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Tax and corruption: Is sunlight the best disinfectant? A New Zealand case study

Lisa Marriott¹

Abstract

Recent events such as the release of the ‘Panama Papers’ to the public in April 2016 have increasingly focused the international community on the connection between tax systems and corruption. Countries benefit in multiple ways from the perception of low levels of corruption. Thus, greater focus is visible in many jurisdictions on increasing regulation to address corrupt activity. This article questions whether international pressure or national concerns are more likely to generate regulatory change in relation to the role of the tax system in facilitating corrupt activities. An historical institutionalist framework is used for analytical purposes. New Zealand is used as a case study to examine this issue as New Zealand is a country typically perceived to have low levels of corruption. This article explores two activities: the tax treatment of facilitation payments made to overseas public officials; and the tax treatment and disclosure requirements of foreign trusts. Facilitation payments made to overseas public officials are deductible for tax purposes in New Zealand. Current practice is showing no sign of change, despite perceptions that this practice denotes a permissive attitude towards corruption and is no longer tolerated in most other comparable tax jurisdictions. The tax treatment and disclosure requirements of foreign trusts together with the link between tax and corruption in New Zealand was highlighted with the release of the Panama Papers. This event generated international media interest with the suggestion that New Zealand was acting as a tax haven. The Panama Papers release resulted in an immediate inquiry, rapid production of a report with multiple recommended changes to extant practice and government agreement to act on all recommendations. The article concludes that sunlight is indeed the best disinfectant for addressing corrupt activities. However, protecting a country’s international reputation is likely to be a greater catalyst in achieving change than a country’s domestic concerns.

Keywords: taxation of foreign trusts, facilitation payments, New Zealand

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1. INTRODUCTION

It has been said that sunlight is the best disinfectant.² This study examines the impact of public scrutiny, and international and domestic concerns, in achieving regulatory change in relation to tax activities connected to corruption. There have been many high-profile cases of perceived tax corruption in recent times. For example, the release of the colloquially termed ‘Panama Papers’ in early 2016 highlighted how offshore entities were facilitating a range of illegal activities, including tax evasion.

This article uses New Zealand as a case study. New Zealand benefits from the widely held belief that it is a country with little corruption. This belief has some evidential backing: New Zealand ranks positively in most corruption measures. For many years Transparency International has ranked New Zealand among the least corrupt countries due to low levels of corruption in the public sector and transparent processes. However, other indices, such as the Financial Secrecy Index, rank New Zealand around the middle of 102 countries.³ In addition, political scandals⁴ and cases of public sector bribery⁵ have been visible in recent times. Moreover, New Zealand has been criticised for what is perceived as a permissive attitude towards some areas of corruption.⁶ Two of the activities that have attracted this criticism are explored in this article: the tax treatment of facilitation payments to overseas public officials (referred to as the facilitation payments issue); and the tax treatment and disclosure requirements of foreign trusts (referred to as the foreign trusts issue).

Globally, New Zealand is now an outlier with its tax treatment of facilitation payments. New Zealand legislation allows for facilitation payments to be deductible for tax purposes under certain circumstances. While historically this was not uncommon in other jurisdictions, most countries have now removed the tax deductibility of facilitation payments. However, New Zealand not only allows for facilitation payments to be tax deductible, it does not monitor how the deduction is used. The OECD and the United Nations have been critical of both facilitation payments and countries that allow them as tax deductions.⁷ However, this criticism has attracted little media attention and the issue of deductibility of facilitation payments has not been addressed.

New Zealand has also attracted criticism for its treatment of foreign trusts. The particular issue is that New Zealand taxes on the basis of the location of the settlor of a trust, rather than the trustee, which is the more common method of taxation in other countries. The consequence of this approach is that foreign trusts are not taxed in New Zealand, which is aligned with New Zealand’s principle of not taxing the foreign

² Attributed to Justice Louis D Brandeis. In the context of this article, the quote is included to suggest that increased transparency will assist with reduced corruption.

³ Tax Justice Network, ‘Financial Secrecy Index – 2015 results’ <<http://www.financialsecrecyindex.com/introduction/fsi-2015-results>>.

⁴ See, for example, Daniel Zirker and Patrick Barrett, ‘Corruption vs. Corruption Scandals in New Zealand: Bridging a Wide Gulf?’ (2017) 69(1) *Political Science* 35.

⁵ Patrick Barrett and Daniel Zirker, ‘New Zealand’s Panama Connection: Financial Services, Facilitation Payments, and A Legal Slippery Slope’ (2017) 3 *International Review of Transparency and Integrity* 1.

⁶ See, for example, OECD, *OECD Working Group on Bribery Annual Report 2014* (OECD Publishing, 2014) 60 <<http://www.oecd.org/tax/crime/oecdworkinggrouponbribery-annualreport.htm>>.

⁷ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Adopted by the Council on 26 November 2009, para VI; United Nations Office on Drugs and Crime in Cooperation with PricewaterhouseCoopers, *Anti-Corruption Policies and Measures of the Fortune Global 500* (United Nations, 2015).

sourced income of non-residents. The issue exists in relation to New Zealand's disclosures, or historical absence thereof, which limit the capacity for most countries' tax authorities to have knowledge of the presence of the foreign trust. This supports the view that, while New Zealand is not facilitating tax evasion in its own country, it is effectively facilitating tax evasion in other jurisdictions. New Zealand's involvement in the international 'Panama Papers' scandal resulted in significant regulatory change in New Zealand, with a rapid inquiry led by one of New Zealand's most well-known tax commentators, with all recommendations subsequently agreed to by the government.

The tax treatment of facilitation payments and of foreign trusts in both cases posed threats to New Zealand's global reputation as a country with low levels of corruption. However, different responses resulted when each of the activities was brought into the public domain. Thus, the focus of this study is on the process of achieving change in the area of tax and corruption.

This article is structured as follows. Section 2 provides a brief background on corruption and the benefits gained when countries are perceived as having low levels of corruption. This section also outlines the relevant provisions of two international conventions that are targeted towards reducing corruption. A brief outline of historical institutionalism, the theoretical framework used for analytical purposes, is provided in section 3. Section 4 describes the New Zealand case study, including how New Zealand is perceived from a corruption perspective, and the two tax activities that are the primary focus of this study: the tax treatment of facilitation payments; and the treatment of foreign trusts. Section 5 outlines New Zealand's responses to possible threats to its reputation as a country with low levels of corruption. Section 6 outlines the lessons that may be learned from New Zealand's recent experience, with an analysis informed by an historical institutionalism lens. The study concludes in section 7.

2. BACKGROUND

There are many advantages gained by a country with a reputation as an honest location to do business. Correlations between low levels of corruption and higher levels of economic growth have been demonstrated. Research has shown that as a country's wealth increases, a country's corruption decreases⁸ and more developed economies have lower levels of corruption.⁹ It is generally agreed that the costs of capital are lower in a less corrupt country. This is captured by the International Monetary Fund (IMF) which observes the significant negative impact of corruption on channels that affect growth: corruption 'breeds public distrust in government and weakens the state's capacity to perform its core functions'.¹⁰ The IMF also notes that, depending on how pervasive corruption is, it can impact on multiple drivers of growth 'such as

⁸ Seini O'Connor and Ronald Fischer, 'Predicting Societal Corruption Across Time: Values, Wealth, or Institutions?' (2012) 43(4) *Journal of Cross-Cultural Psychology* 644.

⁹ Daniel Treisman, 'The Causes of Corruption: A Cross-National Study' (2000) 76(3) *Journal of Public Economics* 399.

¹⁰ International Monetary Fund, 'Corruption: Costs and Mitigating Strategies' (IMF Staff Discussion Note SDN/16/05, 11 May 2016) 5.

macro-financial stability, public and private investment, human capital accumulation, and total factor productivity'.¹¹

It is worth observing the link between perceptions of high levels of corruption and taxation. Studies have linked high levels of corruption to reductions in tax revenue collection.¹² Other studies have demonstrated links between low levels of tax collection and a weak compliance culture.¹³ This can result from a reduced willingness of taxpayers to pay tax when they perceive that others are not paying tax or it can result from reluctance to pay tax where it is perceived that taxes are poorly used in a corrupt state environment. Further impacts from corruption include:

1. lower revenue collection, undermining spending programs;
2. large fiscal deficits and increased debt accumulation;
3. undermining the independence of the central bank in implementing sound monetary policy;
4. discouraging financial development;
5. weak financial oversight and stability;
6. undermining recovery of debts or enforcement of claims;
7. increasing the cost and lowering the quality of public investment;
8. reducing private investment;
9. political instability;
10. harming countries' access to international credit markets; and
11. reducing productivity and reforms.¹⁴

The costs associated with corruption are significant. The IMF estimates the cost of bribery alone at USD 1.5-2 trillion per annum, which is approximately 2 per cent of global GDP.¹⁵ However, alongside the traditional financial costs associated with corruption are the non-financial costs, such as damage to a jurisdiction's reputation when it is considered to be corrupt. Therefore, perhaps it is not surprising that many countries have been quick to adopt more robust regulatory measures to prevent, detect and punish corruption.

