



International treaty examination of the Agreement between the Government of New Zealand and the Government of Niue on the Exchange of Information with Respect to Taxes

Report of the Foreign Affairs, Defence
and Trade Committee

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Agreement between the Government of New Zealand and the Government of Niue on the Exchange of Information with Respect to Taxes

Recommendation

The Foreign Affairs, Defence and Trade Committee has conducted an international treaty examination of the Agreement between the Government of New Zealand and the Government of Niue on the Exchange of Information with Respect to Taxes, and recommends that the House take note of its report.

On 29 August 2012, New Zealand signed the agreement between the Government of New Zealand and the Government of Niue on the Exchange of Information with Respect to Taxes.

Under this agreement, New Zealand and Niue can request information from each other with the aim of detecting and preventing tax avoidance and evasion. Such agreements are used to establish a mechanism for facilitating the exchange of information when a comprehensive tax treaty may not be appropriate.

Niue has historically been recognised as a tax haven by the Organisation for Economic Co-operation and Development (OECD), and in spite of its having repealed all the legislation which led to this designation with effect from 2006, Niue still appears on some countries' tax haven blacklists. Niue is seeking to conclude exchange of information agreements with other countries to demonstrate that it is not in fact a tax haven any longer, and in the hope that it will be removed from blacklists. As New Zealand is Niue's largest economic partner, its first approach was to New Zealand.

We asked the Inland Revenue Department (IRD) what benefits the agreement would confer, for both parties. We heard that it is largely beneficial to Niue, in its efforts to improve its international standing. The agreement will have minimal benefits for New Zealand, as we will be unlikely to need to request much tax information from Niue.

There is an inherent danger in such an agreement in that any personal and financial information exchanged passes out of New Zealand's hands. Strict provisions governing the disclosure and use of the information are enshrined in the treaty. The IRD also told us that both jurisdictions have laws to protect the information, which meet the international standards imposed and monitored by the *Global Forum on Transparency and Exchange of Information in Tax Matters* (the global forum), a multilateral framework for global transparency and exchange of information in tax matters among OECD and non-OECD economies. Should information be mishandled, New Zealand can report it to the Global Forum. New Zealand could also withdraw from the treaty.

We asked the IRD if we were entering into an agreement that could be difficult to administer in practice because of Niue's lack of robust administration and history of on-going border problems. They replied that some dangers remained, but pointed out that as a member of the global forum New Zealand has an obligation to enter into information exchange agreements with any other forum members that request them. We heard that the

global forum is perceived internationally as a success, and that it is in New Zealand's overall interests to commit itself to the treaty.

The national interest analysis for the treaty is appended to this report.

Appendix A

Committee procedure

The treaty was referred to the committee for examination on 2 October 2012. We met on 31 January 2013 to hear evidence and consider it. We heard evidence from the Inland Revenue Department.

Committee members

John Hayes (Chairperson)
Hon Phil Goff
Dr Kennedy Graham
Hon Tau Henare
Dr Paul Hutchison
Su'a William Sio
Lindsay Tisch

Appendix B

National Interest Analysis

Agreement between the Government of New Zealand and the Government of Niue on the Exchange of Information with Respect to Taxes

