# Tax Treaty Override: A Jurisdictional Approach

Luís Eduardo Schoueri*

*Despite the recent developments grounded on constitutional arguments, the current country-by-country approaches to treaty override still fail to qualify the overriding as an unacceptable attempt to extend taxation beyond the limits agreed with treaty partners. Accordingly, treaty override has been seen as a problem the solution of which would depend on each country's view on the role of international law. This article suggests that such failure is due to limitations inherent to this misleading reasoning with respect to the relation between domestic legislation and international law. After describing the main approaches to treaty override, the author proposes that treaty override must be addressed as an issue of jurisdiction, instead of a matter of hierarchy. The proposed approach is consistent with the actual purpose of double tax conventions and with the need to preserve the jurisdictional limitations agreed under tax treaties.*

## 1 Introduction

Bidding farewell to treaty override in Europe, Klaus Vogel once pronounced himself 'firmly in favour of giving precedence to international treaties' over domestic legislation, predicting that, in the future, such conviction would 'become generally accepted'[1] under German legislation. He also added that the same would occur in other countries, except for those which follow the United Kingdom's system and the United States.[2]

Analysing the German constitutional law, Vogel argued that neither Article 25 nor Article 59(2) of the German Basic Law clearly answered whether the domestic law or the international treaty should prevail in case of a conflict. As a consequence, a creative formation of the law ('*Rechtsfortbildung*') should take place. The general sense of justice, in such cases, would lead to the conclusion that the international treaty should prevail.[3]

Based on the rule of law ('*Rechtstaatsgrundsatz*') and on the observation to the principles of public international law ('*Völkerrechtsfreundlichkeit*'), provided for by the Basic Law, Vogel further considered that, given the position of Germany in the international community, the treaty override should be deemed unconstitutional.[4]

Vogel's conclusion opposed to the traditional position, as per the treaty override is considered a regrettable violation of public international law, though without any legal consequences at the German domestic level.[5]

In the last decade, there has been a trend among international scholars to overcome this traditional reasoning, considering treaty override an issue regarding jurisdiction and observation to the principles of public international law, rather than a matter that could be addressed solely by hierarchy or *lex specialis* considerations, as the traditional reasoning implies. The concern that the violation of the principles of international law, namely the *pacta sunt servanda* principle, is not compatible with the principles of a constitutional democracy has increased, and the need to balance the principle of the rule of law with the principle of democracy has been privileged.[6]

Notes

* Professor of Tax Law at the University of São Paulo. Vice President of the Brazilian Tax Law Institute.

1 Klaus Vogel, 'New Europe Bids Farewell to Treaty Override', in *Bulletin – Tax Treaty Monitor*, vol. 58, Amsterdam, IBFD, 2004, p. 8.

2 See Klaus Vogel, *supra* n. 1, at 8.

3 See Klaus Vogel, *supra* n. 1, at 8. Vogel makes reference to a decision of the Swiss *Bundesgericht*, in which it noted that 'a state which binds itself by treaty has to respect its rules whatever that state's own domestic rules are'.

4 See Klaus Vogel, 'Völkerrechtliche Verträge und innerstaatliche Gesetzgebung – Eine neue Entscheidung des BVerfG hat Bedeutung auch für die Beurteilung des treaty override', in *Internationales Steuerrecht* 1/2005.

5 The traditional position will be described below. For a contextualization of the ongoing debate in Germany, see Moris Lehner, 'Treaty Override im Anwendungsbereich des § 50d EstG', in *Internationales Steuerrecht*, 11/2012, pp. 389–404; Andreas Perdelwitz, 'Treaty Override – Revival of the Debate over the Constitutionality of Domestic Treaty Override Provisions in Germany', in *European Taxation – Special Issue*, September 2013, pp. 446–447.

6 See Alexander Rust and Ekkehart Reimer, 'Treaty Override im deutschen Internationalen Steuerrecht', in *Internationales Steuerrecht*, 24/2005, pp. 843–849.

Following this understanding, the *Bundesfinanzhof* ('BFH') considered that section 50d(8)[7] of the German Income Tax Law violated the *pacta sunt servanda* principle, because was contrary to the Germany-Turkey Income and Capital Tax Treaty.[8] Resorting to a proportionality test, the Court concluded that the provision was unconstitutional. Accordingly, the intent to avoid the double non-taxation would not justify the treaty override carried out by the 50d(8) of the German Income Tax Law. Similar reasoning can be found in a recent decision issued by BFH concerning to 50 d(10)[9] of the same law, in contrast with the Germany-Italy tax treaty.[10] The Court itself, upon informing that both decisions would be submitted to the Constitutional Court, declared that since there are other texts contrary to tax treaties, new decisions should be expected to confirm the same trend.[11]

Nonetheless, there is no unanimity with respect to this new formulation. Lehner considers that the reasoning developed by Vogel and later applied by the BFH implies a stronger protection to international conventions than to ordinary legislation.[12] As a consequence, Vogel's understanding would lead to a loss of authority of the legislator and jeopardize the attribution of jurisdiction set forth by the Basic Law.[13]

It is important to notice that, despite the fact that the question is still highly controversial, the discussion has levelled, in a sense that the hierarchy and prevalence considerations have now solely a secondary role. Even though, some States, despite acknowledging that the treaty override is a clear violation to international law, consider it acceptable under domestic legislation and override treaties based on arguments such as the *lex specialis derogat legi generali* and the *lex posterior derogat legi priori* principles.

