discrimination article that nationals of the treaty partner state were entitled to the same allowances as we gave to our own non-resident nationals, so that non-residents of the treaty partner could not claim them on the basis of their nationality.

EXTENSION OF OUR TREATIES TO DEPENDENT TERRITORIES

In the period between 1946 and 1952 we made a large number of ‘Arrangements’ with our Colonies and similar territories such as protectorates (to which I shall refer as dependencies). As a corollary to this we offered to extend to the dependencies our treaties with the Dominions. Those who accepted are shown in Table 2 below. While these may have been driven by considerations of the Empire we also made the same offer to the dependencies in relation to our treaties with other states and the offer was taken up by many of them in the 1950s and 1960s, as can also be seen from Table 2; no extensions to dependencies were made after the ones in the Table. One has the impression that this was driven by the Colonial Office whose aim was that all our treaties would apply to the dependencies with which we had such Arrangements, rather than being driven by tax policy.

The US treaty was the first to include a provision enabling it to be extended to dependent territories of either party, although the first extensions to be made were to the Agreements with Canada and New Zealand. It is interesting that right from the beginning a stated objection to the treaty

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159 I have seen a reference to a list of 29 September 1949 but not seen it. I believe they comprised Aden, Antigua, Cyprus, Gambia, the Gold Coast, Jamaica, Mauritius, Montserrat, Nigeria, Nyasaland, St Christopher and Nevis, Seychelles, Sierra Leone, Trinidad, and the Virgin Islands. Grenada, the Falkland Islands and St Vincent agreed later.

160 Except that in 1972 the later (1960) treaty with Sweden was extended to some of the dependencies in place of the earlier treaty, see Notes to the Table.

161 Denmark wanted to extend the UK–Denmark treaty also to Hong Kong which we refused on the ground that our practice was limited to territories to which we had an Arrangement: TNA IR 40/12346; FO 371/94678.
in the United States was the possibility that it could be extended to low tax
territories and used to avoid US tax by non-resident aliens of the United
States; such an objection was well in advance of its time.\textsuperscript{162} The answer
given to the objection was that it was an encouragement to increase US
trade with such territories, which may have had some force in relation to
Caribbean territories.\textsuperscript{163} Such a provision was adopted in some subsequent
US treaties\textsuperscript{164} and the United States later came to regret that they had not
paid attention to the objection and terminated the extensions in 1983 say-
ing: ‘The terminations occurred because, as extensions of old treaties with
developed countries, they do not reflect the economic relationship between
the United States and these respective jurisdictions. In addition, several of
these treaties are susceptible to abuse.’\textsuperscript{165}

The early Agreements with the Dominions followed the same pattern
with extensions being made to the first treaties with Canada, South Africa
and New Zealand, though not Australia who were recorded as saying that
they would extend their treaty with the UK to dependencies only if it would
give ‘tangible mutual advantages acceptable to Australia’,\textsuperscript{166} which pre-
sumably they concluded was not the case. The difference in procedure was
that the extensions to our treaties with the Dominions were not laid before
Parliament for information at all, whereas extensions to treaties with other
countries were laid as Command Papers in the Treaty Series. Although, as
mentioned above,\textsuperscript{167} the practice changed in the early 1960s for the making
of Agreements with the Dominions after which they were reported to

\textsuperscript{162} The objections are anonymous and were either made up by the Joint Committee on
Taxation to give a balanced view, or were based on comments received from outside, US–UK
Legislative History, above n 7, 2607 and 2619. The State Department recommended to the
President that the advice and consent of the Senate should be taken before the treaty was
extended to any such dependency: US–UK Legislative History, 2652.

\textsuperscript{163} US–UK Legislative History, above n 7, 2594 and 2642. While the treaty provision was
aimed at UK dependencies, the National Foreign Trade Council memorandum pointed out that
it would enable the treaty to be extended to Puerto Rico (US–UK Legislative History, 2617),
but this was denied in the Technical Explanation (US–UK Legislative History, 2595) on the
ground that it was autonomous in revenue matters, which seems unconvincing.

\textsuperscript{164} US–Netherlands (1948) was extended to the Netherlands Antilles, and US–Belgium
(1952) was extended to three dependencies; see D Rosenbloom and S Langbein, ‘United States
The Belgian extensions were terminated at the same time as the UK ones, see next note.

\textsuperscript{165} The US Treasury announced in 1979 that it was investigating whether these exten-
sions should be terminated to prevent use by taxpayers in third countries (Tax News Service
30 September 1979). The extensions were terminated on 1 July 1983 with effect from 1 January
1984, except for the extension to the British Virgin Islands which was terminated on 30 June
1982 with effect from 1 January 1983, and Antigua and Barbuda which gave notice to termi-
nate on 26 February 1983 with effect from 26 August 1983 (US Treasury Department Press
Release, 1 July 1982).