Executive summary

1. On 29 August 2012, New Zealand signed the Agreement between the Government of New Zealand and the Government of Niue on the Exchange of Information with Respect to Taxes (the Niue TIEA).
2. The Niue TIEA establishes a mechanism by which tax officials from New Zealand and Niue (the Contracting Parties) can request tax-related information from each other (such as business books and accounts, bank information, and information on the ownership of legal entities), for the purpose of detecting and preventing tax evasion and avoidance.
3. A tax information exchange agreement (a TIEA) is a form of tax treaty designed to establish exchange of information arrangements with jurisdictions, such as tax havens, with which it may not be appropriate to enter into a more comprehensive form of tax treaty. To date, New Zealand has entered into 18 TIEAs with tax havens, and additional TIEAs are under negotiation.
4. Niue was identified as a tax haven in a list published in 2000 in a report by the Organisation for Economic Co-operation and Development (OECD). Niue has now repealed the key legislation that led to it being identified as a tax haven, but has found that in practice it is difficult to lose the tax haven “tag”. Many countries still consider the 2000 OECD list of tax havens to be definitive. For example, Niue has been added to an OECD country’s tax haven blacklist as recently as 2010 (even though the last of Niue’s tax haven legislation was repealed in 2006).
5. Niue is currently taking steps to address the tax haven perception. Among other things, Niue has requested TIEAs from a number of countries, to demonstrate its commitment to transparency and exchange of information. In view of the close historical, constitutional and economic ties between our two countries, New Zealand was one of the first countries that Niue approached.
6. TIEAs are specifically designed to assist tax authorities detect and prevent tax evasion and tax avoidance. Any reduction of tax evasion or avoidance will give rise to revenue gains for New Zealand. However, Niue is no longer a tax haven, and the risk of New Zealand residents evading or avoiding New Zealand tax through the use of legal structures and transactions involving Niue is very low. Therefore, the actual benefit to New Zealand in revenue terms from entering into the Niue TIEA is likely to be minimal.

Nature and timing of proposed binding treaty action

7. On 29 August 2012, New Zealand signed the Agreement between the Government of New Zealand and the Government of Niue on the Exchange of Information with Respect to Taxes (the Niue TIEA). The proposed treaty action is to bring the Niue TIEA into force through an exchange of diplomatic notes confirming that Niue and New Zealand have

completed their respective constitutional and legal requirements for entry into force, pursuant to Article 12 of the TIEA.

8. Before the exchange of diplomatic notes (and subsequent to satisfactory completion of the Parliamentary treaty examination process), the Niue TIEA will need to be incorporated into domestic legislation by an Order in Council, pursuant to section BH 1 of the Income Tax Act 2007. The making of the Order in Council is expected to be completed early in 2013.

9. On entry into force, the Niue TIEA will apply prospectively as follows:

- for criminal tax matters, the Niue TIEA provisions will apply from the date of entry into force; and
- for all other matters, the Niue TIEA provisions will apply to taxable periods beginning on or after 1 January following the date of entry into force or, where there is no taxable period, to all charges to tax arising on or after 1 January following the date of entry into force.

Reasons for New Zealand to become a Party to the treaty

10. New Zealand has been entering into bilateral exchange of information arrangements in double tax agreements (DTAs) since 1947, and into TIEAs since 2007. A DTA is a comprehensive form of tax treaty that is generally preferred for use with major trading and investment partners. A TIEA is a more appropriate form of treaty for jurisdictions, including tax havens. To date, New Zealand has concluded 55 DTAs and TIEAs (made up of 37 DTAs and 18 TIEAs). To be effective, a country's network of exchange of information treaties needs to be as wide as possible. The negotiation of additional DTAs and TIEAs is therefore an on-going facet of New Zealand's tax policy work programme.

11. Exchange of information is a critical tool for tax authorities worldwide in the detection and prevention of tax evasion and tax avoidance. For example, when investigating the tax affairs of a particular taxpayer, Inland Revenue acting on its own can have difficulty verifying whether the taxpayer has reported their income-earning and financial activities correctly for tax purposes, when these activities are conducted outside New Zealand's territorial borders. Exchange of information provisions in tax treaties with other jurisdictions will enable Inland Revenue to request a treaty partner tax authority to use its information-gathering powers to obtain the necessary information and forward that information to us.

12. However, although concluding a TIEA with Niue is consistent with New Zealand's efforts to keep widening its network of exchange of information treaties, the Niue TIEA was entered into predominantly for other reasons.