This article intends to demonstrate that such reasoning is misleading and disregards the actual relation between domestic legislation and international law. As it will be addressed, the discussion must be centred in the role of double tax conventions, which limit the jurisdiction of the States at the international level.

## 2 Preliminary issue: how to identify a treaty overriding

Tax treaty override has been defined by the OECD[14] as the 'enactment of legislation which is intended to nullify unilaterally the application of international treaty obligations', or the enactment of 'legislation which is intended to have effects in clear contradiction to international treaty obligations'.

In a broad sense, treaty override could cover a number of different situations. The *International Tax Glossary* edited by the IBFD includes therein also legislation reverting a judicial decision in conflict with the legislature's interpretation of a treaty; changing the definition of a term employed in a treaty which, due to Article 3(2) and the dynamic interpretation, implies changing the treaty itself, as well as changes in domestic legislation which unintentionally conflicts with a treaty provision.[15]

Such an extensive definition of treaty override, however, may imply some challenges, derived from the obvious fact that arguments applicable to one case are certainly not extensive to the others, what may lead to undesired generalization of problems and solutions. Accordingly, there is a difference between the situation in which the Legislative enacts a statute clearly overriding tax treaties, on one hand, and, on the other hand, a tax administration's interpretation contrary to the prevailing view about the extension of a tax treaty provision. The latter is a mere case of misinterpretation by the Executive which can generally be controlled by the Judiciary without need of declaring a statute unconstitutional. An example of such misinterpretation could be found when Brazilian authorities claimed that enterprise services not included in Article 12 would be taxed according to Article 21 (other income), not Article 7 (business profits). Although this understanding caused trouble for taxpayers, they could bring the case before Courts, which have systematically

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7 The provision sets forth that the tax exemption for income from employment, agreed under tax conventions, shall only be granted if the taxpayer proves that the other contracting country has waived its right of taxation or that the taxes in reference have been paid in the other country. The need of evidence is not addressed by the tax conventions.

8 *Bundesfinanzhof*, I R 66/09, decided on 1 Oct. 2012.

9 This article defines interest paid to a partner of a German business partnership as business income for purposes of application of a tax treaty, in order to overcome prior case Law of the BFH. The court has held that interest paid to a treaty resident partner cannot be taxed in Germany, due to the interest article of the tax conventions.

10 *Bundesfinanzhof*, I R 4/13, decided on 11 Dec. 2013.

11 *Bundesfinanzhof, Pressemitteilung* Nr 15, of 12 Feb. 2014, available at http://juris.bundesfinanzhof.de (accessed 25 Mar. 2014).

12 Moris Lehner, 'Treaty Override im Anwendungsbereich des § 50d EstG', *supra* n. 5, at 401.

13 Moris Lehner, *supra* n. 5, at 401.

14 OECD, *Recommendation of the Council Concerning Tax Treaty Override.* 2 Oct. 1989. C(89) 146/Final.

15 See 'Treaty Override' in Barry Lanking (Ed.), *International Tax Glossary*, 4th revised edition, Amsterdam, IBFD, 2001.

confirmed that Article 21 is not applicable,[16] what has recently been recognized even by the State attorney.[17] This example is enough for a first limitation in the definition of tax treaty override: the concept shall include only *legislation*, not mere administrative acts (notwithstanding the latter may have normative effects). Generally, treaty overriding derives from an act approved by the Legislative Branch. Gebhart suggests the expression 'legislative treaty override', as opposed to a 'judicial treaty override', the latter referring to a case where a Judiciary would decide against what is generally seen as the intention of the treaty partners.[18]

This limitation, however, is not enough. In several cases, legislation is enacted under a treaty, but somehow may imply a limitation to its terms. A good example may be found in transfer pricing. In spite of the general international effort to find a common understanding on the arm's length standard, it is very difficult to find two identical transfer pricing legislations. Each country tends to apply the very same Article 9 on a different way, which implies different results for similar problems. In several cases, this may be solved by means of APAs or MAPs, but even in such cases, the evidence is enough to show that the wording of a treaty may lead to results which are not contemplated by internal legislation: unless one country would claim the monopoly on the interpretation of Article 9 (formula: 'I am right and you are wrong'), APAs and MAPs shall initiate after the recognition that both countries are applying the same rule differently, but not mistakenly. Thus, one should not consider treaty override when a legislation simply follows one acceptable interpretation of a tax treaty.

Another situation which should not be considered a tax treaty override will be found when the *legislation* is not clear enough on the decision to disrespect the tax treaty. This would be the case in which the legislation would offer several interpretations, some of them contrary to a tax treaty and other in conformity therewith: this would be an occasion for a treaty-conform interpretation which would immediately deny the treaty override.[19]

One can therefore recognize a tax treaty override when the legislation explicitly determines the non-application of a (previous in time) tax treaty provision to a case. Gebhardt refers to treaty override in a narrow sense (*im engeren Sinne),*[20] which is characterized by a formal will of derogating. This is a formal procedure, since the overriding rule makes express reference to the tax treaty and determines that the latter will not be applicable.