\textsuperscript{166} This was in a letter of 10 October 1951 from the Secretary of State for the Colonies to
the South African High Commissioner on the file about the extensions to the South Africa
Agreement: TNA IR 40/16978.

\textsuperscript{167} Text above at n 36.
Parliament as Command Papers (in addition to the Statutory Instrument procedure for giving effect to them in tax law), there are no examples of extensions being reported in this way, as no extensions were made after the change in procedure.

All the early European treaties with the UK continued the practice and contained a similar article. 168 Normally this applied to both states but the treaties with Sweden, Norway, Finland, Switzerland and Germany limited its scope to extension to UK dependencies only. 169 As will be seen from the Table extensions were made to numerous UK dependencies. The benefits to the dependency were that they would obtain a better deal than they could have achieved on their own, 170 and they did not need to arrange for us to conduct separate negotiations which were unlikely to have taken place in practice. The reason given by the US of the expansion of trade by the treaty partner with the extension territories, which may have been true for the US in relation to Caribbean territories, seems unlikely for most of the European countries concerned. During negotiations with the Netherlands it was realised that the original wording could have created a treaty directly between the dependencies of each state, to which the Foreign Office objected. 171 The final wording avoided this problem. The extensions were made before the dangers of treaties with tax havens, which most of the UK dependencies were (or became), were understood. However, many of the extensions excluded the interest article, as had the extensions made by the US treaty. 172

The normal treaty provision stated that if the parent treaty was terminated all the extensions were terminated too unless otherwise agreed. The US later fell into that trap when terminating the dividend article on the introduction of our corporation tax. They had not intended to terminate the dividend article in the extensions, which were not affected by the introduction of corporation tax in the UK, and they had to issue a revised termination retaining the extensions. 173

Extensions to dependencies of the treaty partner were much less common: as will be seen from the Table below, the only extensions were that the treaty with the Netherlands was extended to the Netherlands Antilles in 1957 without it seems any thought of the possible effect, 174 and the treaty

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168 The same provision is found in a few treaties other than between the UK and the Dominions, eg Belgium–US (1948), France–Norway (1953), Canada–France (1951), Indonesia–New Zealand (1954) and New Zealand (1948).

169 The records of the negotiations show that Sweden had no colonies, and Norway’s were uninhabited.

170 For an example of this see South Africa’s attempt to give reduced benefits to neighbouring countries to which the treaty was being extended in the text below around n 183.

171 TNA IR 40/17127 f 60.

172 Interest was also automatically excluded from the extensions of the Canada, New Zealand and South Africa treaties as those treaties did not cover interest.

173 See above n 111.

174 There is nothing in TNA IR 40/17155 to show that the possible tax effect was considered. Effect to the extension was given by the Double Taxation Relief (Taxes on Income)
with Denmark was extended to the Faroe Islands. The similar extension to the Netherlands Antilles made to the subsequent treaty with the Netherlands was ultimately terminated by the UK with effect from 1989. Our second treaty with South Africa (1962) was extended to South West Africa in 1962.

An article providing for territorial extension of the treaty was later included in the OEEC Third Report (1960) and subsequently in the 1963 OECD Draft and OECD Models and survives to this day. Their archives do not contain any analysis of the merits of such extensions. The earliest draft of the Commentary merely referred to the constitutional necessity of such a provision in treaties:

As these so-called ‘territories of extension’ have as such no international capacity of their own or only a limited one, both the extension of Conventions for the avoidance of double taxation and the termination of such extension are to be declared by the Contracting State concerned.

(Netherlands Antilles) Order 1957, SI 1957 No 425. It also records that ‘We asked the Netherlands whether they would be extending the treaty to the Dutch East Indies but they could not say as their constitutional status was still in the balance’ (IR 40/17127 f 28).

There were also negotiations to extend the Belgian treaty to Ruanda–Urundi and the Belgian Congo, but these were never finalised.


Talks had been held about a new treaty from 1987 but it was announced in a Press Release of 19 October 1989 that Ministers had decided that having considered the position reached in these discussions a satisfactory basis for a new treaty did not exist. Domestic law was amended to provide a saving for the exemption for deduction of UK tax from interest paid by a UK resident company to its Netherlands Antilles subsidiary to fund interest on a quoted Eurobond issued by the subsidiary before 26 July 1984 (the start of the quoted Eurobond exemption); FA 1989, s 116. (When earlier terminating the extension to the Antilles of their treaty with the Netherlands, the US had caused disruption in the Eurobond market resulting in losses to investors and had undermined its credibility as a treaty partner; F Crandall, The Termination of the US-Netherlands Antilles Tax Treaty: What were the Costs of Ending Treaty Shopping, (1988–89) 9 Northwestern Journal of International Law & Business 355.)