13. Niue was identified as a tax haven in a list published in an OECD report in 2000.¹ At that time, Niue operated an "offshore financial centre" that included preferential banking, insurance, company, partnership and trust regimes (available only to non-residents, and ring-fenced from Niue's domestic economy). Niue subsequently abolished its offshore financial centre and repealed all of the related legislation, and from the end of 2006 should no longer have been considered to be a tax haven. However, many countries still consider

¹ The list of tax havens was included in the OECD's report: "Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices".

the 2000 OECD list of tax havens to be definitive. Other countries appear to be concerned that Niue could re-establish its offshore financial centre at any time. This has made it difficult for Niue to escape its tax haven “tag”. For example, as recently as 2010, an OECD country added Niue to its country blacklist of tax havens.

14. Niue is currently taking steps to show that it does not pose any risk to the international community. In particular, Niue has joined the Global Forum on Transparency and Exchange of Information (the Global Forum), and has submitted itself for peer review by that organisation. The first phase of that review is currently in progress. However, peer reviews conducted by the Global Forum focus on the effectiveness of a jurisdiction’s exchange of information treaties, and Niue does not yet have any exchange of information treaties in place. The Global Forum’s initial report on Niue is therefore likely to be very negative. (Global Forum reports are published, and the Global Forum also reports annually to the G20 on the outcome of its peer reviews. The G20 has threatened to deploy sanctions against non-complying jurisdictions.)

15. These developments mean that Niue urgently needs to conclude TIEAs or other exchange of information treaties. As Niue’s most significant economic partner, and due to our historic and constitutional ties, New Zealand was one of the first countries that Niue approached to seek a TIEA. Niue is currently also enacting implementation legislation that will enable it to enter into and give effect to TIEAs.

16. Because Niue is no longer a tax haven, New Zealand is unlikely to need to make many requests for information to Niue under the Niue TIEA. However, the close constitutional ties between New Zealand and Niue mean that the continuing perception of Niue as a tax haven raises reputational issues for New Zealand. Assisting Niue to improve its international standing, by entering into TIEAs and thereby demonstrating a commitment to exchange of information, is in New Zealand’s overall interests.

17. Alternative options, other than entering into a TIEA, have been explored. However, no feasible non-regulatory options have been identified. It is not a realistic option for New Zealand to decline to enter into the TIEA. This is because there is now an international expectation that countries will enter into exchange of information treaties when asked by another country. This expectation has been codified into the Terms of Reference used by the Global Forum in its country peer reviews.² New Zealand is also subject to Global Forum peer review, and therefore is subject to this requirement.

18. A possible alternative treaty option would be for both New Zealand and Niue to sign an existing OECD multilateral treaty (the Convention on Mutual Administrative Assistance in Tax Matters) that provides for exchange of information in tax matters, amongst other things. The New Zealand Government is currently considering the option of signing the OECD multilateral treaty. New Zealand officials have also proposed to Niuean officials that they recommend to their Government that Niue signs the multilateral treaty.

19. For the reasons given above, Niue effectively needs to conclude exchange of information treaties as quickly as possible. The multilateral treaty would generally assist Niue in this regard. Signing, however, would give rise to other implications for Niue such as an on-going requirement to pay a fee of around 5,000 euros per annum and potentially provide for some additional forms of assistance in tax matters. Due to such

² Footnote 27 of the Global Forum’s Terms of Reference.

issues, very few small island jurisdictions, like Niue, have signed the multilateral treaty to date. Accordingly, it is by no means certain that Niue will sign the multilateral treaty. In the short-term, for the purposes of the Global Forum peer review currently in progress, Niue needs to urgently conclude TIEAs to demonstrate its commitment to exchange of information.

20. Note that, if New Zealand and Niue were to both sign the OECD multilateral treaty, after having already signed a TIEA, the fact that there would then be two exchange of information treaty arrangements in place would not create problems. The same issue would also arise in respect of other New Zealand DTAs and TIEAs. In practice, information could be exchanged under either treaty instrument.

Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand

21. TIEAs are specifically designed to assist tax authorities to detect and prevent tax evasion and tax avoidance. Any reduction of tax evasion or avoidance will give rise to revenue gains for New Zealand. However, Niue is no longer a tax haven, and the risk of New Zealand residents evading or avoiding New Zealand tax through the use of legal structures and transactions involving Niue is very low. Therefore, the actual benefit to New Zealand in revenue terms from entering into the Niue TIEA is likely to be minimal at best.

22. Although the Niue TIEA will not bring the revenue benefits that are generally anticipated from TIEAs, there will be other benefits for New Zealand. The advantages can be summarised as follows:

- As described above, the close constitutional ties between New Zealand and Niue mean that there will be general reputational benefits for New Zealand if Niue can improve its international standing.
- Assisting Niue to start building its own TIEA network can be expected to generally improve the effectiveness of Niue’s tax system. Tax system improvements in Niue will reduce pressure on the New Zealand Government to provide budgetary assistance to Niue. These improvements will also be consistent with other recent New Zealand Government initiatives to help Niue improve the effectiveness of its tax system and build capacity in its tax administration.
- Pacific Island jurisdictions, by virtue of their relatively close proximity to New Zealand, are often perceived by other OECD member countries to be in New Zealand’s “sphere of influence”. The TIEA with Niue will extend New Zealand’s growing network of DTAs and TIEAs in the Pacific region, and demonstrate our commitment to establishing exchange of information arrangements with our closest neighbours. This will send a good signal internationally.
- The Niue TIEA represents progress by New Zealand in widening its network of exchange of information treaty arrangements.

23. The only identifiable disadvantage for New Zealand in concluding a TIEA with Niue is that Inland Revenue will incur administrative costs in responding to any requests for information from Niue, which will not be subject to the usual offset by revenue gains to New Zealand from reduced tax evasion and tax avoidance by New Zealand residents. However, given Niue’s circumstances, such requests are likely to be minimal, and it is unlikely that requests would involve more complex areas such as transfer pricing. If requests are received, Inland Revenue has streamlined systems already in place for

responding to requests under its 55 other exchange of information arrangements, and additional costs will be marginal.

Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms

24. The Niue TIEA will impose a reciprocal obligation on each Contracting Party to provide, upon request, information that is foreseeably relevant to the administration and enforcement of taxes. As noted above, Niue is unlikely to make many requests for information from New Zealand, and those it may make are unlikely to relate to complex issues such as transfer pricing. If valid requests are received, under the Niue TIEA Inland Revenue will be obliged to use its information-gathering powers to obtain the requested information, on a timely basis, and to forward that information to Niue.

25. The Contracting Parties will be required to maintain strict confidentiality regarding any information received regarding a request. Such information may be disclosed only to authorised persons, and may be used only for specified purposes (principally, the administration and enforcement of the domestic tax laws of the respective Contracting Party, see Article 8).

26. Reservations are not provided for under the Niue TIEA.

27. Article 11 of the Niue TIEA provides that any difficulties or doubts arising as to the interpretation or application of the TIEA are to be resolved, if possible, by mutual agreement between the competent authorities (for New Zealand, the Commissioner of Inland Revenue or his or her authorised representative; for Niue, the Secretary of Finance or the Secretary's authorised representative). The Parties may also decide on other forms of dispute resolution.

Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation

28. Subject to the successful completion of the Parliamentary treaty examination process, the Niue TIEA will be implemented into New Zealand domestic law by Order in Council, in accordance with section BH 1 of the Income Tax Act 2007. Section BH 1 authorises the giving of overriding effect to DTAs and TIEAs³ by Order in Council. That is, the Order in Council may specify that the provisions of the agreement will have effect notwithstanding any provision of the Inland Revenue Acts, the Official Information Act 1982 or the Privacy Act 1993 – although only in relation to tax matters.