A treaty override will occur in all cases in which a domestic legislator determines the non-application of a treaty rule, irrespective of the fact whether there is or not a justification for such act.

Accordingly, if one adopts a concept which goes beyond such formal approach, the existence, or not, of a treaty overriding can always be challenged. One will claim that the fact that tax legislation determines that a specific provision is not applicable to a case does not necessarily imply that the legislator is not respecting a treaty. In several cases, one can argue that the legislator is simply applying the treaty and avoiding that through a literal application of one treaty provision, benefits may be granted that were not foreseen in the treaty itself. This was, for instance, the reasoning adopted by Mike McIntyre in his defence of the US practice. He claimed that overriding could be a mere extensive interpretation (and therefore no actual overriding), or a test or a mere potential (but not effective) override.[21]

The idea of an 'interpretative override' is quite tempting. The argument can generally be used in case of rules against abuse: if one admits that treaties are not applicable in abusive situations, than one cannot claim that States are disrespecting their international compromises when they deny a benefit which would otherwise not be comprised within the scope of the treaty. This seems also to be the idea behind Avi-Yonah's contention that the treaty override is not a serious problem, as it is usually argued. He observes that the US, main target of the OECD Report, seldom carry out treaty overrides.[22] Furthermore, the treaty override would only occur in reasonable cases, based on the purpose of the treaty. In other words, treaty override situations should be allowed, according to the author, when compatible with the main purpose of the treaty, which, according to him, would be to prevent double taxation and double non-taxation. In this sense, the treaty override would be an important tool to prevent the abuse of treaties, provided that it is rarely used.[23] As he summarizes, there would be an underlying assumption of treaties that they would only

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16 Superior Court of Justice, Appeal No. 1.161.467/RS, decided on 17 May 2012. For a detailed analysis of the arguments developed by the Court, see Luís Eduardo Schoueri and Mateus Calicchio Barbosa, 'Brazil: Technical Services and the Application of Article 7 under Brazilian Treaty Practice – A Case Study', in Michael Lang, Jeffrey Owens, Pasquale Pistone et al. (Ed.), *Tax Treaty Case Law Around the Globe 2013*, Vienna, Linde/IBFD, 2013, pp. 103–116.

17 Ministry of Finance, Attorney General of the National Treasury, Opinion No. 2363, 6 Dec. 2013.

18 See R. Gebhardt, *Deutsches Tax Treaty Overriding.* Hallesche Schriften zur Betriebswirtschaft, DOI 10.1007/978-3-658-00059-2-, Wiesbaden, Springer. 2013, p. 6.

19 See Alexander Rust and Ekkehart Reimer, *supra* n. 6, at 846–848.

20 See R. Gebhardt, *supra* n. 18, at 11.

21 See Mike McIntyre, 'A Defense of Treaty Overrides', in *Tax Notes International,* vol. 1, 1989, p. 611.

22 See Reuven Avi-Yonah, 'Tax treaty overrides: a qualified defense of U.S. practice', in Guglielmo Maisto (Ed.), *Tax Treaties and Domestic Law,* vol. 2, Amsterdam, IBFD, 2006, pp. 66–68.

23 See Reuven Avi-Yonah, 'Tax treaty overrides: a qualified defense of U.S. practice', *supra* n. 22, at 77–78.

be intended to benefit bona fide residents, otherwise any treaty would become a 'treaty with the world', what would justify the override.[24]

It is challenging to determine whether an abusive practice is, or not, within the scope of tax treaties. If one considers the very history of treaty overriding, one will immediately note that legislators do not clearly believe they are restraining the application of tax treaties, but rather that they are avoiding abuse. Accordingly, the first case in which treaty overriding had an international repercussion dates of 1980, when the United States enacted the Foreign Investment in Real Property Act (FIRPTA). This law constituted an exception to the rule (present in US tax treaties) according to which capital gains earned by non residents from sale of participation in pure holding companies would be exempted. According to FIRPTA, this gain would be taxable when referring to real estate holdings.[25] Although one could already claim that this would not be against tax treaties, this does not seem to have been the general understanding by that time, what can be revealed by the fact that FIRPTA was not immediately applicable and a five-year period was granted for the continued application of the tax treaties notwithstanding FIRPTA provisions.

Also the 1986 Tax Reform Act (TRA), which modified the section 884 of the Internal Revenue Code in order to prevent branches of foreign entities to be granted a tax treatment more favourable than the applicable to local companies.[26] Since this new rule could override tax treaties' rules, section 884(c) declared that tax treaty privileges would be applicable provided the beneficiary would be a 'qualified resident', which was defined per section 884-c-4-A. Said definition was not included in the US tax treaties and preconditioning treaty benefits to the evidence that the beneficiary was a qualified resident was a clear treaty overriding. Once again, one could claim that the internal rule would simply avoid abuses, but this was not the general perception. Accordingly, upon edition of TRA, the Group of Six (Germany, Belgium France, UK, Luxembourg and The Netherlands) signed a joint memorandum to express their concerns to the fact that TRA could be against US tax treaties.[27]

In spite of Vogel's enthusiastic support for the existence of a general anti-abuse clause in all treaties,[28] which would be the necessary background to support the idea that there would be no overriding in such cases, one has to recognize that there is no general acceptance of the existence of such clause. Evidence thereof can be found, for instance, on the fact that several treaties contain clauses for limitation of benefits or other specific anti-abuse provisions. It is difficult therefore to admit that situations beyond the limits foreseen in the treaties should also be excluded from its benefits. Therefore, in case of treaties providing for specific anti-abuse rules, the unilateral legislation which includes among the abusive situations a case not foreseen in the treaty must be considered a treaty override.

