

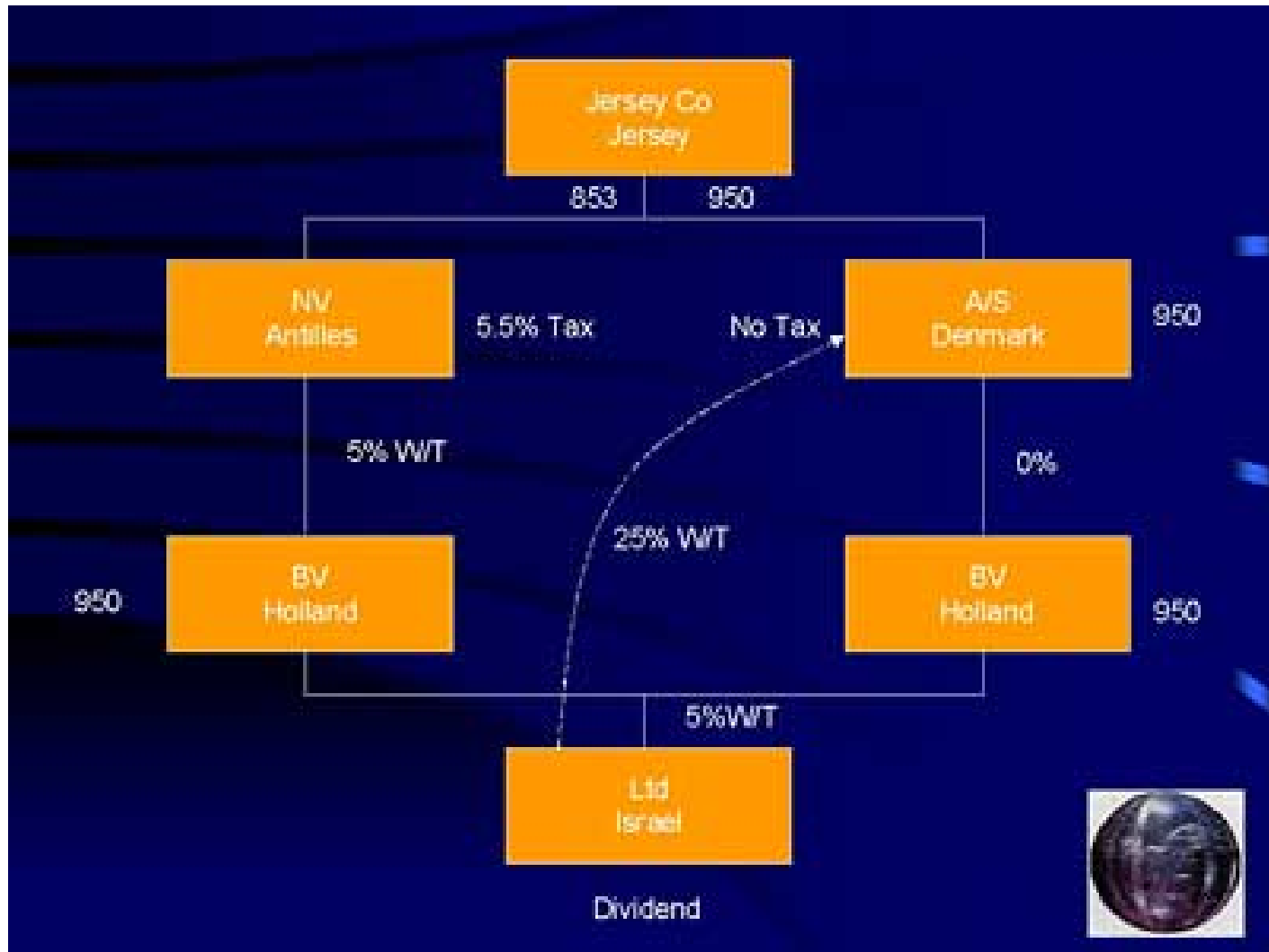


GAAR and Double Tax Agreements

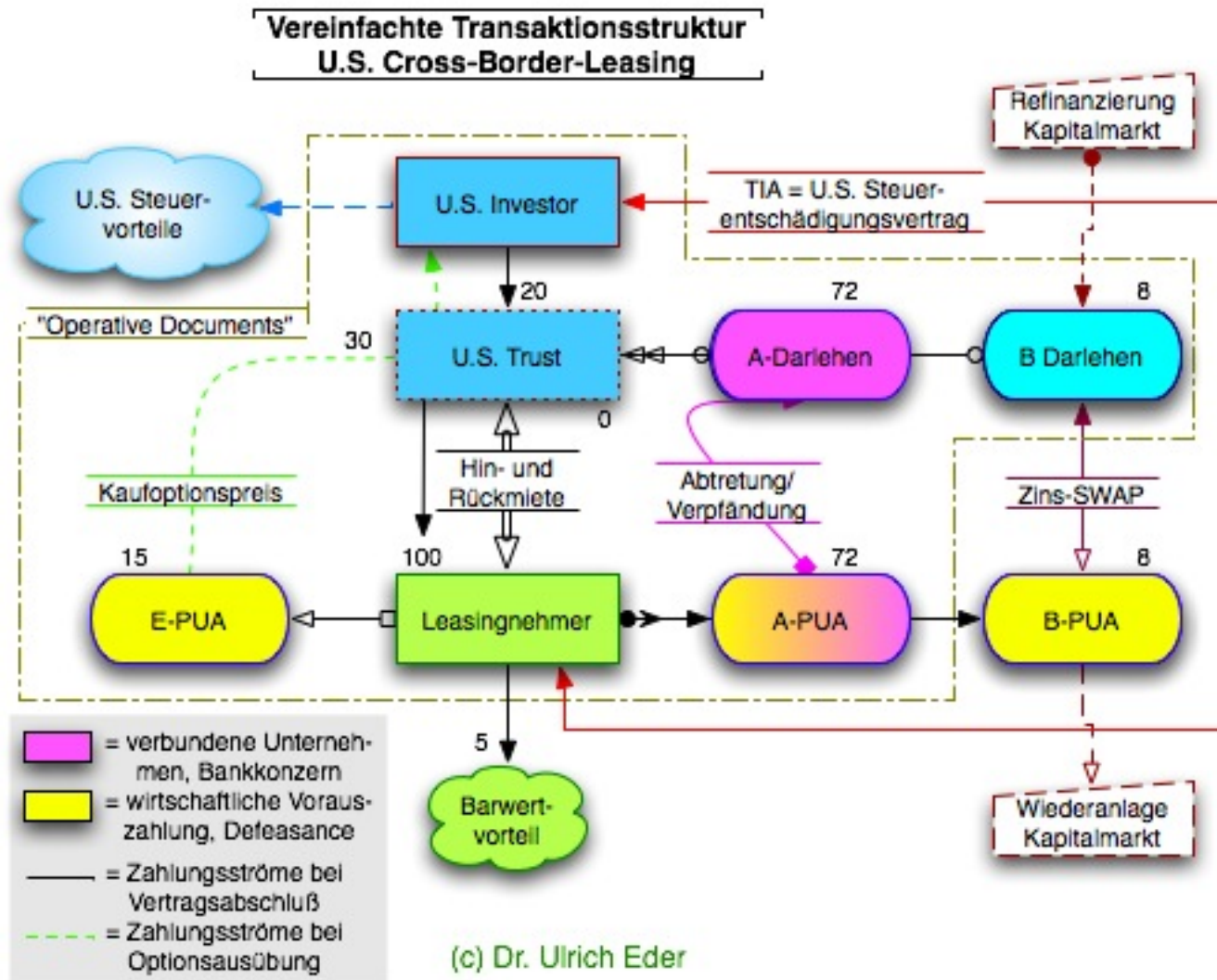
A New Zealand Perspective

Craig Elliffe

International Tax Planning



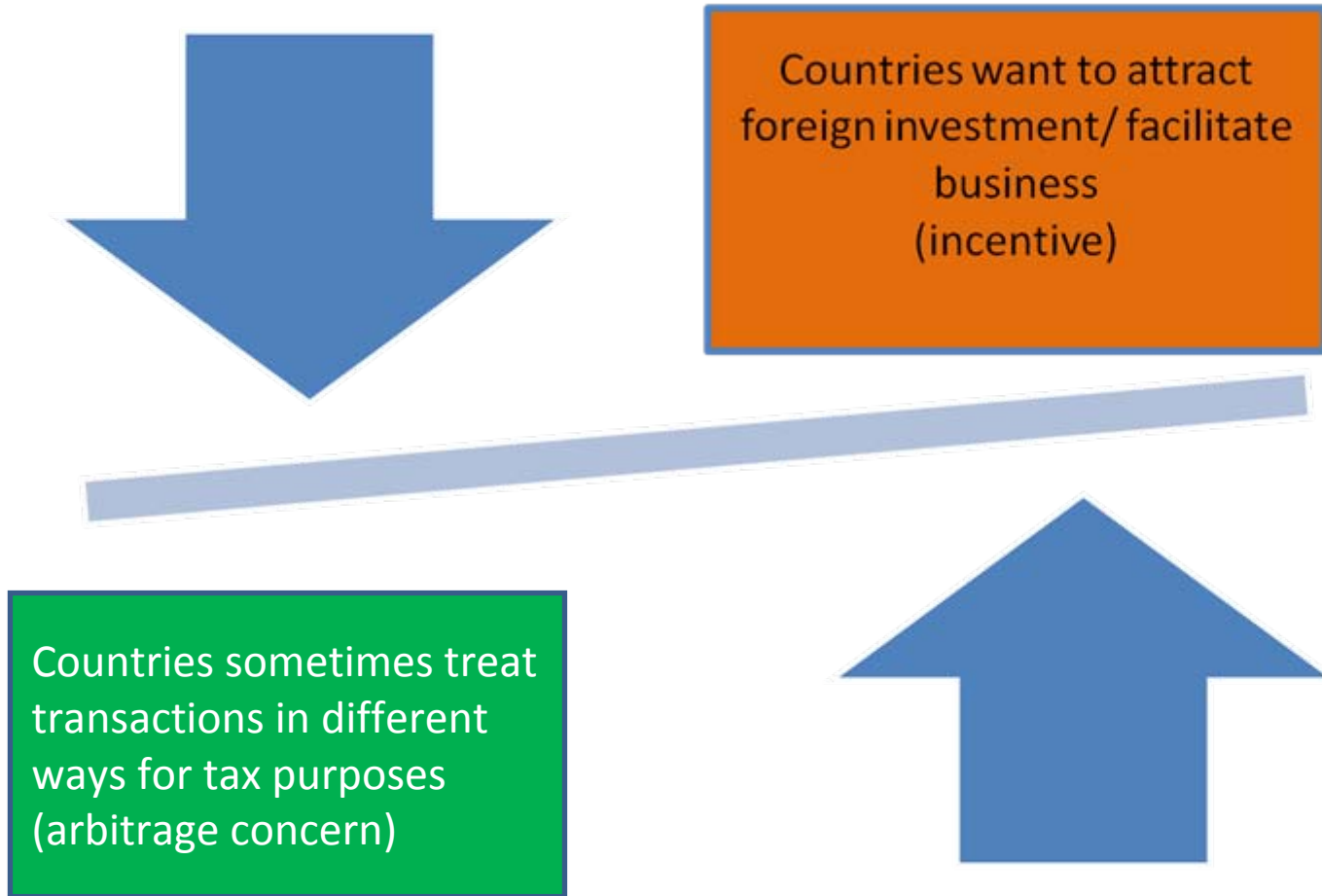
International Tax Planning



International Tax Planner



The Competing Pressures of International Tax

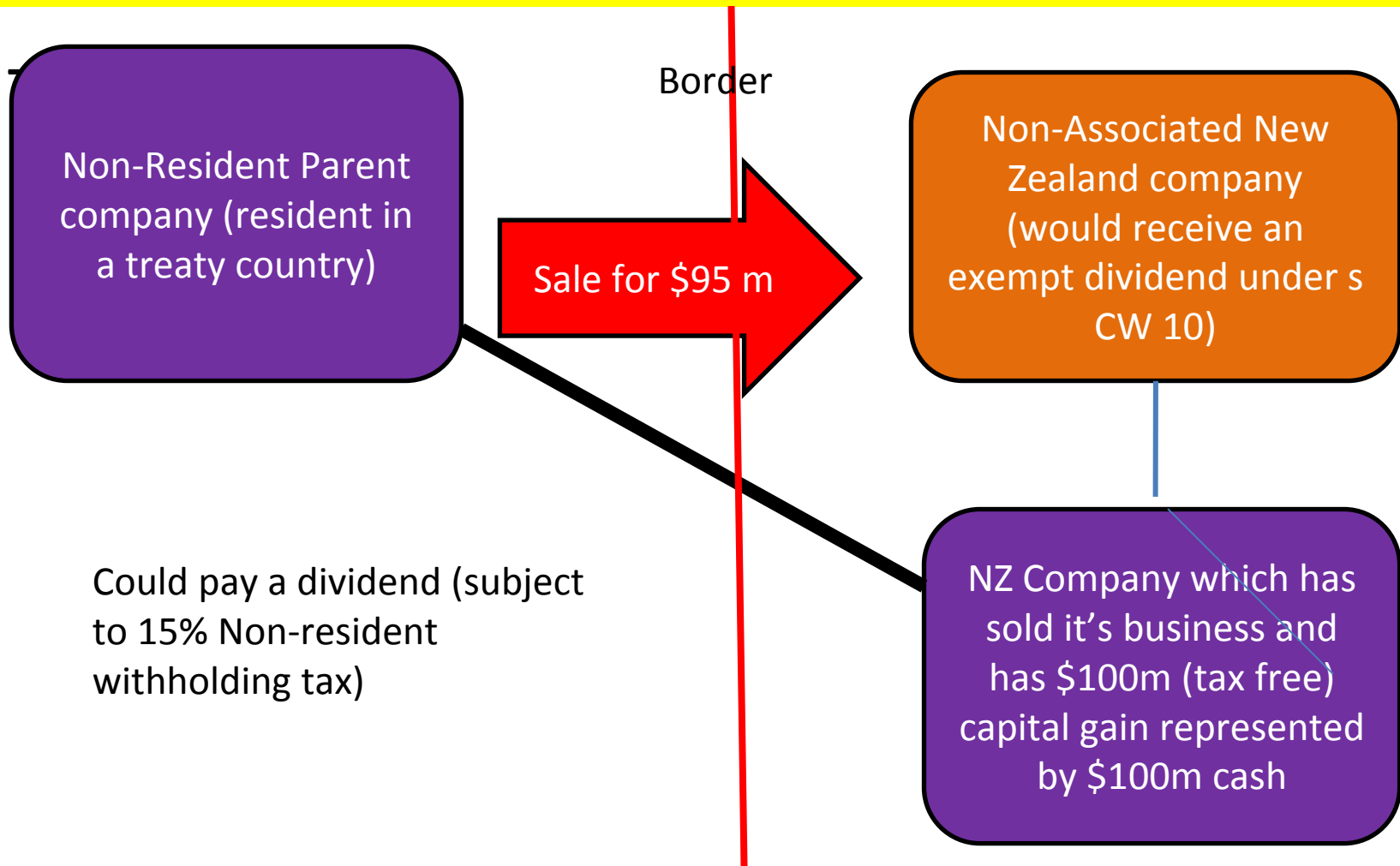


Vital issue

Cross Border
transactions

Application
of the GAAR

An example of a cross –border transaction



New Zealand GAAR