29. When the Niue TIEA is signed, officials will arrange for an Order in Council to be made, and for the other steps for entry into force to be undertaken. This includes New Zealand notifying Niue by diplomatic note that all of its domestic constitutional and legal procedures for entry into force of the Niue TIEA are complete. Niue will likewise notify New Zealand when its own procedures are complete. It is expected that this process will be completed before the end of 2012.

30. There are no other viable regulatory options for implementing the obligations in the agreement.

³ Despite the reference to DTAs, the agreements to which the section relates are those that have been negotiated for any one or more of the purposes listed in the section. The facilitation of exchange of information is a listed purpose. Therefore, the TIEA falls within the ambit of section BH 1.

Economic, social, cultural and environmental costs and effects of the treaty action

31. No social, cultural or environmental effects are anticipated. Any economic effects are expected to be favourable, as noted above.

The costs to New Zealand of compliance with the treaty

32. If requests for information are received from Niue under the Niue TIEA, New Zealand will incur administrative costs in complying with those information requests. As noted above, such requests are likely to be minimal and limited to non-complex matters. In addition, streamlined and effective mechanisms for dealing with exchange of information requests have already been established for New Zealand's existing DTA and TIEA network. The administrative costs of responding to requests from Niue are therefore expected to be marginal.

33. All costs arising to Inland Revenue as a result of the operation of the Niue TIEA will be met within existing baselines.

Completed or proposed consultation with the community and parties interested in the treaty action

34. The Ministry of Foreign Affairs and Trade, and the Treasury, have been consulted and agree with the proposed treaty action. Further, the concept of TIEAs in general has been canvassed in the Government's published policy work programmes.

Subsequent protocols and/or amendments to the treaty and their likely effects

35. No future amendments are anticipated. New Zealand will consider any proposed amendments to the Niue TIEA on a case by case basis, and any decision to accept an amendment would be subject to the usual domestic approvals and procedures.

Withdrawal or denunciation provision in the treaty

36. Article 13 of the Niue TIEA provides that either Contracting Party may terminate the Niue TIEA by giving six months' written notice through the diplomatic channel. The Niue TIEA may only be terminated by either of the Contracting Parties three years after it has entered into force. The Contracting Parties will remain bound by the confidentiality provisions contained in Article 8 of the Niue TIEA even after it has been terminated.

37. Any decision by New Zealand to terminate the Niue TIEA would be subject to the usual domestic approvals and procedures.

Agency Disclosure Statement

38. Inland Revenue has prepared this extended national interest analysis. It has undertaken an analysis of the issue of implementing a TIEA between New Zealand and Niue, and the legislative and regulatory proposals arising from that implementation. It has considered all other relevant options in that process. Inland Revenue is of the view that there are no significant constraints, caveats or uncertainties concerning the regulatory analysis.

39. An Order in Council is required to implement the Niue TIEA into New Zealand domestic law. The Order in Council will override the Inland Revenue Acts, the Official Information Act 1982 and the Privacy Act 1993; this is authorised by section BH 1 of the Income Tax Act 2007 and is necessary to give effect to the terms of the Niue TIEA.

40. Inland Revenue notes that the form of this TIEA and national interest analysis is consistent with that of a number of previous TIEAs and national interest analyses prepared regarding other TIEAs concluded by New Zealand.

41. The advantages of the Niue TIEA to New Zealand, as noted, will likely be minimal. However, the Niue TIEA will assist Niue enhance both its international standing and the effectiveness of its tax system, which is generally in New Zealand's interests (given our close historic and constitutional ties, and New Zealand's provision of economic support to Niue). No costs are expected to arise from the Niue TIEA, and no risks have been identified.

42. Inland Revenue is of the view that the policy options considered will not impose additional costs on businesses; impair private property rights or market competition; adversely impact the incentives on businesses to innovate and invest; or override fundamental common principles.

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