Moreover, one needs to agree with Hey[29] to say that the so-called general anti-abuse clause would be too abstract (there is no clear concept of abuse in international law), what would imply that each treaty partner would apply its own internal anti-abuse rules, which will most probably be different from one State to another. In such sense, it is hard to argue that an internal rule would be 'inserted' in the treaty when only one of both States applies it.

As one can see from the examples above, the internal legislator overrides a tax treaty when a treaty benefit is conditioned upon a fulfilment of a requirement which was not foreseen in the treaty itself.

Also unconvincing is the denial of treaty overriding in cases domestic legislation would be enacted in order to avoid the so-called double non-taxation. There is no consensus on the existence of an 'international tax regime', which would include the 'single tax principle' ('income from cross-border transactions should be subject to tax once [i.e., neither more nor less than once]');[30] on the contrary, it is quite well spread among scholars the idea that treaties not only avoid effective double taxation, but also virtual one. Thus, the mere fact that an item of income is not effectively taxed in one country is not an argument strong enough to allow the other treaty partner to tax a subject beyond its own limits.

In any case, the circumstance that a treaty overriding can be justified is not enough to deny its existence. One can argue that treaty overriding is, or is not, against

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24 See Reuven Avi-Yonah, 'Chapter 11 – The Role of Treaties', in Reuven Avi Yonah, Diane M. Ring and Yariv Brauner, *U.S International Taxation*, 2nd ed., New York, Foundation Press, Thomson, 2005, p. 509.

25 See Herbert H. Alpert and Fred Feinglod, 'USA: Foreign Investment in Real Property Act of 1980', in *Bulletin for International Fiscal Documentation,* vol. 35, Amsterdam, IBFD, 1981, p. 195.

26 See The Tax Reform Act of 1986, vol. I, Legislative History, *Tax Management Portfolios*, Washington DC, *Tax Management Inc,* p. 454; Carl Esters, 'Recent Developments in U.S. Taxation of Foreign Direct Investment', in *Bulletin for International Fiscal Documentation*, vol. 45, Amsterdam, IBFD, 1991, p. 17.

27 See *Tax Notes*, vol. 36, 1987, p. 437.

28 See Klaus Vogel's introduction in *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern von Einkommen und Vermögen,* Klaus Vogel and Michael Lehner (orgs.). 4. ed., Munich, CH Beck, 2003, p. 185.

29 See Johanna Hey, 'Nationale Missbrauchsvroschriften im Spannungsfeld von DBA-und EU-Recht', in Jürgen Lüdicke (org.), *Wo steht das deutsche Internationale Steuerrecht?*, Köln, Dr Otto Schmidt, 2009, p. 137.

30 See Reuven Avi-Yonah, *International Tax as International Law*: An analysis of the International Tax Regime, New York, Cambridge University Press, 2007, pp. 8–9.

international law. The definition – enactment of legislative act which derogates the application of previous treaty rules – remains untouched.

## 3 Traditional approach: a hierarchical country-by-country solution

Traditionally, treaty overriding has been seen as a problem the solution of which would depend on a country's view on the role of international law which origin dates back to the debate between the defenders of 'dualism' and 'monism'. According to the 'dualists', led by Triepel,[31] in Germany, Anzilotti,[32] in Italy, and Irineu Strenger,[33] in Brazil, the national and international orders would be independent, with respect to their origins and to the relations they concern. Hence, there would be no conflict between rules of such legal orders: if there would be no contact, there would be no conflict. The national and international legal orders would only communicate if there were a reception of international rules by the national legal orders, which would occur by law or an express act of the Government.[34]

Such understanding was challenged by the monists, according to whom there would only be one legal order. Among the monists, there were those who defended that the domestic legislation should prevail and those who understood that international treaties were more important. The monists were headed by the members of the Viennese School (Kelsen and Verdross, whose understanding has been supported in Brazil[35] by Marotta Rangel, Haroldo Valladão, Oscar Tenório and Celso de Albuquerque Mello). According to the monists, there would be only one legal order, in which the national legal orders were integrated, as partial legal systems. In this sense, the international treaties and conventions would be immediately valid in the national legal orders, without any need of formal reception acts.[36]

Despite the early theoretical divergences, monists and dualists evolved to more 'moderate'[37] understandings. It is possible to affirm that their divergences nowadays are solely related to philosophical and legal principles and do not involve practical effects.[38]