Domestic position is that black letter law compliance is *(of course)* insufficient if the taxpayer has made use of a provision in a manner which is outside Parliament's contemplation

Apply s GB 1(3) *(dividend stripping provision)* and re-characterise the sale proceeds of the shares (\$95m) as a dividend

Response of the Parent Company

This was the sale of movable property (shares) under the treaty and under Article 13 can be taxed only in the state where the alienator is a resident (refer Art 13(7) US/NZ)

New Zealand does not have taxing rights because NZ agreed to tax its residents on the sale of their shares in subsidiaries in the other contracting state

OECD Commentary (2003 revisions)

Factual Approach

- Domestic anti-avoidance rules establish the facts to which the rules in the treaty are applied
- Re-characterisation takes place for both the purposes of the treaty and the domestic law

Interpretative Approach

- Will view the impugned transaction as an abuse of the treaty itself-proper construction of the tax treaty will allow them to disregard the transaction
- No re-characterisation but that a proper construction of the treaty allows them to disregard the abusive transaction

OECD Commentary (2003 revisions)

Para 9.1

- Whether the benefits of tax conventions must be granted when abusive transactions are entered into (*interpretative approach*)

- Whether specific provisions to prevent tax abuse conflict with tax conventions (*factual approach*)

What approach does New Zealand take?