This is not included in the Table which is restricted to the first treaty with South Africa. The extension is in South Africa No 2 (1962) (Cmd.1894, 8 August 1962); and Treaty Series No 4 (Cmd.2249, 1964). South West Africa (now Namibia) was a former German colony which after World War I became a League of Nations Mandated Territory under the administration of South Africa. Subsequently the UN asked South Africa to surrender South West Africa to United Nations trusteeship, which it refused to do culminating in a decision of the International Court of Justice in South Africa’s favour in 1950 declaring that the mandate was still in force now supervised by the UN General Assembly. Subsequently in 1966 the General Assembly terminated the mandate and in 1971 the International Court of Justice ruled that South Africa had no right to administer it. The extension was therefore made after the ICJ had ruled in favour of South Africa and before the mandate was terminated by the UN.

A draft was prepared by WP14: FC/WP14(59)1 (3 March 1959); TFD/FC/78 (23 September 1959); TFD/FC/82 (Countries’ comments on the previous item) (11 December 1959); TFD/FC/83 (12 December 1959); FC/WP14/6011 (19 January 1960); FC(60)1 (14 March 1960); TFD/FC/89 (10 May 1960) plus corrigendum; FC(60)2 (25 May 1960); C(60)157 (13 July 1960).

FC/WP14(59)1 (3 March 1959).
By the time of the OEEC Third Report this had become an argument of convenience:

A clause of this kind is of particular value to States which have territories overseas or are responsible for the international relations of other States or territories, especially as it recognises that the extension may be effected by an exchange of diplomatic notes.\footnote{181}

Table 2 shows the extensions made to these treaties. It demonstrates how the article was mainly used to benefit UK dependencies\footnote{182} rather than the treaty partner’s dependencies. Another feature of the Table is that some treaties were extended to a smaller number of dependencies than others. In particular the treaty with South Africa was extended to only seven of them. This was because South Africa did not want to include the benefit of exemption from non-resident shareholders’ tax and undistributed profits tax to the dependencies. Initially our view was that such exclusions were not within the enabling power in our treaty with South Africa as being ‘such modification as may be necessary’ but in the end we accepted the interpretation that it meant modifications necessary to reach agreement.\footnote{183} The dependencies to which the treaty was not extended were presumably those who did not agree to the two exclusions. However, even before the extension South Africa made separate treaties (with our consent) with a total of seven\footnote{184} African dependencies listed in the Table, none of which contained the excluded articles, making an overall total of 14, compared to 21 for Canada and 18 for New Zealand. Originally South Africa had also objected to making extensions to Basutoland, Bechuanaland and Swaziland as they only wanted an exchange of information provision with those territories but we said that an extension had to be all or nothing. South Africa subsequently made a full treaty with them.\footnote{185} There are also a few instances of dependencies objecting to the extension of treaties with particular countries to them recorded in the Notes to the Table.

Although there was only one extension of the treaty with the Netherlands to Rhodesia and Nyasaland, proposals had been discussed to extend it to the usual dependencies. However, by the time that treaty had been extended to the Netherlands Antilles there were proposals for a new treaty, although no extensions to UK dependencies were made to the new (1967) treaty either.

\footnote{181}{\textit{The Elimination of Double Taxation: Third Report of the Fiscal Committee} (Paris, OEEC, 1960) 47.}
\footnote{182}{The term ‘dependencies’ is used in a loose sense without any political significance and as comprising the countries concerned at any subsequent time.}
\footnote{183}{TNA IR 40/16978.}
\footnote{184}{Plus one, Basutoland (now Lesotho), which is not relevant to the Table as there were no extensions to it. They objected to the extension of the treaty with Sweden to it: TNA IR 40/17218.}
Table 2: Territorial Extensions to Early Treaties

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<th>Treaty Date</th>
<th>United States</th>
<th>Canada</th>
<th>South Africa</th>
<th>New Zealand</th>
<th>Netherlands</th>
<th>Sweden</th>
<th>France</th>
<th>Denmark</th>
<th>Norway</th>
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Extension to UK Territories