Accordingly, when one comes to the countries' practice, it is clear that different legal systems diverge in the issue.[39] An evidence can be found in a research conducted by Karl J. Partsch back in 1964,[40] when one could find the most different solutions: while the USSR would not recognize treaties a legal status, one would find, on the other hand, legal systems, like France, where treaties would prevail over laws enacted later in time (provided reciprocal treatment would be granted by the treaty partner), or, under some circumstances, even over constitutional rules, like in The Netherlands. In the UK, treaties validly concluded do not demand parliamentary sanction in order to be binding on the state, but they will only have effect on the laws of the UK after 'appropriate legislative action has been taken'.[41] Accordingly, '[a] treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom', in a sense that:

> [e]xcept to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or on behalf of a private individual.[42]

Such a variety of solutions may lead one to believe that a common solution would not be possible, what would mean that depending on the treaty – and on the treaty partners involved – legal certainty would diverge.

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31 See Karl Heinrich Triepel, As relações entre o direito interno e o direito internacional (The relations between domestic law and international law), in *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, Belo Horizonte, October 1966, pp. 7–64.

32 See Charles Rousseau, *Droit International Public*, 9th ed., Paris, Dalloz, 1979, p. 4.

33 See Irineu Strenger, *Direito Internacional Privado*: parte geral (Private International Law: general part), vol. 1, São Paulo, Revista dos Tribunais, 1986, p. 78.

34 See Guido Soares, *Curso de Direito Internacional Público* (Public International Law Course), vol. 1. São Paulo, Atlas, 2002, p. 203.

35 See Celso D. de Albuquerque Mello, *Curso de Direito Internacional Público* (Public International Law Course), vol. 1, 14th ed., Rio de Janeiro, Renovar, 2002, p. 111–112; Haroldo Valladão, *Direito Internacional Privado* (Private International Law), Rio de Janeiro, Freitas Bastos, 1968, pp. 36–53; Oscar Tenório, *Direito Internacional Privado* (Private International Law), *v. I, Rio de Janeiro*, Freitas Bastos, 1965, p. 65–67; Vicente Marotta Rangel, Os conflitos entre o direito interno e os tratados internacionais (The conflicts between domestic law and international treaties), in *Boletim da Sociedade Brasileira de Direito Internacional*, year 23, n. 45/46, p. 2–54, 1967.

36 See Guido Soares, *supra* n. 34, at 204.

37 According to Vogel, the prevalent theory is the 'moderate dualism', which considers that domestic and international legislation are part of two spheres that exist separately. An international treaty, in order to be effective in domestic law, must be introduced in domestic legislation. See Klaus Vogel, The domestic law perspective, in Guglielmo Maisto (Ed.), *Tax Treaties and Domestic Law*, vol 2., Amsterdam, IBFD, 2006, p. 3.

38 See Rudolf Geiger, *Grundgesetz und Völkerrecht*, München, Beck, 1985, p. 16.

39 Professor Guido Soares presented Antonio Cassese's classification regarding how constitutions deal with the relation between international treaties and domestic legislation. Accordingly, there are (i) constitutions which ignore the question concerning the internalization of international treaties; (ii) constitutions which put the international treaty in the same hierarchy as domestic ordinary legislation; (iii) constitutions which consider international treaties as '*quasi*' constitutional rules; and (iv) constitutions that absorb tax treaties as constitutional rules. See Guido Soares, *supra* n. 34, at 216–225.

40 See Karl J. Partsch, 'Die Anwendung des Völkerrechts im innerstaatlichen Recht – Überprüfung der Transformationslehre', in *Berichte der Deutsche Gesellschaft für Völkerrecht*, Heft 6, 1964, p. 248–250.

41 See Jonathan Schwarz, *Schwarz on Tax Treaties*, Wolter Kluwer, UK, 2009, p. 4.

42 *McLaine Watson v. Department of trade* [1989] 3 All ER 523, HL, at 526.

Although this may be confirmed by the present experience of national decisions, this paper claims that Vogel's appeal towards a farewell to treaty override should not depend on a per-country legislative decision, but rather on a general understanding of the role of tax treaties.

### 3.1 *An Example of a Hierarchical Approach: The Brazilian Solution and Debates*

When one adopts an hierarchical approach, the overriding solution depends on understanding the position a treaty is granted within an internal legal system, i.e., whether treaties are internalized as an ordinary law, or whether a special status (superior or inferior) is recognized to it.

The Brazilian Tax Code, enacted in 1966, expressly assigned international treaties as a source of tax law.[43] The relation between domestic legislation and tax treaties is dealt with by Article 98 of the Brazilian Tax Code, according to which:

> Art. 98. The international treaties and conventions revoke or modify the internal tax legislation, and shall be observed by the legislation which follows them.

The wording of such provision is highly criticized by scholars.[44] Accordingly, tax treaties do not 'revoke' nor 'modify' domestic legislation, which remain in force after the signature of a tax treaty. If the tax treaty is applicable, the effectiveness of domestic legislation is restricted, and such provisions become inapplicable with respect to certain individuals and situations.