There are two primary international conventions associated with bribery and corruption. The first of these was introduced in 1997 by the OECD - the OECD Convention on Combating Bribery ('*OECD Convention*').¹⁶ All OECD member countries have adopted the Convention, along with eight non-member countries. The aim of the OECD Convention is to ensure that countries adopt a shared responsibility

¹¹ Ibid.

¹² Timothy Besley and Torsten Persson, 'Why Do Developing Countries Tax So Little?' (2014) 28(4) *Journal of Economic Perspectives* 99.

¹³ International Monetary Fund, above n 10.

¹⁴ Ibid 5-13.

¹⁵ Ibid 5.

¹⁶ *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed on 17 December 1997, OECD (entered into force 15 February 1999).

for addressing corruption in international business transactions. Article 1 of the Convention requires countries to take measures ‘as may be necessary’ to establish a criminal offence under that country’s law for any person

intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.¹⁷

The OECD Convention establishes legally binding standards that create an offence where foreign public officials are bribed in international business transactions. While the OECD cannot enforce the adoption of specific legislation in nation states, it does monitor and report on progress subsequent to countries ratifying the Convention. Since its introduction there have been three phases of monitoring nation states against the Convention.

The OECD view on tax deductibility of ‘bribes’ has changed since the introduction of the Convention. In early publications the OECD recommended that ‘those Parties that do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility’.¹⁸ The Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, published in 2009, has now moved to recommend that ‘member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner’.¹⁹ Moreover, OECD guidance on facilitation payments recommends that member countries

undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon; [and] encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies’ books and financial records.²⁰

The OECD Convention continues to state that it urges ‘all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments’.²¹ Thus, the signal from the OECD is that facilitation payments are not acceptable in the ordinary course of doing business.

¹⁷ Ibid art 1, para 1.

¹⁸ OECD Working Group on Bribery in International Business Transactions, ‘Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption’ (Consultation Paper, January 2008).

¹⁹ OECD, *Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, (2009)64, 25 May 2009.

²⁰ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, above n 7, para VI.

²¹ Ibid para VII.

A further relevant Convention, the UN Convention against Corruption ('*UN Convention*'), was introduced by the UN in 2003. The aim of the UN Convention is

to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; to promote integrity, accountability and proper management of public affairs and public property.²²

The UN Convention has since been signed by 140 countries.²³ In a similar way to the OECD Convention, the UN Convention requires State Parties to adopt legislative and other measures to establish criminal liability for offering bribes to foreign public officials.²⁴ Like the OECD Convention, the UN Convention also covers the issue of tax deductibility of expenses that constitute bribes and facilitation payments. In relation to bribes the UN Convention states that 'each State Party shall disallow the tax deductibility of expenses that constitute bribes ... and, where appropriate, other expenses incurred in furtherance of corrupt conduct'.²⁵ In relation to facilitation payments, the UN position is noted in other policy documents:

[S]o-called 'facilitation payments', a form of bribery made with the purpose of expediting or facilitating the performance by a public official for a routine action, is a problem that many companies have to deal with. The United Nations Convention against Corruption prohibits facilitation payments.²⁶

The UN and OECD Conventions do not make specific comment on the use of trust structures to facilitate corrupt activity. However, the Base Erosion and Profit Shifting (BEPS) program currently being undertaken by the OECD is targeted at tax planning strategies that 'exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity'.²⁷ The OECD observes that, while some schemes are illegal, 'most are not', which 'undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level'.²⁸

3. HISTORICAL INSTITUTIONALISM

An historical institutionalist (HI) lens informs the analysis in this article. HI is used for analytical purposes, as it allows for the interaction between history, political institutions, public policies and societal preferences to be considered in understanding

²² *United Nations Convention against Corruption*, opened for signature 9-11 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) art 1.

²³ United Nations Office on Drugs and Crime, 'United Nations Convention against Corruption, Signature and Ratification Status as of 21 September 2016' <<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

²⁴ *United Nations Convention against Corruption* art 16.

²⁵ *Ibid* art 12, para 4.

²⁶ United Nations Office on Drugs and Crime in Cooperation with PricewaterhouseCoopers, *Anti-Corruption Policies and Measures of the Fortune Global 500*, above n 7.

²⁷ OECD, 'Base Erosion and Profit Shifting', <<http://www.oecd.org/tax/beps-about.htm>>.

²⁸ *Ibid*.

actual policy choices made.²⁹ Moreover, HI originally arose from a desire to explain variation, which is the objective of this study.³⁰ HI highlights a number of influencing factors within the political domain that contribute towards the different actions adopted in each of the scenarios discussed in this study.

HI is pluralist in its methodological approach, which allows for the multiple competing perspectives to be drawn out. HI supports macro-level analysis and seeks to focus on the interactions between multiple institutions and processes. The focus of HI on ‘relations between politics, state and society’³¹ draws out the politically nuanced scenarios discussed herein. It is a feature of HI that it focuses on a small number of cases that have some commonality,³² which is relevant for the current study. HI can also assist with emphasising the historical impact of policies and institutions on future policy development³³ which is also relevant to this research.

HI has a number of components that assist with analysis of the two activities investigated in this study. Those that are particularly relevant are:

1. *Path dependency*, which is the idea that extant policy has a continuing or constraining influence over policy into the future.³⁴ At least in part, path dependency relates to the political risk associated with introducing new policy. HI provides for policy to evolve, with the caveat that a high level of political pressure is required to do so.³⁵ Reference back to the ‘historical’ component of HI is needed to track how ideas become embedded in practice. HI suggests that the concept of increasing returns links to path dependency, as policy directions become more difficult to change when they have moved steadily in one direction over time. This then requires a ‘critical juncture’ to achieve change.
2. *Critical junctures* are defined by Collier and Collier as major transitions in institutional life that shape politics and policy formation into the future; frequently ‘the critical juncture is intertwined with other processes of change’.³⁶ The Panama Papers discovery may be considered as a critical juncture: it was a large event that resulted in meaningful societal impact. Moreover, the event resulted in significant policy change.
3. *Punctuated equilibria*, within the context of HI, involve the expectation that a policy will continue in a state of equilibrium, as determined by decisions made at its origin, or past point of punctuation. However, equilibria are not

²⁹ Sven Steinmo, ‘Historical Institutionalism and Experimental Methods’ in Orfeo Fioretos, Tulia G Falleti and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2016) 107.

³⁰ Ibid.

³¹ Ellen M Immergut, ‘The Theoretical Core of the New Institutionalism’ (1998) 26(1) *Politics & Society* 5, 17.

³² Kathleen Thelen, ‘Historical Institutionalism in Comparative Politics’ (1999) 2 *Annual Review of Political Science* 369.

³³ Jacob Torfing, ‘Path-Dependent Danish Welfare Reforms: The Contribution of the New Institutionalisms to Understanding Evolutionary Change’ (2001) 24(4) *Scandinavian Political Studies* 277.

³⁴ B Guy Peters, *Institutional Theory in Political Science* (Pinter, 1999) 63.

³⁵ Ibid 65.

³⁶ Ruth Collier and David Collier, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America* (Princeton University Press, 1991) 27.

permanent and are capable of change.³⁷ Punctuated equilibria highlight that new policies evolve during periods of crisis, with stasis visible during other periods.

4. *Power* is highlighted by HI in emphasising the uneven distribution of power among interest groups. The ‘institutional’ component of HI shows how institutions allocate power to some interests in the decision-making process. Studies have shown how policies may facilitate the organisation of interests through emphasising the legitimacy of particular claims.³⁸
5. *Ideas* are inevitably multiple and competing in tax policy. However, interests and ideas can interact, generating incentives that support certain behaviours and making ‘the expression of political views more or less viable for certain groups’, thereby impacting on the power held within certain institutions.³⁹ Perhaps the most important argument is the institutionalisation of certain behaviours, which constrains the potential for new ideas to be conveyed.⁴⁰ However, ideas can also help to communicate both the need for change and the form that this change should take. Ideas may also help in communicating the need for change and how this change can be structured. Blyth asserts that ‘change can reconstitute those interests by providing alternative narratives through which uncertain situations can be understood’.⁴¹ One example of a dominating idea in the New Zealand context is the ‘broad-base, low-rate’ approach that is generally adopted in relation to tax policy.

Historical institutionalism is used in this study to highlight the influences on the policy approaches adopted in the two case studies examined in this research. Specifically, the HI approach is used as a framework in section 6 to analyse the path dependency arrangements, punctuated equilibria, power and ideas that are visible in the two case studies discussed in sections 4 and 5.