Factual

Statutory background

OECD Commentary-factual preference

Consistent with power of reconstruction in s
GA 1

New Zealand Statute

S BB 3

Subparts BG
(avoidance) and
BH (Treaties)
have an
overriding effect
on other matters
in the Tax Act

BH 1(4)

“Despite
anything in this
Act”

Difference in views



New Zealand Statute

Actual wording of the Statute- where the treaty prescribes a clear override and the Treaty cannot be used in an abusive manner (see below)

Gives effect to Parliament's intention that it would honour its public international law obligations (treaties) *pacta sunt servanda*- and Court of Appeal has held in a different context (ER Squibb), DTA overrides

BH 1 overrides

Commentary supports a factual analysis but also makes it clear that a treaty can not be used where a "main purpose" is tax abuse

New Zealand Act can be contrasted with Australia and Canada- which are explicit in their rules that their GAAR's override their treaties

New Zealand Statute

Parliament cannot have intended for BG 1 to be ousted in any circumstances

Treaties are diplomatic, substantive documents not intended to be interpreted in a strict fashion

BG 1 Overrides

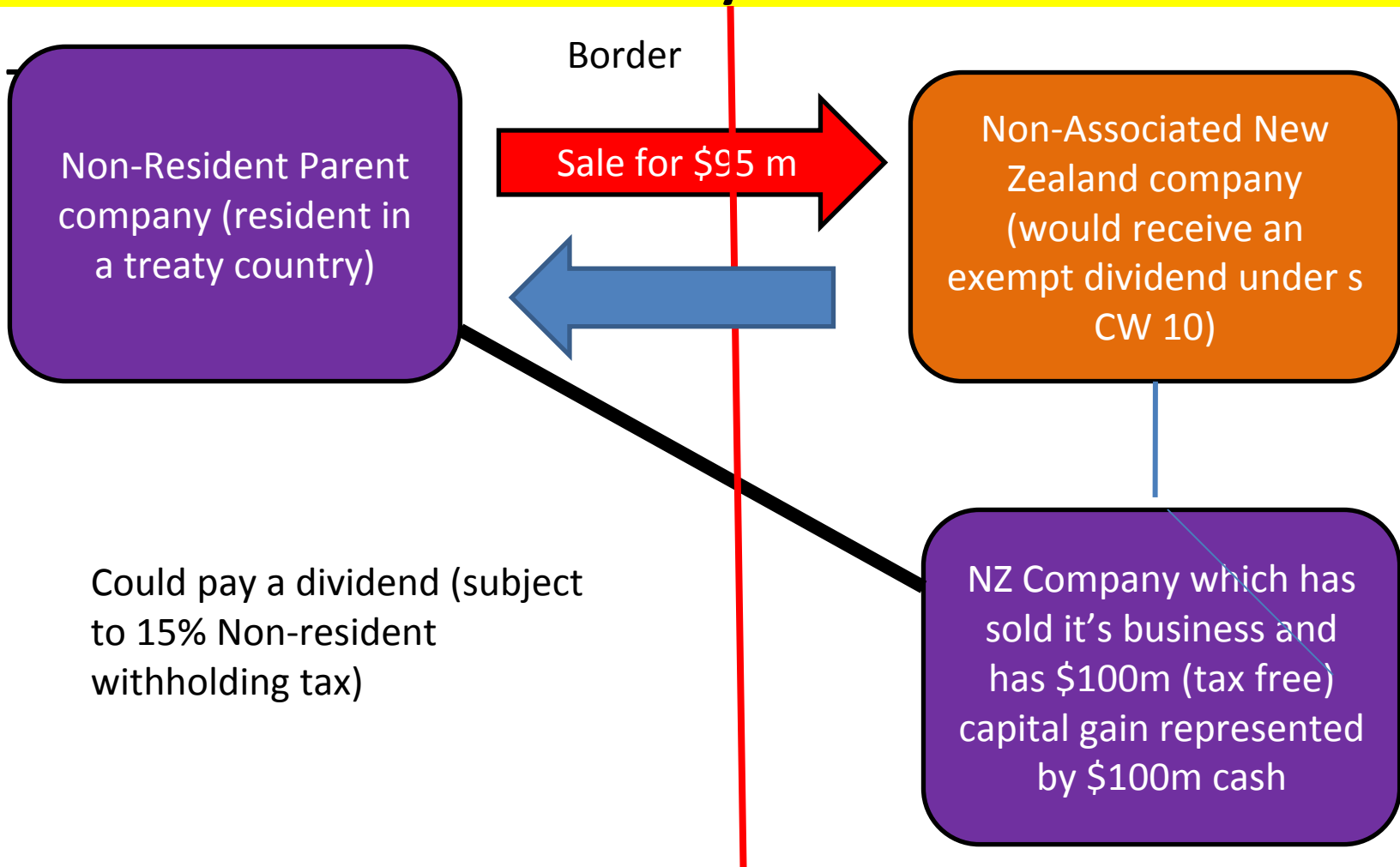
Commentary does not support the use of treaties in abusive situations