Brazilian scholars generally hold the position that the correct interpretation of Article 98 must be in the sense that 'international treaties prevail over domestic legislation formerly or subsequently enacted'.[45] According to Rothmann, if there is a double tax convention in force, the parties may not adopt unilateral measures 'intending to modify the content of the double tax convention'.[46] The prevalence is also confirmed by Navarro Coêlho, according to whom 'the Brazilian Constitution grants precedence to international treaties and provides for the applicability of its provisions upon the signature of the treaty by Brazil'.[47] He also argues that 'Article 98 of the Brazilian Tax Code sets forth the supremacy of the conventional tax rule in relation to domestic legislation, forbidding its modification by the ordinary legislature'.[48]

Brazilian Courts used to admit the prevalence of international law over domestic legislation.[49] In 1913, the Brazilian Supreme Court decided that a treaty was in force, in spite of the enactment of a subsequent law contrary to the provisions of such international agreement.[50] This statement would be repeated in a later decision of the Court.[51] There is also a precedent in which the Supreme Court concluded that a treaty had revoked laws formerly enacted.[52]

Such trend was interrupted in 1977, when the Supreme Court decided that, in a conflict between treaty and *lex posterior*, the latter would prevail, since it would express the actual will of the legislature. In this occasion, the Court concluded that the prevalence of domestic legislation should be granted, notwithstanding the international consequences of a clear violation of the provisions of a treaty.[53]

Whilst the outcome of this decision, the judges dissented in their reasoning with respect to the relation between treaty and domestic law and made an important distinction, which became fundamental to the comprehension of the Brazilian case law regarding the application of international treaties. The leading opinion adopted the understanding whereby Brazilian domestic legislation should prevail over international treaties. However, it resorted to a distinction between the Convention dealt with in the case (the Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes) and tax treaties, considering a classification made by some international law scholars between 'contractual treaties' and 'normative treaties'. Normative treaties would be those treaties which have a

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43 According to Art. 96 of the Brazilian Tax Code, '*{t}he expression "tax legislation" comprises the statutes, the international treaties and conventions, the decrees and the complementary rules which provide, in whole or in part, for taxes and the juridical relations regarding them.*'

44 See Alberto Xavier, *Direito Tributário Internacional do Brasil* (Brazilian International Tax Law), 6th ed., Rio de Janeiro, Forense, 2004, pp. 119–149; Hugo de Brito Machado, *Curso de Direito Tributário* (Tax Law Course), 5th ed., Rio de Janeiro, Forense, 1992, p. 43; Ruy Barbosa Nogueira, Tratados internacionais em matéria de tributação (International Tax Treaties), in *Direito Tributário Atual*, vol. 3, São Paulo, IBDT, 1983, p. 341–379; Sacha Calmon Navarro Coêlho, As contribuições para a seguridade e os tratados internacionais (Social Security Contributions and International Treaties), in *Revista Dialética de Direito Tributário*, n. 26, São Paulo, Dialética, Nov. 1997 p. 67–85.

45 See Hugo de Brito Machado, *supra* n. 44, at 43.

46 See Gerd W. Rothmann, *Interpretação e aplicação dos acordos internacionais contra a bitributação* (Interpretation and application of double tax conventions). Doctoral Thesis – Faculty of Law, University of São Paulo, São Paulo, p. 81.

47 See Sacha Calmon Navarro Coêlho, *supra* n. 44, at 80.

48 *Ibid*.

49 See José Inácio Franceschini, Conflito entre os tratados internacionais e as normas de direito interno que lhe forem posteriores (Conflicts between international treaties and subsequent domestic provisions), *Revista dos Tribunais*, year 71, vol. 556, São Paulo, RT, February 1982, pp. 28–36.

50 See Celso D. de Albuquerque Mello, *supra* n. 35, at 432.

51 Supreme Court, Appeal No. 7.872, decided on 10 Nov. 1943.

52 Supreme Court, Appeal No. 9.587, decided on 21 Aug. 1951.

53 Supreme Court, Extraordinary Appeal No. 80.004, decided on 6 Jan. 1977.

general character, accepting the adhesion of other States, while the contractual treaties would be similar to an agreement between individuals.[54]

Despite not being generally accepted,[55] this classification must be considered in Brazilian system, since it has been consistently adopted by the Supreme Court since the judgment mentioned above. The referred understanding influenced the subsequent judgments of the Supreme Court on the matter,[56] and also other Brazilian courts, such as the Superior Court of Justice.[57]

Such a conclusion can furthermore be sustained when one considers the 1988 Constitution,[58] whose Article 5, paragraph 2, establishes a general clause reading as follows:

> § 2º The rights and guaranties provided by this Constitution do not exclude any other arising from the regime and principles adopted therein, or from the international treaties of which the Brazilian Federal Republic is part.

It is noteworthy that this provision is much deeper than its similar set forth by the German Constitution (the 'Basic Law'), whose Article 25 establishes that 'the general clauses of public international law are part of the Federation Law. They prevail over the laws and impose rights and obligations directly to the residents of the federal territory'.[59] Unlike the Brazilian Constitution, the German Basic Law does not make reference to rights and guaranties arising from the treaties. This explains the traditional German approach whereby only 'general clauses' would be self-applicable, not any provision of an international treaty.[60] As already mentioned, the *Bundesfinanzhof* seems to be challenging this understanding.