4. CASE STUDY: NEW ZEALAND

New Zealand is typically perceived to be a country with low levels of corruption. This is supported by high rankings on many of the well-known surveys on corruption. Perhaps the most well-known measure of corruption is the Transparency International Corruption Perception Index (CPI). This is a global survey that measures the perceived level of public sector corruption across multiple countries. Corruption is measured on a scale from 0 to 100, where 0 is highly corrupt and 100 is not corrupt. Measures for New Zealand over the past five CPI rankings are outlined in Table 1. New Zealand is typically highly ranked by this measure and, while it fell from top position in 2014 and 2015, it returned to be equal first (with Denmark and Finland) in 2016.

³⁷ Peters, above n 34, 68

³⁸ Immergut, above n 31, 22.

³⁹ Peter A Hall, ‘The Movement from Keynesianism to Monetarism: Institutional Analysis and British Economic Policy in the 1970s’ in Sven Steinmo, Kathleen Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press, 1992) 90, 91.

⁴⁰ Ibid.

⁴¹ Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge University Press, 2002) 38.

Table 1: Corruption Perception Index Rankings and Scores: 2011-2015⁴²

	2012	2013	2014	2015	2016
CPI (ranking)	1= (from 176 countries)	1= (from 177 countries)	2 (from 175 countries)	4 (from 168 countries)	1= (from 176 countries)
CPI (score)	90/100	91 / 100	91 / 100	88/100	90/100

It is worth observing that the Transparency International ranking is a perceptions-based index focused on the public sector, rather than an index measuring actual behaviours across a range of sectors, such as the private sector or not-for-profit organisations. An example of what is arguably a more comprehensive survey is the World Justice Project Rule of Law Index. The most recent survey was undertaken in 2016 and covers 113 countries and jurisdictions from over 100,000 household and other expert surveys that assess how the rule of law is experienced by the general public worldwide.⁴³ The scores in the Index are built from assessments of 1,000 local respondents per country as well as local legal experts.

Indicators in the Rule of Law Index are grouped by eight factors, which are outlined in Table 2. In the most recent Index, New Zealand scored 0.83 overall on a scale of 0-1, where 1 is the strongest adherence to the rule of law. This placed New Zealand at position 8 behind Denmark, Norway, Finland, Sweden, the Netherlands, Germany and Australia. The specific positions held by New Zealand are outlined in Table 2. Order and security, civil justice and criminal justice are the categories where New Zealand is weakest.

Table 2: Rule of Law Index Rankings for New Zealand (2016)⁴⁴

	Score	Global Ranking	Regional Ranking
Constraints on government power	0.86	6	1/15
Absence of corruption	0.90	6	2/15 (behind Singapore)
Open government	0.84	6	1/15
Fundamental rights	0.82	10	1/15
Order and security	0.86	15	5/15 (behind Singapore, Japan, Hong Kong and Australia)
Regulatory enforcement	0.82	8	2/15 (behind Singapore)
Civil justice	0.78	11	4/15 (behind Singapore, Japan and the Republic of Korea)
Criminal justice	0.75	13	4/15 (behind Singapore, Hong Kong and Australia)

Reference to a more recently developed ranking places New Zealand in a less favourable position. The Tax Justice Network launched their Financial Secrecy Index in November 2015. This Index provides a ranking of 102 jurisdictions according to

⁴² Transparency International, 'Corruption Perceptions Index 2016'

<http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table>.

⁴³ World Justice Project, 'WJP Rule of Law Index 2016' <<http://worldjusticeproject.org/rule-of-law-index>>.

⁴⁴ Ibid.

the ‘secrecy and the scale of their offshore financial activities’.⁴⁵ The Tax Justice Network describe this ranking as ‘politically neutral’ and ‘a tool for understanding global financial secrecy, tax havens or secrecy jurisdictions’.⁴⁶ The term secrecy jurisdiction is used as an alternative to the term tax haven. New Zealand is ranked at position 54 on this Index, which is around the middle of the 102 countries included. The index covers measures such as how secretive the country is, how large its offshore financial services are and responses to 15 key financial secrecy indicators. In relation to the key financial secrecy indicators, New Zealand scores poorly on some transparency measures, in particular:

1. recorded company ownership, as New Zealand does not maintain company ownership details in official records;
2. public company accounts, as New Zealand does not require that company accounts be available on the public record; and
3. country-by-country reporting, as New Zealand does not require public country-by-country reporting by companies.⁴⁷

Of the 15 key financial secrecy indicators, only three score at the highest level and these three are related to efficiency of tax and financial regulation, and the network of bilateral treaties providing for information exchange on request.

Table 3 provides the Transparency International ranking (from 168 countries) and the World Justice Project ranking (from 113 countries) of the countries that are New Zealand’s top ten trading partners. Table 3 shows that many of the top trading partners are ranked highly. However, some, such as New Zealand’s top trading partner – China – are not. Other countries such as Malaysia and Thailand are also noted as countries with high levels of corruption.

Table 3: New Zealand’s Top Ten Trading Partners Rankings’ on Corruption Indices

Country	Trading Position	CPI Ranking (2016) ⁴⁸	Rule of Law Index Ranking (2016) ⁴⁹
China	1	83= / 168	80 / 113
Australia	2	13 / 168	11 / 113
US	3	16 / 168	18 / 113
Japan	4	18 / 168	15 / 113
Republic of Korea	5	37= / 168	19 / 113
Singapore	6	8 / 168	9 / 113
UK	7	10= / 168	10 / 113
Germany	8	10= / 168	6 / 113
Malaysia	9	54 / 168	56 / 113
Thailand	10	76= / 168	64 / 113

⁴⁵ Tax Justice Network, above n 3.

⁴⁶ Ibid.

⁴⁷ Tax Justice Network, ‘Report on New Zealand 2015’
<<http://www.financialsecrecyindex.com/PDF/NewZealand.pdf>>.

⁴⁸ Transparency International, above n 42.

⁴⁹ World Justice Project, above n 43.

A case study method is adopted in this study. The case study method is appropriate when the researcher has no control over the events being examined. Moreover, case studies typically examine phenomenon occurring within a real-life context.⁵⁰ The cases selected in this study are chosen as they reflect the underlying problem of potential damage to New Zealand's reputation as an honest jurisdiction in which to do business. Historical and current documents form the primary data source for the analysis, which is guided theoretically by historical institutionalism.

Notwithstanding the sometimes inconsistent results in rankings outlined above and the two case studies discussed in this article, New Zealand should not, as a general rule, be considered a corrupt country. The two case studies that are the topic of this research are selected due to their nature as outliers in a country that is typically considered as incorrupt. The following sub-sections outline these two tax case studies, both of which have attracted national and international criticism: the tax treatment of facilitation payments; and the tax treatment of foreign trusts.

4.1 Tax treatment of facilitation payments and bribes

Under s DB 45(1) of the *Income Tax Act 2007* (NZ) ('*Income Tax Act*'), bribes are not an allowable deduction. However, this is not extended to all bribes; instead, it is bribes given or offered within circumstances specified in ss 101, 102(2), 103(2), 104(2), 105(2), 105C or 105D(1) of the *Crimes Act 1961* (NZ) ('*Crimes Act*'). Moreover, s DB 45(1) does not apply in circumstances specified in s 105C(3) of the *Crimes Act*.

Before examining the specific sections of the *Crimes Act* two observations are necessary. The first is that s DB 45 overrides the General Permission of the *Income Tax Act*. The General Permission is s DA 1, which provides the general rule for deductibility of expenditures or losses, ie, that expenditures or losses must have a nexus with the derivation of income in order to meet the general test for deductibility. The second is the definition of a bribe, which is provided in s 99 of the *Crimes Act* as 'any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect'.

In theory, a bribe is different from a facilitation payment, as a bribe is made to change or ascertain an unknown outcome, whereas a facilitation payment is made to confirm or accelerate a known outcome. However, the boundary between a bribe and a facilitation payment is not always clear. The Serious Fraud Office in the United Kingdom takes the position that 'a facilitation payment is a type of bribe and should be seen as such'.⁵¹ This approach is also visible in organisations such as the United Nations and the OECD.

The activities that the *Crimes Act* denies a deduction for are as follows:

1. bribery of a judicial officer (s 101);
2. bribery of a Minister of the Crown (s 102(2));
3. bribery of a Member of Parliament (s 103(2));

⁵⁰ Robert K Yin, *Case Study Research: Design and Methods* (Thousand Oaks, 2nd ed, 1994).

⁵¹ Serious Fraud Office (UK), 'Facilitation Payments' <<http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx>>.

4. bribery of a law enforcement officer (s 104(2));
5. bribery of an official (s 105(2));
6. bribery of a foreign public official (s 105C);
7. bribery outside New Zealand of a foreign public official (s 105D(1)).

The issues around the tax deductibility of bribes are twofold. First, it is only in the abovementioned activities that a bribe is *not* tax deductible. The second issue around tax deductibility of bribes is in relation to the bribery of a foreign public official under s 105C of the *Crimes Act* and in particular s 105C(3) which provides for the section to *not* apply when the act is ‘committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action; and the value of the benefit is small’.