New Zealand Courts will grant considerable scope to the GAAR

Mostly similar in effect



Disputes where there is no conflict between the treaty and domestic law

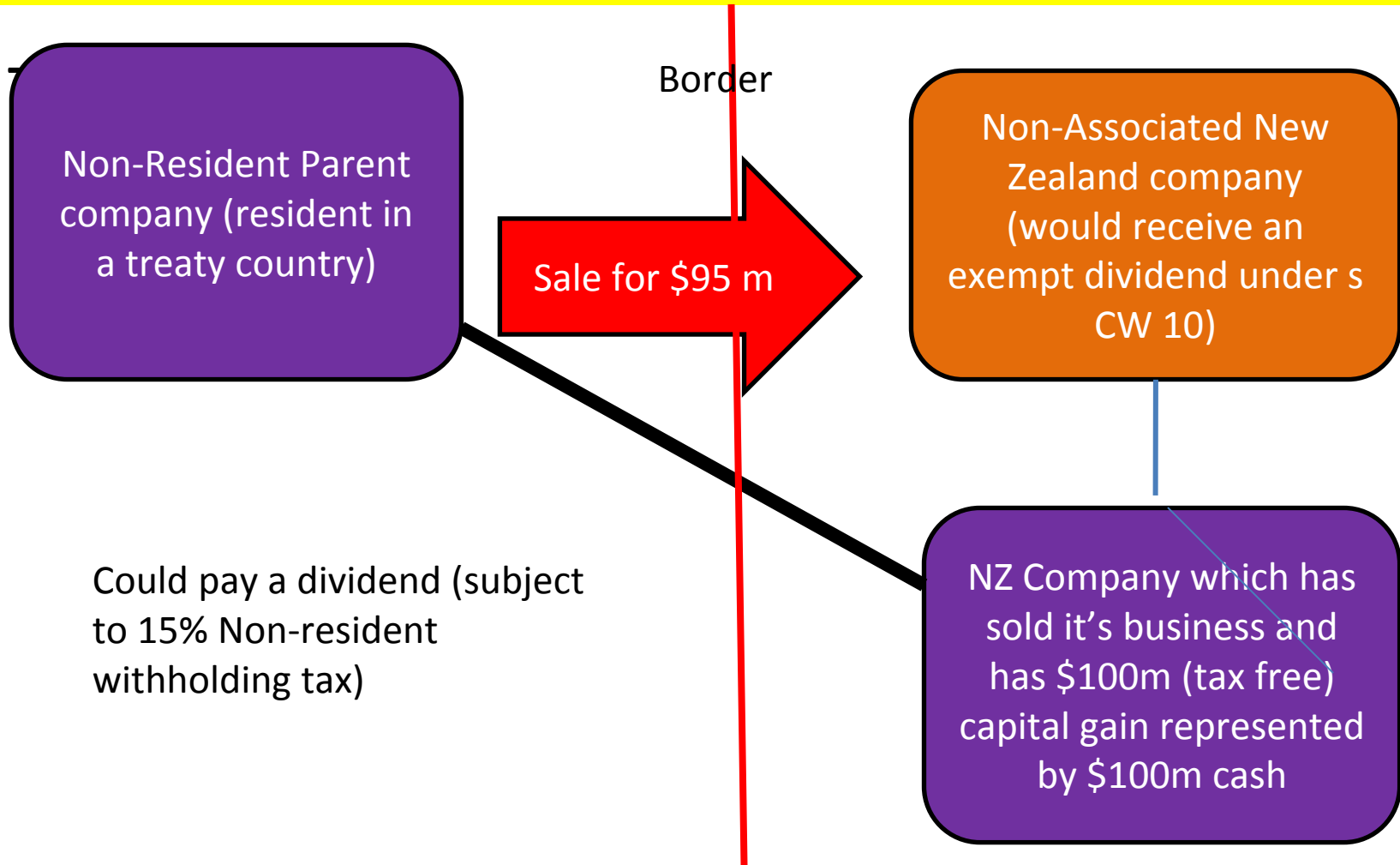


“No Conflict” situations

Domestically the transaction is re-characterised as a dividend and the treaty is applied consistent with that factual approach (vast majority of situations)