Under Brazilian Law, however, this discussion does not seem applicable. As Xavier explains, according to Article 5, paragraph 2, referred above, whenever one infers a right or guaranty from an international treaty, it will be incorporated to the rights and guaranties referred by Caption II of the Constitution.[61]

Furthermore, Constitutional Amendment No. 45, of 8 December 2004, added paragraph 3 to Article 5, according to which the treaties and conventions concerning human rights that are approved in both houses of National Congress, in two distinct voting rounds, by three fifths of their respective members, shall be deemed as equivalent to Constitutional Amendments. It is not clear whether tax treaties would contain human rights, but one should at least consider respected scholars' opinions, like Ricardo Lobo Torres who, despite not referring to tax treaties, includes the principle of equality in tax matters among human rights.[62] If one understands that double taxation, for harming the principle of ability to pay, is contrary to the principle of equality, then it is immediate that the protection against double taxation is a human right, since it positively ensures equality.

Thus, the traditional position among Brazilian scholars is that tax treaty rules prevail over internal domestic tax laws. Although it will be argued that the 'prevalence' is not an adequate approach towards the relation between domestic and treaty law, the wording of the Tax Code and the Constitution itself seem enough to indicate that, be that as it may, internal legislation must be compatible with tax treaties under Brazilian legal system.

### 3.2 *No Hierarchy and the Later-in-Time Rule: The US Approach*

When it comes to treaty overriding, Doernberg offers an interesting explanation of the US perspective when he compares the legislative process in the enactment of statutes, on one hand, and the ratification of treaties on the other hand: it is enough to say that the House of Representatives has no official role in the latter, and even in Senate, there is a substantial difference since treaties are

**Notes**

54 See Louis Le Four, *Précis de Droit International public*, Paris, Dalloz, 1937, p. 204.

55 See e.g., José Francisco Rezek, *Direito Internacional Público*: curso elementar (Public International Law: elementary course), 7th ed., São Paulo, Saraiva, 1998, p. 30.

56 See Supreme Court, Extraordinary Appeal No. 99.376, decided on 6 Jan. 1984; Supreme Court, Extradition No. 662-2, decided on 28 Nov. 1996.

57 Superior Court of Justice, Appeal No. 37.065-5, decided on 15 Dec. 1993. In this decision, Justice Demócrito Reinaldo expressly refers to the decision of the Supreme Court described above, concluding: '*Article 98 of the Tax Code, when establishing that treaty or convention are not revoked by the internal tax law, refers to agreements signed by Brazil concerning specific matters and it is only applicable to treaties of a contractual nature*'.

58 With respect to the evolution of the constitutional provisions regarding the matter, Klaus Vogel states: '*Before World War II the problem of treaty overruling by domestic legislation was not referred to by constitutions. The first constitution to confer to international treaties priority over domestic law was that of Japan in 1947. In Europe, the Netherlands went ahead by 1953, inserting Art. 60e into its Constitution of 1815, which is now that Constitution's Art. 94. In France, Art. 28 of its Constitution of 1946 already provided: 'Les traités diplomatiques régulièrement ratifiés ayant une autorité superieure à celle de lois internes …'. Yet this provision was not applied to subsequent statutes. The same was controversial at first with respect to Art. 55 of the French Constitution of 1958, which reads: 'Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité superieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie'. Meanwhile, however, the* Cour de cassation *and the* Conseil d'Etat*, as well as leading scholars, have recognized that the article gives treaties priority over subsequent as well as earlier statutes'.* See Klaus Vogel, *supra* n. 37, at 6.

59 In the original: '*Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechts. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes*'.

60 For further details, see Luís Eduardo Schoueri, *Planejamento fiscal através de acordos de bitributação – 'Treaty Shopping'*, São Paulo, Revista dos Tribunais, 1995, p. 95.

61 The Supreme Court has already decided that 'rights and guaranties' include tax principles provided by the Constitution. See Supreme Court, Direct Action of Unconstitutionality No. 939-7, decided on 15 Sep. 1993.

62 See Ricardo Lobo Torres, *Curso de Direito Financeiro e Tributário* (Tax and Public Finance Law Course), 10th ed., Rio de Janeiro, Renovar, 2003, p. 67.

responsibility of the Foreign Relations Committee, while statutes are in hands of Finance Committee. It is foreseeable that a conflict may arise and that Congress may not be in agreement with treaties' provisions.[63]

Notwithstanding this, in the United States, treaties are part of the laws of the country, just like internal law. There is no hierarchy and it is possible for a domestic law to prevail over an international treaty, if national legislature expressly states that it is the case.[64] According to Article VI.2 of the US Constitution (*supremacy clause*) '*laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*'. Considering that both international treaties and domestic legislation are *supreme law*, as per this general rule, any law subsequent to an international treaty that conflicts with it shall prevail (*later-in-time rule*), giving rise to a treaty override situation.

In 1902, the Supreme Court judged a case in which it was affirmed that one may not assume that the domestic legislator intended to violate an international treaty.[65] The presumption is that the legislator intended to preserve the obligations contracted by the State. Accordingly, the treaty override may not be assumed, unless the law expressly states that it intends to prevail over the international treaty. Hence, it is necessary that the law expressly provide for the treaty override.