No guidance is provided on what is ‘small’, ie, whether it is a small specific value, such as \$100 or \$1,000, or whether it is small relative to some financial measure within the organisation, such as 1 per cent of income or 1 per cent of net profit after tax. Thus, there is potentially wide scope for interpretation of ‘small’ within different organisations. No guidance is provided by the Inland Revenue on this issue, nor is there any monitoring by Inland Revenue on the use of this particular deduction by New Zealand entities.⁵²

Some examples are provided of what a ‘routine government action’ is not, rather than what it is. The s 105C definition of routine government action is that it

does not include any decision about whether to award new business; or whether to continue existing business with any particular person or body; or the terms of new business or existing business; or any action that is outside the scope of the ordinary duties of that official; or any action that provides an undue material benefit to a person who makes a payment; or an undue material disadvantage to any other person.

Reference to ‘ensuring’ or ‘expediting’ performance gives this expenditure the characteristics of a facilitation payment, rather than a bribe. The primary argument raised in support of retention of the tax deductibility of facilitation payments is that these are necessary to ensure that New Zealand businesses remain internationally competitive if they are trading in countries where facilitation payments or bribes are common practice. However, as there are few countries now that retain the practice of allowing tax deductible facilitation payments and/or bribes, this argument is significantly weaker than it was some decades earlier when the practice was more common (only Australia, Canada, the USA and the Republic of Korea retain the option for such a deduction).

The OECD and UN Conventions, together with the expected behaviours from signatories to these Conventions, were outlined in section 2. New Zealand has attracted criticism from both of these international organisations for an approach to addressing corruption which is perceived to be lax. In particular, the OECD has noted

⁵² Information received by author from the Inland Revenue Department, requested under the *Official Information Act 1982* (NZ).

serious concerns about the lack of enforcement of the foreign bribery offence. Since becoming a Party to the Convention in 2001, New Zealand has not prosecuted any foreign bribery cases. Only four foreign bribery allegations have surfaced. New Zealand opened its first investigations into two of these allegations in July 2013.⁵³

Of further relevance to this study is the critique in the most recent OECD report on implementing the OECD Convention.⁵⁴ The report identifies that while New Zealand has adopted legislative provisions that deny the tax deductibility of bribes, there are weaknesses in the legislation. The report notes that ‘the lead examiners are seriously concerned that, 7 years after its phase 2 evaluation, New Zealand has not addressed any of the weaknesses identified in its regime of non-deductibility of bribes’.⁵⁵

4.2 Foreign trusts

The foreign trust issue came to light in New Zealand with the release of what have become known as the ‘Panama Papers’.⁵⁶ The Panama Papers are believed to comprise around 11.5 million fraudulently obtained confidential documents from a Panama-based law and trust services firm, Mossack Fonseca.⁵⁷ New Zealand was referenced in the documents and the New Zealand media were quick to associate a range of corrupt practices with Mossack Fonseca to New Zealand. The scandal was deepened with the identification of the involvement of the personal lawyers of the then Prime Minister, John Key, in lobbying to stop an Inland Revenue review of the rules associated with New Zealand foreign trusts.⁵⁸

4.2.1 *The tax treatment of foreign trusts in New Zealand*

In New Zealand, the tax residence of the settlor determines the tax treatment of the trust and whether the trust’s foreign sourced income is taxable in New Zealand. This is outlined in s HC 10 of the *Income Tax Act*: ‘a trust is a foreign trust in relation to a distribution if no settlor is resident in New Zealand at any time in the period that starts on the later of 17 December 1987 and the date on which a settlement was first made on the trust’. Where the trust has a New Zealand resident settlor, the trustee is responsible for including New Zealand and foreign-sourced income in their taxable income, regardless of the tax residency of the trustee. A trust will cease to be a

⁵³ OECD, *OECD Working Group on Bribery Annual Report 2014*, above n 6, 60.

⁵⁴ OECD, ‘Phase 3 Report on Implementing the OECD Anti-Bribery Convention in New Zealand’ (October 2013).

⁵⁵ Ibid 103.

⁵⁶ It is acknowledged that the abuse of New Zealand foreign trusts for potential illegal activity had been highlighted years before the Panama Papers were revealed. See Gareth Vaughan, Denise McNabb and Richard Smith, ‘New Zealand Foreign Trusts: the Scandals, the Reforms, and Some Throat-Clearing From the EU’, *Naked Capitalism* (4 August 2016) <<http://www.nakedcapitalism.com/2016/08/new-zealand-foreign-trusts-the-scandals-the-reforms-and-throat-clearing-from-the-eu.html>>, for a range of references to sources raising issues relating to New Zealand foreign trusts.

⁵⁷ Government Inquiry into Foreign Trust Disclosure Rules (constituted by John Shewan), *Government Inquiry into Foreign Trust Disclosure Rules: Report* (June 2016). A total of 752 lines relating to New Zealand are reported from a total 559,602 across all the documents (ibid 18).

⁵⁸ See, for example, Matt Nippert, ‘The Antipodes email: John Key, his lawyer and foreign trusts’, *New Zealand Herald* (29 April 2016) <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11630367>.

foreign trust if it makes any distribution after a settlor becomes a New Zealand resident, or if a New Zealand resident makes a settlement on the trust.⁵⁹

The relevant legislation is ss CW 54 and HC 26(1) of the *Income Tax Act*. Under ss CW 54 and HC 26(1), where foreign-sourced amounts are derived by a trustee who is resident in New Zealand, these amounts are exempt income if no settlor of the trust is a New Zealand resident in the income year. This exemption applies only to trustees, that is, if beneficiaries are New Zealand resident, then income received by beneficiaries is taxed. Where income is sourced in New Zealand it is also taxed as income in the hands of the trustee. Thus, the New Zealand approach to taxing offshore trusts is driven by the principle that non-residents are not taxed on non-New Zealand sourced income. However, it is also possible that this income may be free from tax in the foreign settlor's jurisdiction as a result of New Zealand's approach to taxing foreign trusts.⁶⁰

New Zealand's foreign trust rules were introduced in 1988, together with other international tax reforms. The rules depart from typical international practice of taxing on the basis of the residence of the trustee.⁶¹ It is acknowledged that the difference between the generally accepted international approach and the approach adopted in New Zealand creates an arbitrage opportunity. The rule is designed to protect the New Zealand tax base by restricting the ability of New Zealand residents to place assets in a trust that is managed offshore with non-resident trustees in order to avoid New Zealand income tax on the income of the trust.⁶²

New Zealand's approach is premised on the idea that while trustees have legal ownership of the assets, the settlor has the economic power, as the settlor establishes the trust, transfers assets to the trust, appoints the trustees, determines who the beneficiaries are and specifies the terms of the trust deed.⁶³ It has been suggested that one of the objectives of New Zealand's approach to the tax treatment of trusts is to assist New Zealand in developing an international financial services industry.⁶⁴ However, the primary objective was to protect against the use of non-resident trusts by New Zealanders to protect income from New Zealand income tax.

Inland Revenue do not report separately the value of fees collected from foreign trusts; instead they report this in an amount that includes employment income for third party employees and principals for foreign trust provider entities. This is estimated at approximately NZD 24 million per annum.⁶⁵ Also disclosed is the tax collected on fee income, goods and services tax, and pay-as-you-earn paid on behalf of third party

⁵⁹ For a more in-depth discussion on the tax treatment of trusts see Mark Brabazon, 'Trust Residence, Grantor Taxation and the Settlor Regime in New Zealand' (2016) 22(4) *New Zealand Journal of Taxation Law and Policy* 346; Michael Littlewood, 'Foreign Trusts, the Panama Papers and the Shewan Report' [2017] 1 *New Zealand Law Review* 59.

⁶⁰ *Ibid.*

⁶¹ Inland Revenue and New Zealand Treasury, *Tax Policy Report: Foreign Trusts Rules*, Report No T2014/2190/IR2014/620 (2014) <<http://www.treasury.govt.nz/publications/reviews-consultation/foreign-trust-disclosure-rules>>.

⁶² OliverShaw Limited, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016.

⁶³ Inland Revenue and New Zealand Treasury, above n 61.

⁶⁴ Jeremy Beckham and Craig Elliffe, 'The Inconvenient Problem with New Zealand's Foreign Trust Regime' (2012) 18(2) *New Zealand Journal of Taxation Law and Policy* 1.