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- Aden Colony: Y # | Y | Y | Y | Y | Y | Y | Y # | Y # | Y # | Y # | Y ^# |
- Antigua: Y # | Y | Y | Y | Y | Y | Y | Y | Y # | Y # | Y # | Y # |
- Barbados: Y # | Y | Y | Y # | Y | Y | Y # | Y | Y # | Y |
- Bechuanaland: α | Y # | Y | Y # | Y # |
- British Honduras: Y # | Y | Y | Y | Y | Y # | Y # | Y | Y # | Y |
- Br Solomon Is: Y # | Y | Y | Y # | Y | Y # | Y # |

186 The territories included in the extensions concerned are listed by the names they had in the relevant documents extending the treaty to them. To the best of my knowledge the current names are: Aden Colony—Yemen (part), Bechuanaland—Botswana, British Honduras—Belize, British Solomon Islands—Solomon Islands, Gilbert and Ellice Islands—Kiribati and Tuvalu, Gold Coast—Ghana, Malaya and North Borneo—Malaysia (part), Northern Rhodesia—Zambia, Southern Rhodesia—Zimbabwe, Nyasaland—Malawi, Tanganyika and Zanzibar—(Tanzania).
Table 2: (Continued)

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Notes to the Table

Dates in the list of countries refer to the date of the extension to that territory (if that territory was not included in the original list of extensions). Only extensions to the first treaty with that country are included. Only the exclusion of dividends and interest are noted by the symbols below. Many extensions have other exclusions.

Key to Symbols

# Extension not applicable to interest.
^ Extension not applicable to dividends.
§ These territories were the subject of a separate agreement with South Africa on 27 September 1959 (Proclamations No 260, 1959 (Basutoland), No 261, 1959 (Bechuanaland) and 262, 1959 (Swaziland), Government Gazette vol CXCVIII No 6314, 13 November 1959 at 1).
α These territories (plus Basutoland) were the subject of a separate agreement with South Africa on 18 June 1959 (Proclamations Nos 260, 1959 (Basutoland), No 261, 1959 (Bechuanaland) and 262, 1959 (Swaziland), Government Gazette vol CXCVIII No 6314, 13 November 1959 at 1).
β The subject of a separate agreement with South Africa of 22 May 1956 (Proclamation No 174, 1956, Government Gazette vol CLXXXV No 5734, 31 August 1956 at 1); amended 30 October 1959 (Proclamation No 60, 1960, Government Gazette vol CXCIX No 6383, 18 March 1960 at 5); replacing an agreement with Southern Rhodesia of 19 May 1952 (Proclamation No 162, 1952, Government Gazette, vol CLXXIX No 4906, 15 August 1952 at 4); after termination of the Federation in 1963 a new agreement was made with Southern Rhodesia of 10 June 1965 (Proclamation No 214 1965, Government Gazette vol 17, No 1214, 3 September 1965 at 5) and the extension continued in respect of the rest of Rhodesia and Nyasaland.

Numbered Notes

(1) No 62 (1959), Cmd.824, 19 August 1957/3 December 1958. The termination by the US of art VI (dividends) of the treaty with the UK did not include the extensions: No 34 (1966), Cmd.3010, 30 June 1965
(2) In Canada The Canada Gazette, 1 September 1951 at 2382. There is no official publication in the UK but the extension is recorded in UN Treaty Series vol 345 (1959) at 326.
(3) In South Africa Proclamation by Governor-General No 32, 1961, Government Gazette vol CCIII 3 February 1961 No 6620 at 9. There is no official publication in the UK. The extensions to Grenada and Sierra Leone (Proclamations 299 of 1946, 271 of 1954 and 32 of 1961) are still in force so far as South Africa is concerned but this might be contested.
(4) In New Zealand The New Zealand Gazette, 19 July 1951 No 55 at1018. See C Elliffe, International and Cross-Border Taxation in New Zealand (New Zealand, Thomson Reuters, 2015) 593 for how treaties become part of New Zealand law by a declaration of the Governor-General by Order in Council and ITA 2007 (New Zealand) s BH 1(1) and (3). There is no official publication in the UK.
(5) No 47 (1963), Cmd.2083, 20/27 December 1962. According to TNA IR 40/17155 Swaziland did not want to extend the treaties with the Netherlands to it, as it had with Sweden.
CONCLUSION: THE INFLUENCE OF THESE TREATIES ON THE OEEC AND OECD MODELS

At the end of the period covered by these treaties the Council of the OEEC set up a Fiscal Committee as a result of urging initially by the International Chamber of Commerce\(^\text{187}\) and then by the Dutch delegation. The terms of reference were worked out by an ad hoc committee of experts on taxation under the chairmanship of van den Temple, the Director General of Fiscal Affairs in the Netherlands.\(^\text{188}\) The Fiscal Committee was given the ambitious project of dealing not only with direct taxation but also indirect taxation, the standardisation of concepts and nationality discrimination\(^\text{189}\) in the period from March 1956 to July 1958 when it would be determined whether the Fiscal Committee should be continued.\(^\text{190}\) The Fiscal Committee made an interim report in 1957\(^\text{191}\) and a further report in 1958\(^\text{192}\) by which time it had prepared draft articles and commentary on the definition of taxes, permanent establishment, fiscal domicile, and non-discrimination,

\(^{187}\) C(54)294 (12 November 1954).