Treaty will limited the NZ tax to 15% under the dividend article (or perhaps a lower rate-see NZ/Aust treaty)

Disputes where there is a conflict



Disputes where there is a conflict

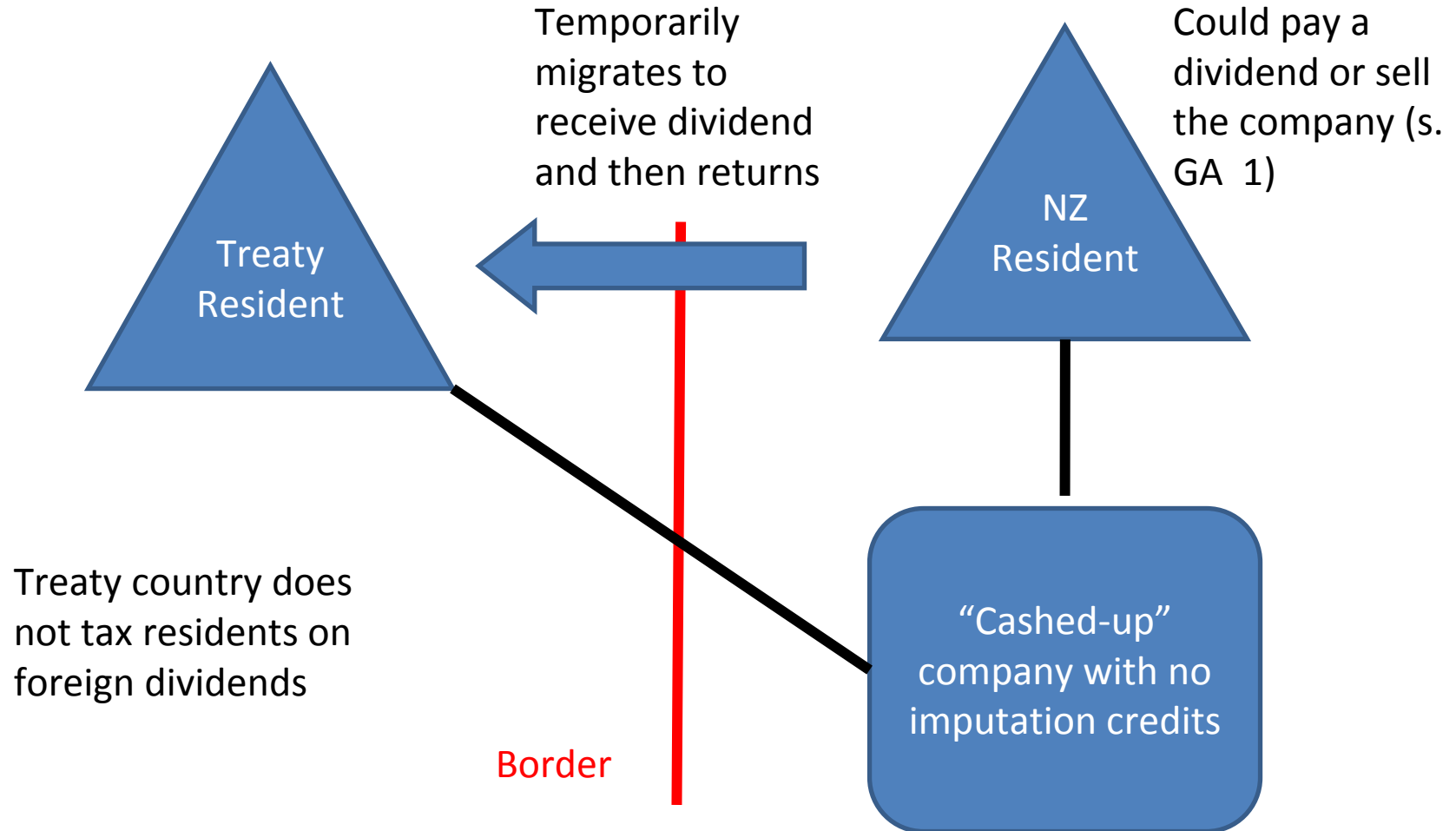
Article 13 (5) hypothetically

- For the avoidance of doubt, “alienation” includes the sale of personal property including shares in a company. This Article is intended to have precedence over Article 10.