⁶⁵ *Ibid.*

employees and principals for foreign trust providers of NZD 3 million per annum.⁶⁶ Therefore, the presence of foreign trusts does not provide a significant contribution either to the broader economy of New Zealand or to the tax base. Foreign trust registrations since 2006 in New Zealand total 11,671 as at 31 May 2016.⁶⁷

4.2.2 *Tax havens in New Zealand?*

There is a well-established industry in New Zealand facilitating non-New Zealand residents to establish and maintain foreign trusts in New Zealand. The industry adopts a position that it exists to support the New Zealand financial services industry. However, the tax treatment of foreign trusts has generated criticism of what is perceived as New Zealand's status as a tax haven in relation to foreign trusts.⁶⁸ The Inland Revenue / New Zealand Treasury response to this criticism is that secrecy is required in order for a country to be considered as a tax haven and as New Zealand has reasonable disclosure requirements, it is not possible for New Zealand to be a tax haven. However, this is a somewhat narrower qualification of the more widely accepted definition of what comprises a tax haven. Moreover, whether some aspects of New Zealand's disclosure regime are 'reasonable' is open to challenge. The more typically accepted view is that a tax haven has four key factors:

1. no or nominal tax on the relevant income;
2. lack of effective exchange of information;
3. lack of transparency; and
4. no substantial activities.⁶⁹

The first criterion, of no or nominal tax on relevant income, is not viewed as sufficient in isolation to classify a country as a tax haven. Thus, the New Zealand claim that 'tax havens are all about secrecy'⁷⁰ is a somewhat convenient claim that avoids the issue that tax may be avoided on income from foreign trusts due to the mismatch of treatment under New Zealand tax rules and other jurisdictions' tax rules. The New Zealand approach to taxing trusts is unlikely to result in any loss to the New Zealand tax base. However, this is not the same as there being no loss to any tax base and it is possible that the New Zealand approach facilitates point (1) of the tax haven definition above, which is no or nominal tax on the relevant income. It is also notable that despite the claims from New Zealand bureaucrats that it is not a tax haven, this does not detract from the fact that New Zealand is perceived this way.⁷¹

While most commentators do not refer to New Zealand as a tax haven, some of the language used suggests that it is not far away from being such an entity. Examples include:

⁶⁶ Ibid.

⁶⁷ Government Inquiry into Foreign Trust Disclosure Rules, above n 57, para 4.24.

⁶⁸ See, for example, Mark Bennett, 'Implications of the Panama Papers for the New Zealand Foreign Trust Regime' (2015) 21 *New Zealand Association of Comparative Law Yearbook* 27.

⁶⁹ OECD, 'Countering Offshore Tax Evasion: Some questions and answers on the project' (2009) <<https://www.oecd.org/ctp/harmful/42469606.pdf>>.

⁷⁰ Inland Revenue and New Zealand Treasury, above n 61, 2.

⁷¹ Beckham and Elliffe, above n 64, note sources identifying New Zealand as one of the top ten tax havens in the world.

1. the New Zealand Law Commission describing New Zealand as an ‘attractive haven’ for offshore trusts;⁷²
2. Littlewood suggesting the New Zealand tax system is structured in such a way that provides for the country to be ‘used as a tax haven’;⁷³
3. Deborah Russell proposing that ‘New Zealand is not a tax haven in general, but in respect of these foreign trusts, it operates as a tax haven’.⁷⁴

The submission from Littlewood to the Government Inquiry into Foreign Trust Disclosure Rules (Shewan Inquiry) also comments on the issue of whether New Zealand is a tax haven. Littlewood writes:

[I]f a ‘tax haven’ is defined as meaning ‘a jurisdiction that does not tax incomes’, then plainly New Zealand is not a tax haven. A more meaningful definition, however, is that a tax haven is ‘a jurisdiction that allows itself to be used by non-residents as a means of avoiding the tax that they would otherwise have to pay in their home countries’. By this definition, New Zealand is plainly a tax haven.⁷⁵

Thus, the question of whether New Zealand is a tax haven will be determined by the definition adopted of a tax haven. While it is evident that no New Zealand tax is avoided by the tax rules adopted for foreign trusts in New Zealand, the extent to which the New Zealand regime facilitates tax avoidance in other jurisdictions remains unclear. Moreover, it is unclear if a country is a tax haven when they facilitate tax avoidance in another jurisdiction.

On the issue of secrecy, while the New Zealand regime did not hold itself out as offering secrecy, this was effectively achieved due to the disclosure requirements. Issues highlighted in submissions to the Shewan Inquiry include the difficulty associated with detecting and preventing abuse of the rules as the limited disclosure requirements result in difficulty for tax authorities in other countries to identify New Zealand foreign trusts and for Inland Revenue to provide information on these trusts. The foreign jurisdiction requires knowledge of the New Zealand foreign trust in order to request information on the trust, but Inland Revenue may not hold information on the residency of the settlor of that trust.

It is generally accepted that New Zealand’s approach to foreign trusts does not impact on New Zealand’s tax revenue. This is reasonable, as New Zealand has never set out to tax the non-New Zealand sourced revenue of non-residents. However, it has also been claimed that no ‘substantive evidence [has] been produced to suggest that New Zealand foreign trusts have been used to facilitate evasion of other countries’ taxes’.⁷⁶

⁷² Law Commission, *Review of Trust Law in New Zealand: Introductory Issues Paper* (2010) 20 <<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP19.pdf>>.

⁷³ Michael Littlewood, ‘Using New Zealand as a Tax Haven: How Is It Done? Could It Be Stopped? Should It Be Stopped?’ (Working Paper No 1 of 2016, 11 April 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761993>.

⁷⁴ Deborah Russell, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016.

⁷⁵ Michael Littlewood, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016.

⁷⁶ OliverShaw Limited, above n62. Similar observations are visible in other submissions.

This may, at least in part, result from inadequate disclosure requirements that limit the opportunity for other jurisdictions to have knowledge of the presence of these trusts.

Littlewood observes that despite the generally agreed position that New Zealand's tax revenue is not diminished with its approach to foreign trusts, there are likely to be less obvious losses made in the form of damage to New Zealand's reputation. Indeed, Littlewood suggests the approach of New Zealand is

simply wrong in principle for a country to allow itself to be used to undermine other countries' tax systems – especially if it does so deliberately. Further, whilst there are plenty of other tax havens in the world, it would seem that there are no other members of the OECD that permit this particular form of tax avoidance.⁷⁷

Littlewood makes the point that if New Zealand changed its foreign trust regime, then those trusts currently taking advantage of New Zealand's approach would need to resort to other, potentially less 'safe', countries to achieve the same result.

4.2.3 *Disclosure requirements*

Until 2006, there were no ongoing disclosure requirements for foreign trusts.⁷⁸ New Zealand introduced additional disclosure requirements for Australian trusts in 2006. Section 59B of the *Tax Administration Act 1994* (NZ) requires a resident foreign trustee for a foreign trust to disclose (to the Commissioner of Inland Revenue): the name or other identifying particulars of the foreign trust; the name and contact details of the resident foreign trustees; whether a settlor is resident in Australia; and certain other particulars if the resident foreign trustee claims to be a qualifying resident foreign trustee. It is notable that this section does not require identification of the details or residence of the settlor, with the exception of when the residence is Australia.⁷⁹ However, no additional information disclosure is mandated; only that the residence is in Australia together with the aforementioned requirements relating to the name of the trust and resident foreign trustees.

Where the settlor is resident anywhere other than Australia, the trustee is not obliged to supply anything other than the name or other identifying particulars that relate to the foreign trust; for example, the date of the settlement on the trust. The requirement for the trustee to advise Inland Revenue of the name or other identifying particulars of the trust is provided only on initial registration and no annual updating is required.⁸⁰

Documentation from Inland Revenue and the New Zealand Treasury in 2014 notes concerns about

the adequacy of our disclosure and record-keeping requirements – particularly in light of expanding obligations to exchange information now and in the future as a result of FATCA [Foreign Account Tax Compliance Act], AEOI [automatic exchange of information], and the multilateral agreement for exchange of information and assistance.⁸¹

⁷⁷ Littlewood, 'Using New Zealand as a Tax Haven', above n 73, 4.

⁷⁸ Government Inquiry into Foreign Trust Disclosure Rules, above n 57, 14.

⁷⁹ *Tax Administration Act 1994* (NZ) s 59B(1)(c).

⁸⁰ Littlewood, above n 75, 19.

⁸¹ Inland Revenue and New Zealand Treasury, above n 61, 2.