\(^{188}\) C(56)1 (13 January 1956). The Dutch, Swiss and German delegations submitted memoranda, see Report C(56)49.

\(^{189}\) Note by the Secretary-General, FC(56)1 (16 May 1956).

\(^{190}\) C(56)49(Final) (19 March 1956).

\(^{191}\) C(57)145 (3 July 1957). By that time the following Working Parties, normally of two delegates from the countries in brackets, were in operation: 1 permanent establishment (Germany, the UK); 2 fiscal domicile (Denmark, Luxembourg); 3 listing of taxes (Italy, Switzerland); 4 discrimination (Netherlands, France); 5 shipping and air transport (Sweden, Belgium). More were then created: 6 inland waterways (France, Germany); 7 apportionment of profit (UK, Netherlands); 8 royalties (Germany, Luxembourg); 9 immovable property (Italy, Austria); and 10 dependent and independent services (Sweden). By the end, there were also Working Parties 11 interest (France, Belgium); 12 dividends (Germany, Italy, Switzerland); 13 capital (Switzerland); 14 territorial scope, definitions, mutual agreement, exchange of information, diplomatic privileges, entry into force (Austria, Sweden); and 15 avoidance of double taxation (Denmark, Ireland). (No.16 does not appear to exist, and No.17 dealt with inheritance taxes.)

\(^{192}\) C(58)118 (28 May 1958).
which became a recommendation of the Council to be adopted in treaties, which was published.\textsuperscript{193} This was a very considerable achievement in such a short period. Further Reports followed in July 1959,\textsuperscript{194} August 1960,\textsuperscript{195} and August 1961.\textsuperscript{196} With minor changes the articles included in these reports plus six further articles\textsuperscript{197} were joined together to become the OECD Draft of 1963.

In many cases one can see the influence of these treaties on the OEEC and its successor the OECD. In particular, these treaties influenced the definitions of ‘person’ and ‘company’; the use of the expression ‘resident;’ the content of the permanent establishment article, particularly the exclusion for a warehouse (although the OEEC put the whole definition in more logical form); the nil rate of withholding tax on royalties (though not on dividends or interest); the development of the content of the employment and professional services article (which the OEEC split into two and redrafted, using the concept of fixed base which we had used with Germany for the latter); in the non-discrimination article the introduction of the permanent establishment, ownership and (together with the US) ‘all taxes’ provisions; and the territorial extension article. While the OEEC never adopted our subject-to-tax requirement for dividends, interest and royalties we can perhaps claim credit for its replacement by beneficial ownership in 1977 (about which it might be better if we kept quiet) which has the advantage over subject-to-tax by catering for bodies such as pension funds and charities.\textsuperscript{198}

On the other hand, a number of cases have been mentioned where the OEEC diverged from these treaties, including their adopting a dual residence provision, and ‘place of effective management’ after rejecting ‘central management and control,’ dropping the rule that an agent holding a stock of goods constituted a permanent establishment, adopting suggested rates of withholding tax on dividends and interest, and including film royalties in the royalties article.

The overall picture is that these treaties were a step on the road to the OEEC and OECD Models whose influence has continued to this day. None of the changes was earth-shattering but they formed an important contribution to today’s treaties.

\textsuperscript{193} C(58)118(Final) (15 July 1958), published as the 1st Report, above n 49.
\textsuperscript{194} 2nd Report, above n 147, covering shipping and air transport, dependent and independent personal services, immovable property, and capital.
\textsuperscript{195} Third Report, above n 181, covering allocation of profits to a permanent establishment, other income, personal scope, and territorial extension.
\textsuperscript{196} Fourth Report, above n 98, covering dividends, interest, royalties, avoidance of double taxation and mutual agreement procedure.
\textsuperscript{197} The articles on general definitions, capital gains, exchange of information, diplomatic and consular officials, entry into force, and termination.
\textsuperscript{198} But see above nn 118 and 119.