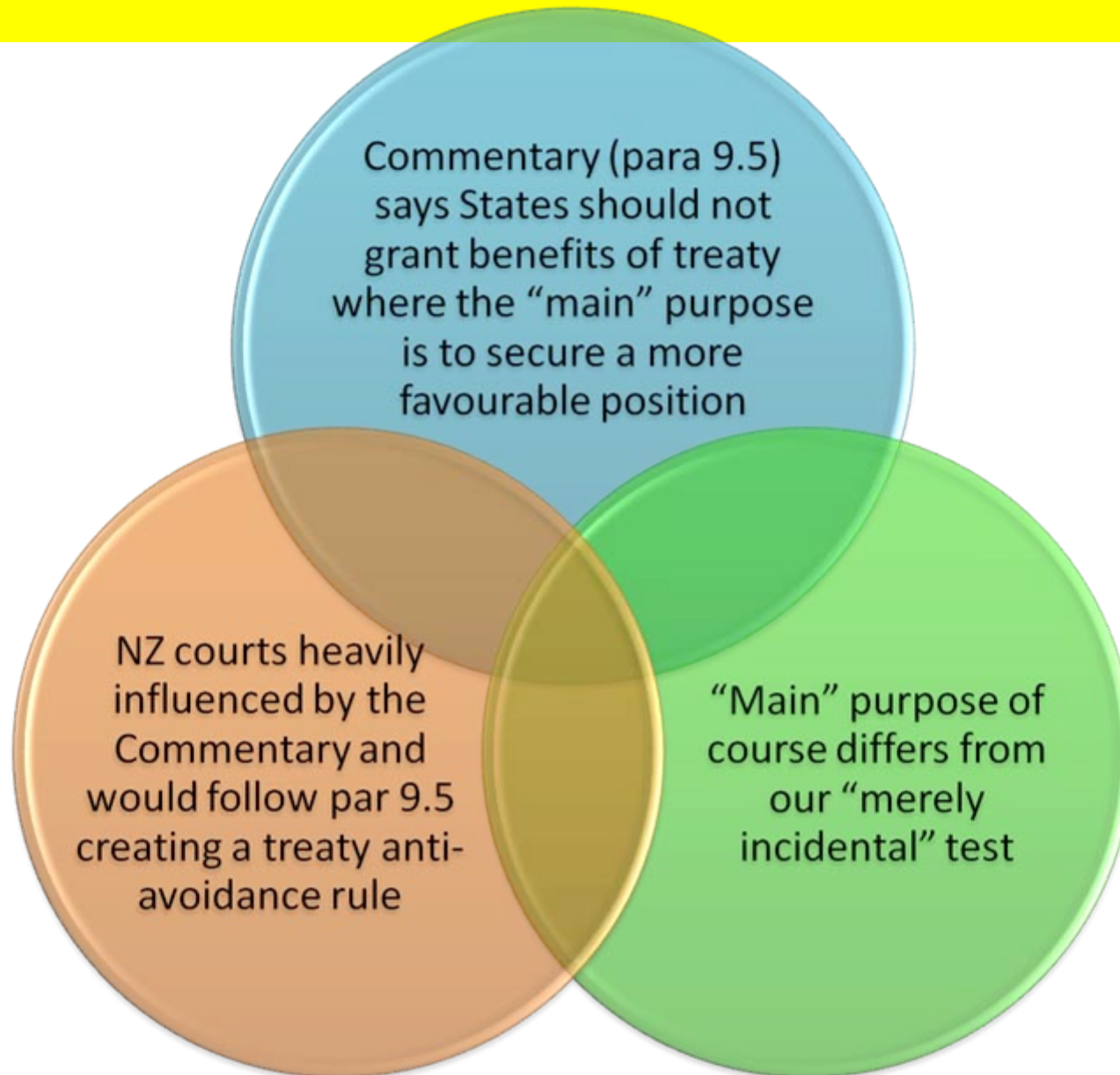
Treaty in conflict but overrides

- Still need to ensure no abuse of the provisions of the Convention

Abusive transactions



Abusive transactions



Summary

GAAR applies to DTA's

Under a factual approach to interpretation, the transaction will be re-characterised

Vast majority of cases where there is no conflict, treaty applies to domestic GAAR re-characterisation (more than merely incidental)

If the transaction is an abusive one then the Treaty cannot be applied- the relevant question being whether the "main purpose" is contrary to the object and purpose of the treaty provisions



Will be some (limited) cases where the obligation to our treaty partners (*pacta sunt servanda*) but not involving an abuse of a treaty