The same document notes a concern about New Zealand's ability to 'realistically bring the regime up to the appropriate standard in a way that is enforceable and ensures compliance'.⁸² The disclosure rules were highlighted in submissions as being particularly problematic. For example, Littlewood writes: 'if the New Zealand government would prefer not to allow the country to be used as a tax haven, the remedy would be straightforward. All that would be required would be to strengthen the disclosure requirements'.⁸³

As noted by a respondent to the Shewan Inquiry, the 2006 response to the Australian request for greater disclosure suggests that a problem did exist with the disclosure regime of the time: '[t]he fact that the Australian government negotiated a special deal with New Zealand suggests that Australians were using New Zealand foreign trusts inappropriately'.⁸⁴ It is also notable that since this time, there have been very few Australian trusts registered in New Zealand.⁸⁵ It is also relevant that the Australian *Income Tax Assessment Act 1936* contains provisions that limit Australian residents from using New Zealand trusts to avoid Australian taxation.⁸⁶

4.2.4 Submissions to the Shewan Inquiry

There were a total of 22 submissions to the Shewan Inquiry that were publicly released. The Shewan Inquiry report refers to 23 submissions, but one (from Amicorp New Zealand Limited) was not released. Amicorp New Zealand is part of Amicorp group who describe themselves as one of the top ten trust companies in the world.⁸⁷ On the New Zealand webpage, New Zealand foreign trusts are described as

an effective estate planning vehicle increasingly used as an alternative to trusts from zero tax jurisdictions as NZ is considered a high tax jurisdiction and a white list country. If properly established, it offers excellent tax efficiency and can be easily combined with other investment structures in high tax jurisdictions.⁸⁸

The terms of reference for the Shewan Inquiry relate to:

1. New Zealand's existing foreign trust disclosure rules, including enforcement of the rules, exchange of information with foreign jurisdictions and practices for complying with the rules;
2. whether the existing foreign trust disclosure rules and enforcement of the rules are sufficient to maintain New Zealand's reputation, taking into account New Zealand's commitment to the OECD base erosion and profit shifting action plan, the global standard for automatic exchange of information, the tax treaty network, anti-money laundering and countering financing of terrorism laws and other related regimes; and

⁸² Inland Revenue and New Zealand Treasury, above n 61, 2.

⁸³ Littlewood, above n 75, 18.

⁸⁴ Russell, above n 74.

⁸⁵ Government Inquiry into Foreign Trust Disclosure Rules, above n 57.

⁸⁶ Chartered Accountants' Australia New Zealand, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016.

⁸⁷ Amicorp Group <<http://www.amicorp.com/amicorp-group/index>>.

⁸⁸ Ibid.

3. options for enhancements to New Zealand's foreign trust disclosure rules.⁸⁹

Not all responses addressed all components of the terms of reference. Nine of the 19 responses to the first point above responded that they believed the current policy settings were fit for purpose, with one submitter choosing not to make their own response and instead concurring with another submitter in this respect. A further submitter did not comment on the extant rules, and instead noted the potential benefits to New Zealand from the presence of foreign trusts.

The other responders adopted a range of positions that reflected dissatisfaction with the current policy settings. These ranged from suggesting the current scheme is 'fundamentally flawed'⁹⁰ to suggesting that the current New Zealand tax law facilitates tax evasion in the trusts home country⁹¹ or that loopholes were created as a result of New Zealand's tax law.⁹² Multiple submissions observed that it was not New Zealand potentially losing tax revenue from the current tax policy settings relating to foreign trusts.

In relation to disclosure, most submitters were in agreement that there was a need for greater disclosure. Most submitters felt that the current rules were inadequate (10) or that the introduction of Automatic Exchange of Information would act to resolve current disclosure issues. Only one submitter to this question expressed the view that adequate controls and processes were in place.

The third issue relates to anti-money laundering and countering foreign terrorism. The majority of submitters did not expressly comment on this particular issue, with those that did generally agreeing that the rules were adequate or that there was insufficient evidence of failure of the current scheme. Only two respondents suggested that the current rules were inadequate.⁹³

An additional issue that arose frequently in submitters' responses was the need to protect New Zealand's reputation as a jurisdiction with low levels of corruption and good regulation. Some suggested that New Zealand's reputation had been damaged as a result of the treatment of foreign trusts, while others were more concerned that the future of New Zealand's reputation was not damaged by an inadequate response to the Panama Papers.

5. THE NEW ZEALAND RESPONSE

Two different responses to the two different issues raised in the previous section are visible in New Zealand. There has been little reaction to criticism of New Zealand's tax treatment of facilitation payments, indicating path dependency. By way of contrast, there has been significant and prompt reaction to New Zealand's involvement in the Panama Papers saga, indicating a critical juncture and changes in prevailing ideas. The different responses are outlined in the following sub-sections.

⁸⁹ New Zealand Gazette, *Establishment of the Government Inquiry into Foreign Trust Disclosure Rules*, Notice No 2016-go2253, 19 April 2016 <<https://gazette.govt.nz/notice/id/2016-go2253>>.

⁹⁰ Simon Boyce, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016.

⁹¹ Littlewood, above n 75.

⁹² Russell, above n 74.

⁹³ Chartered Accountants' Australia New Zealand, above n 86, and Transparency International, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016.

5.1 Tax treatment of facilitation payments

In November 2014, the New Zealand government introduced the Organised Crime and Anti-corruption Legislation Bill with the expressed aim of strengthening the law to combat organised crime and corruption.⁹⁴ The Bill was passed into law in November 2015, by way of 15 amendment Acts. The changes were intended to introduce an all-of-government response to addressing various components of organised crime. Components addressed include attending to gaps in the current anti-corruption framework, increasing penalties for bribery and corruption and multiple amendments to offences such as human trafficking, identity related offences and money laundering offences.⁹⁵

The legislative changes allowed New Zealand to ratify the UN Convention, and enable implementation of the *Agreement between the Government of the United States of America and the Government of New Zealand on Enhancing Cooperation in Preventing and Combating Crime*.⁹⁶ It further extends New Zealand's compliance with a range of other international conventions.

The Bill also resulted in changes to the *Income Tax Act* in relation to the acceptance of a bribe by a foreign public official. However, the legislative changes did not result in any changes likely to result in different behaviours or different interpretations of the legislation, with the issues outlined in the previous section still remaining.

There were 23 (written and oral) submissions to the Law and Order Select Committee on the Organised Crime and Anti-corruption Legislation Bill, most of which were concerned with issues such as the timing of implementation and information sharing provisions. Of the 20 written submissions to the Select Committee on the Bill, two submissions directly commented on facilitation payments. They also made reference to New Zealand's reputation as follows:

At stake is New Zealand's reputation as one of the least corrupt countries in the world. By taking a strong stance on facilitation payments, and providing clarity to all New Zealand organisations trading and operating abroad, the government will also send a clear and important message to the international community that honest transactions are expected when working with New Zealand Inc. and New Zealand companies;⁹⁷

and

A facilitation payment is still a bribe no matter how low the amount and such payments inculcate a culture of corruption. Given New Zealand's leadership in the field of ethics and integrity, and also its deserved global

⁹⁴ Explanatory Note, Organised Crime and Anti-corruption Legislation Bill 2014 (NZ) <<http://www.parliament.nz>>.

⁹⁵ Ministry of Justice (NZ), 'Organised Crime and Anti-Corruption Legislation Bill – Initial Briefing' (5 February 2015) <https://www.parliament.nz/resource/en-NZ/51SCLO_ADV_00DBHOH_BILL56502_1_A420384/57a531cdb1c2734fed0ec6b756e7b11ee5067f72>.

⁹⁶ *Agreement between the Government of the United States of America and the Government of New Zealand on Enhancing Cooperation in Preventing and Combating Crime*, signed on 22 March 2013 (not yet in force), <<http://www.treaties.mfat.govt.nz/search/details/p/54/590>>.

⁹⁷ Transparency International, Submission to the Law and Order Select Committee on the Organised Crime and Anti-corruption Bill, February 2015, 6.

reputation for anti-corruption, it seems anomalous that we would wish to leave such a loophole.⁹⁸

Two other submissions made reference to potential damage to New Zealand's reputation. However, this was not in relation to the tax issue and instead applied to organised crime.⁹⁹

The submission from the New Zealand chapter of Transparency International raised two issues.¹⁰⁰ The first was the suggestion that the Bill should more fully clarify that facilitation payments are bribes. Arguments for this included that this would align New Zealand with other jurisdictions that have adopted this approach, and that 'a bribe is a bribe if it is a large payment or a small payment'.¹⁰¹ The submission makes the point that the UN Convention prohibits all bribes to government officials, regardless of their size. The second point raised is the observation in the Transparency International submission that 'if a facilitation payment were a due advantage it would be regulated by law, classified as a fee/expense, be budgeted and be recorded for legitimate tax or transaction cost treatment'.¹⁰² This statement captures a key issue. Legitimate business expenditure will meet the requirements of s DA 1 of the *Income Tax Act*. The payment will have the necessary nexus with income and there will be no question of its deductibility status for tax purposes. Section DB 45 of the *Income Tax Act* is only necessary where payments fall outside what is typically considered to be legitimate business expenditure.

5.2 Foreign trusts

By way of contrast with New Zealand's response to criticisms pertaining to the tax treatment of facilitation payments, the government response to New Zealand's involvement in the Panama Papers is markedly different. The issue first came to light via the media in early 2016 and by April 2016 the Shewan Inquiry (John Shewan being one of New Zealand most well-known tax professionals) was underway. The report was specified to be due by 30 June 2016, less than four months after the Panama Papers were first released.

The Shewan Inquiry attracted a similar number of submissions, 23, to those to the Law and Order Select Committee on the Organised Crime and Anti-corruption Legislation Bill. However, these were focused on the tax issues, and New Zealand's global reputation. The Shewan Inquiry report includes 20 recommendations under the headings of:

1. registration process (6);
2. strengthened disclosure on registration (3);
3. ongoing tax obligations (4);
4. registration and annual filing fee (1);

⁹⁸ Michael Macaulay, Submission to the Law and Order Select Committee on the Organised Crime and Anti-corruption Bill, February 2015, 1.

⁹⁹ New Zealand Bankers' Association, Submission to the Law and Order Select Committee on the Organised Crime and Anti-corruption Bill, February 2015.

¹⁰⁰ Transparency International, above n 97.

¹⁰¹ Transparency International, above n 97, 5.

¹⁰² Transparency International, above n 97, 10.

5. expansion of scope and application of anti-money laundering rules (3);
6. suspicious transaction reporting (2); and
7. information sharing (1).

The Government's response¹⁰³ was to agree with all the recommendations, although the 'way in which a small number are implemented will be tweaked'.¹⁰⁴ In the media release accompanying the Government's response to the recommendations, it was noted that 'the Shewan Inquiry's recommendations are sensible and well-reasoned and by acting on all of them, we will ensure that our foreign trust disclosure rules are strengthened and New Zealand's reputation is protected'.¹⁰⁵ It was also stated that the Government intends to move quickly to implement the recommendations.

The Inquiry questions directed respondents to address reputation, with the question, '[a]re the existing foreign trust disclosure rules adequate to ensure New Zealand's reputation as a country that co-operates with other jurisdictions to deter abusive tax practices is maintained?' Therefore, it is not surprising that the majority of the submissions addressed the issue of New Zealand's reputation, with only four submissions not touching on the issue of either damage to, or the importance of, New Zealand's reputation. However, two contrasting positions are evident from these submissions. The first is visible in the submission from the New Zealand Council of Trade Unions as outlined below:

New Zealand's influence in such forums depends on its reputation. We cannot credibly call on other countries to help us prevent tax abuse in New Zealand if we are at the same time aiding and abetting the gouging of their revenue bases. In addition, tolerating such abuse undermines trust in New Zealand's legal and administrative systems. Accepting such abuse on the basis that it makes money for a small group of lawyers and accountants gives the impression that our principles and morality are for sale. That is bad for New Zealand's social cohesion and in the long run bad for us economically because it discourages good business practices, longer term investment and longer term thinking.¹⁰⁶

This is the position adopted by most of the Inquiry respondents and may be contrasted with the submission from OliverShaw:

There thus seems little foundation in any assertions that New Zealand's international reputation has been damaged by the operations of New Zealand foreign trusts. Certainly no evidence has been produced to demonstrate how this has led to damage to New Zealand except perhaps to the extent that some more ill-considered New Zealand media coverage has impacted

¹⁰³ New Zealand Government, *Government Inquiry into Foreign Trust Disclosure Rules: Government's Response* (July 2016) <<http://taxpolicy.ird.govt.nz/sites/default/files/news/2016-07-13-inquiry-response.pdf>>.

¹⁰⁴ Inland Revenue, 'Government's Response to Shewan Inquiry Recommendations' (Media Statement, 13 July 2016).

¹⁰⁵ *Ibid.*

¹⁰⁶ New Zealand Council of Trade Unions, *Submission to the Government Inquiry into Foreign Trust Disclosure Rules*, May 2016, para 2.8.

negatively on the reputation of New Zealand foreign trusts to be a safe haven for the family wealth of non-residents.¹⁰⁷

5.3 Summary

This section has outlined the New Zealand responses to the visibility given to the tax treatment of foreign trusts and the tax treatment of facilitation payments. A response that is perhaps best described as inadequate is present in relation to the tax treatment of facilitation payments with, in effect, no resulting changes that would impact on extant outcomes. This may be contrasted with the timely and comprehensive response associated with the tax treatment of foreign trusts, where the outcomes are likely to be significantly different as a result of reforms implemented.

6. LESSONS LEARNED

The two activities discussed in this article are not the only activities likely to impact on New Zealand's international reputation as a country with low corruption. They are chosen here as they have both recently attracted criticism. Moreover, they are of interest as, while both have the potential to negatively impact on New Zealand's global reputation, the two activities resulted in different governmental responses: one activity continues largely unchanged while the other has been the subject of a government Inquiry and the subsequent acceptance of multiple policy changes. There are a number of observations that may be made from the outcomes of the two issues, which are outlined over the following sections. These observations are informed by the HI lens outlined in section 3.

6.1 Path dependency and critical junctures

As noted in section 3, policy is expected to evolve. However, in many cases, a high level of political pressure is needed to generate significant policy change. This is particularly the case in tax policy. Periods of stasis are evident for both the tax treatment of facilitation payments and the tax treatment of foreign trusts. However, a critical juncture is only visible in the case of the trust activity, whereas the tax treatment of facilitation payments continues on the path dependent trajectory.

Both activities considered in this study were likely to impact negatively on New Zealand's reputation as a country with low levels of corruption. The facilitation payments issue generated criticism from international organisations, but did not receive the same profile as the trusts issue, and also did not generate the same level of public interest as the foreign trust concern. By way of contrast, the international attention created by the Panama Papers issue, and New Zealand's inclusion as a participating country in questionable activity, was significantly higher. While it is not always evident when an event may be considered to be a critical juncture, one indication is that it becomes difficult to return to a point where other alternatives are available once a particular option is selected.¹⁰⁸ This is the situation in the case of the foreign trusts issue, as it will be difficult for New Zealand to reverse agreed actions, particularly in relation to increasing information disclosure.

¹⁰⁷ OliverShaw Limited, above n 62.

¹⁰⁸ James Mahoney, 'Path Dependence in Historical Sociology' (2000) 29(4) *Theory and Society* 507.

New Zealand's potential reputational damage was highly visible in the foreign trusts issue. There were multiple references to New Zealand's reputation in submissions to the Shewan Inquiry. Indeed the Shewan Inquiry reported New Zealand's 'compliant' rating in the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes in the 2013 Peer Review Report and that New Zealand 'takes pride in its reputation as a country that cooperates with other jurisdictions to deter abusive tax practices'. The Shewan Inquiry report goes on to state that '[t]he Inquiry was informed by the Government that maintenance of that reputation is important'.¹⁰⁹ The potential reputation damage from the high level of visibility associated with the Panama Papers generated the sufficient critical juncture to result in a high-level inquiry and subsequent policy change. The concern with damage to New Zealand's reputation was present from the time the Panama Papers issue was first raised, and continued to be visible in the terms of reference, submissions to the Inquiry, the report and the government responses to the report. However, the events surrounding the facilitation payment issue were diluted and did not have the same profile or impact as the Panama Papers, thereby not appearing to raise the same level of potential damage to New Zealand's reputation.

6.2 Punctuated equilibria

Punctuated equilibria are demonstrated with minimal change over an extended period of time, followed by a period of rapid and significant change, with eventual reversion to new stable policy. Punctuated equilibria are visible in relation to foreign trusts, with the change of policy direction in response to the publicity associated with the Panama Papers scandal. However, again this is not visible with facilitation payments. There was not a sufficiently large or powerful issue to generate the change in policy direction for facilitation payments, unlike the foreign trusts issue.

Under HI, factors that explain why a set of arrangements is created may be quite distinct from those that explain why it has endured over time; for example, punctuated equilibrium indicates that new structures may evolve during times of crisis, with periods of stasis prominent during other periods. A country operating as a tax haven poses an international threat, as compared to allowing tax deductions for facilitation payments, which will only impact on that own nation state's tax revenue. Thus, the two tax issues ultimately have different impacts: the tax treatment of foreign trusts has the potential to impact on the tax revenue of multiple other jurisdictions, likely exerting higher levels of pressure for change. As globalisation impacts increasingly on tax policy, it is perhaps inevitable that an individual nation state's tax policy that is detrimental, or potentially detrimental, to another nation state's tax policy will see the first-mentioned such state come under pressure to accede to a more commonly adopted policy direction.¹¹⁰

6.3 Power

The two tax issues discussed in this article were presented differently to the public. Submissions for the facilitation payments issue were sought within a number of other broad issues. In contrast, the tax treatment of foreign trusts was presented as an

¹⁰⁹ Government Inquiry into Foreign Trust Disclosure Rules, above n 57, para 2.3.

¹¹⁰ The growing demand for increased transparency in fiscal arrangements is noted in Pravir Tesiram and Stephen Law, 'Proposed Reforms to New Zealand Foreign Trust Rules' (2017) 23(2) *Trusts & Trustees* 179.

isolated, and specific, issue. The inclusion of one issue within a group of larger issues appears to have diluted the impact of interest groups who may otherwise have focused on the issue of facilitation payments. Submissions were expected to cover multiple issues, of which facilitation payments and the tax deductibility thereof, were not the most important to many of the interest groups. This is reflected in the fact that only two of the submissions commented on the facilitation payment issue.

Steinmo observes that the balance of power may change over time, which is also a factor that can help explain the different treatments afforded to the two activities discussed herein.¹¹¹ The OECD has been involved in international tax policy for decades; for example, the OECD Model Tax Convention has been in place for over 60 years. The general trend is for tax policy among OECD countries to become more aligned, with projects such as the OECD's BEPS project likely to significantly impact on nation states' tax policies.

It is notable that the policy issue that did generate change – the tax treatment of foreign trusts – was agreed to have no negative impact on the New Zealand tax base. By way of contrast, the tax policy issue that did not generate change – the tax deductibility of facilitation payments – is likely to negatively impact on the New Zealand tax base. While it would appear that the facilitation payments made to overseas public officials are intended to be 'small', there is no knowledge of the amount of such payments that are made, and therefore it is not possible to quantify their tax impact. However, it may not be unreasonable to posit that their presence is valuable to New Zealand businesses due to their retention despite disapproval from international bodies. It is suggested that if they had little or no value to New Zealand enterprise, then it would be a straightforward and practical solution to repeal their tax deductible status. Moreover, as noted in section 5.1, legitimate business expenditure will meet the requirements of s DA 1 of the *Income Tax Act*, and the statutory nexus between the expenditure and the income earning process will be present, thereby negating the need for s DB 45.

Power is also evident in the terms of reference for the Inquiry for the foreign trusts issue. Reference to the title of the Inquiry provides an indication of this: 'Government Inquiry into Foreign Trust Disclosure Rules'. The Inquiry is thereby restricted to disclosure rules and minimises the potential for the fundamental issues around New Zealand's approach to taxing foreign trusts to be addressed.

6.4 Ideas

The primary driver of the difference in responses appears to be concern with New Zealand's reputation. Respondents to the Law and Order Select Committee on the Organised Crime and Anti-corruption Legislation Bill were not strongly focused on the tax elements of the Bill. Instead, it was the anti-money laundering and organised crime components that attracted the majority of the submission commentary. This is likely to be, at least in part, because the tax issues were 'hidden' within a number of other changes. By way of contrast, in the case of the Shewan Inquiry the focus was clearly on the tax issues and there was no potential for the issues to be diluted within a broader range of issues. However, what was evident in the submissions is that the questions directed focus to be on the disclosure rules, rather than the wider issues of

¹¹¹ Sven Steinmo, 'The Evolution of Policy Ideas: Tax Policy in the 20th Century' (2003) 5(2) *British Journal of Politics and International Relations* 206.

whether New Zealand was acting as a tax haven. Notwithstanding this comment, addressing the disclosure rules effectively would be likely to end any accusation that New Zealand was facilitating tax evasion in other jurisdictions.

The role of New Zealand as a ‘good global citizen’ arose in many submissions to the Shewan Inquiry.¹¹² One view was that ‘it is certainly not up to, or even possible, for New Zealand to attempt through its tax laws to compensate for what we may see as deficiencies of the tax policies of other countries’.¹¹³ However, the issue was less about deficiencies of tax policy in other countries and more about insufficient disclosure to allow other countries to enforce their tax laws. This was represented in other submissions, for example that ‘it is not New Zealand’s role to be the prime enforcer of other countries’ tax systems ... However, New Zealand should be in a position to provide reasonable assistance to other countries with the enforcement of their laws when requested...’.¹¹⁴ Thus, there is a conflict between New Zealand’s laws and how these will impact in other jurisdictions. The incompatibility between New Zealand taxing on the basis of residence of the settlor, while much of the rest of the world taxes on the basis of the residence of the trustees, was not disputed. The issue was whether this was a concern that New Zealand should be addressing. In general, the view was that New Zealand’s tax treatment was aligned with overall principles of taxation and ‘tax differences (and mismatches) should not normally be a specific concern to be addressed’.¹¹⁵

The KPMG submission to the Shewan report notes the global trend for countries to provide support for each other in preventing behaviours such as tax evasion and illegal money flows.¹¹⁶ The greater focus on the international impact of New Zealand’s behaviour was evident in relation to the foreign trusts issue. By way of contrast, there was no suggestion that the tax deductibility of facilitation payments in New Zealand would impact on another jurisdiction.

The OECD is increasing efforts in relation to automatic exchange of information, resulting from increasing globalisation and cross-border activities. New Zealand’s response to the foreign trusts issue shows willingness to cooperate with other tax jurisdictions, thereby protecting its reputation as an honest country. The OECD observes the importance of automatic exchange of information in bringing national tax administrations in line with the globalised economy.¹¹⁷ The common reporting standard (the global framework for the collection, reporting, and exchange of financial account information about entities and individuals outside their tax resident jurisdiction) has been introduced into New Zealand law.¹¹⁸ From 1 July 2017, under automatic exchange of information, non-exempt New Zealand financial institutions will need to collect and report information to Inland Revenue on accounts held by or

¹¹² See also discussion on neighbourliness in Huigenia Ostik, ‘Neighbourliness and New Zealand’s Foreign Trust Regime’ [2017] 2 *New Zealand Law Review* 285.

¹¹³ OliverShaw Limited, above n 62, 4.

¹¹⁴ PricewaterhouseCoopers, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016, 2.

¹¹⁵ KPMG, Submission to the Government Inquiry into Foreign Trust Disclosure Rules, May 2016, 7.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Inland Revenue, ‘Automatic Exchange of Information and the Common Reporting Standard’ (2017) <<http://www.ird.govt.nz/international/exchange/crs/aeoi-crs/>>.

(in certain circumstances) controlled by non-residents. This information may then be shared with other tax jurisdictions in specific countries.¹¹⁹

Some ideas have a greater ‘fit’ in a particular political economic or social environment – such as automatic exchange of information. Thus, ideas are not limited to previous policy choices and, as is visible in the treatment of trusts in New Zealand, ideas may include new policy options. Steinmo suggests that ideas may change over time when new information is received that challenges the status quo; where there are inconsistencies in extant beliefs; where the context changes; or where individuals may be persuaded that a different approach is preferable.¹²⁰ All of these are visible in relation to the foreign trusts issue. Many are also present in relation to the facilitation payments issue, with the notable exception of the last point, which is persuading individuals that a different approach is preferable.

Ideas can be used to validate certain approaches in policy debates. This is visible in both scenarios. In relation to facilitation payments, ideas were used to justify no action. Extant policy arrangements, including the requirements for deductibility that the value of the benefit was small and it was to a foreign public official for a routine government action, have been used to justify their retention, despite the OECD highlighting their undesirable nature. By way of contrast, in relation to foreign trusts, ideas such as automatic exchange of information and protecting the New Zealand reputation for low corruption were used to support change.

7. CONCLUSION

Analysis of governmental responses to two different areas relating to corruption in New Zealand highlights some key activities that appear to have impacted on the outcomes of reviews into two activities relating to tax and corruption. Historical institutionalism helps to highlight the changes that resulted from the two different policy scenarios outlined in this case study. While both had the potential to impact negatively on New Zealand’s reputation as a country with low levels of corruption, only the tax treatment of New Zealand foreign trusts was sufficiently serious to generate significant policy change. The critical juncture generated by the Panama Papers appears to have assisted with creating a sufficient crisis to generate a more significant policy response. The potential reputation damage to New Zealand’s image of low levels of corruption was greater in relation to the foreign trusts issue, due to the reach of the crisis and its potential to negatively impact on New Zealand’s global reputation as an incorrupt jurisdiction. The communication of the foreign trusts issue as a stand-alone ‘problem’ may be contrasted with the inclusion of the tax treatment of facilitation payments within a broader set of issues, which reduced the visibility of the issue in the way it was communicated, and the submissions and their responses.

The dominating global ideas relating to automatic exchange of information appear to have had a strong impact on both the submissions to the Shewan Inquiry and on the recommendations from that Inquiry. Greater international media interest in the subject, rather than solely national media reporting, appears to have impacted on the speed of

¹¹⁹ Inland Revenue, ‘Automatic Exchange of Financial Account Information - Information for Financial Institutions’ (2016) <<http://taxpolicy.ird.govt.nz/publications/2016-other-aeoi-fact-sheet/overview>>. First exchanges are likely to occur in 2018.

¹²⁰ Steinmo, ‘The Evolution of Policy Ideas’, above n 111.

decision-making and action in relation to the foreign trusts issue. This is despite the fact that any negative financial impact for New Zealand is likely to result from the tax deductibility of facilitation payments, rather than the tax treatment of foreign trusts.

The limitations associated with this study are acknowledged. There is limited ability to generalise from a case study. Moreover, a case study approach using New Zealand, which is a country with low levels of corruption, may have limited application to other countries where corruption is embedded within the culture of that location. The study also only examines two examples where New Zealand has been tainted with corruption. Future research could examine other tax examples or extend into other regulatory and disclosure regimes within New Zealand.

The study leads to the suggestion that concern for New Zealand's reputation is likely to be the catalyst for future changes, rather than a desire to be a good global tax citizen. While these two factors may be connected, submissions to the Shewan Inquiry showed little concern for other jurisdictions' tax revenue collection, but greater disquiet relating to the potential impact on New Zealand's reputation in the event that no action was taken.