The need for an express provision was also addressed in *Cook v. United States,*[66] in 1933, in which the Supreme Court decided that '*a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed*'.

### 3.3 *The 'Lex Specialis' Approach*

The traditional treatment of treaty overriding in Germany was based on the '*lex specialis*' approach. As already mentioned in the introduction, this approach may be reviewed, if the decisions of the *Bundesfinanzhof* are confirmed by the Constitutional Court. Notwithstanding this circumstance, one may consider the debates in Germany as an example of the '*lex specialis*' approach, which is usual in several European countries.

The German *Abgabenordnung* includes a provision that is similar to Article 98 of the Brazilian Tax Code:

> §2. Treaties with other States, in the sense provided by Article 59, No. 2, period 1, of the Basic Law, which provide for taxation, prevail over domestic tax legislation, provided that they have become directly applicable national law.

However, unlike the Brazilian Constitution, the German Basic Law does not contain a provision concerning the guaranties arising from international treaties, but only the principles of public international law. Neither is there a law with a complementary nature, such as the Brazilian Tax Code, which complements the Federal Constitution, with the authority 'to establish general provisions in tax matters'.

Nevertheless, said provision has not been deemed unconstitutional. On the contrary, German scholars reached an interpretation according to the Basic Law, despite, as evidenced by a historical research on the enactment of the provision, the original intent in 1977 was to establish that no domestic legislation could revoke a provision of an international treaty.[67]

According to that understanding, said provision, as a federal law, could not give precedence to tax conventions over domestic legislation. Hence, the only reasonable interpretation would be that the *Abgabenordnung* would demand that the international treaty would be considered *lex specialis* in relation to the domestic legislation. In this sense, it would be possible that a posterior federal law would modify or revoke a provision of a double tax treaty. Nevertheless, the law would necessarily expressly do so, since, on the contrary, the convention should be considered as *lex specialis* and, as such, prevail over said federal law.[68] In the same sense were the opinions of Klein and

**Notes**

[63] See Richard L. Doernberg, '"Overriding Tax Treaties: The U.S. Perspective,"' 9 *Emory Int'l L. Rev.* 71 (Spring 1995).

[64] See Luís Eduardo Schoueri, Validade de normas internas contrárias a dispositivos de acordos de bitributação no Direito e na prática norte-americana (Validity of domestic legislation contrary to double tax treaties provisions in the US Law and practice), in *Revista Direito Tributário Atual*, vol. 13, São Paulo, IBDT, April 1994, p. 119–132, passim, with further details with respect to the debate.

[65] During the judgment of this case, it was affirmed that '*{t}he purpose of a law to override all or part of a treaty will not be lightly assumed. It should appear clearly and distinctly from the words used in the law*'. See *Lee Zen Tai v. United States*, 185 U.S. 213, 221 (1902).

[66] See *Cook v. United States*, 288 U.S. 102 (1933).

[67] See Stephan Eilers, 'Override of tax treaties under the domestic legislation of the U.S. and Germany', in *Tax Management International Journal,* vol. 19, Washington D.C., 1990, p. 296–297.

[68] See Klaus Vogel, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen*, Kommentar auf der Grundlage der Musterabkommen, 3. ed., Munich, Beck, 1996, p. 164–169.

Orlopp,[69] Debatin,[70] Hübschmann and Spitaler,[71] Weigell,[72] Tipke and Kruse[73] and Mössner.[74]

The reasoning based on *lex specialis*, despite its acceptance by reputed scholars, may be questioned if one points out that, actually, treaties do not concern the same matter as domestic legislation. Only the domestic legislation, and not the treaty, creates taxes; the treaty only limits the jurisdiction, as described above. In order to speak of *lex specialis*, it would be necessary that the treaty provided for the levy of taxes, establishing a tax rate, for instance, diverse from the domestic law. The treaty does not establish a rate, it only limits it. The treaty does not contain a *lex specialis* providing for the matter, whose competence is attributed solely to the domestic legislature.

### 3.4 *The Limitation of the Hierarchical Approach*

While the hierarchical approach may be satisfactory if the internal legal system deals with the issue, from an international perspective it is clearly problematic, since the validity of tax treaties would depend on the parties' internal legal systems.

The immediate consequence is that a very same treaty will be subject to different treatments according to the treaty partners. Therefore, the primary scope of the tax treaty – distribution of taxing rights – may be jeopardized.

### 3.5 *International Perspective*

The Vienna Convention clearly condemns the treaty override, especially due to the *pacta sunt servanda* principle, set forth in its Article 26. Article 27 of the Convention reinforces such understanding, providing that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

In fact, since the treaty override constitutes a violation to the international obligations contracted by the States, it is possible to consider that, if there were no sanction to the violating State, there would be a strong limitation to the international law.

Also the OECD[75] has expressed the understanding that the States should refrain from enacting legislation contrary to their international obligations.[76] The OECD positioning derives from the previously discussed series of treaty overrides carried out by the US during the 1980s.[77]

## 4 Reviewing the Traditional Approach: Jurisdiction as a Key to the Problem

The issue of treaty overriding has been centred on a hierarchical debate, i.e., whether tax treaties are granted a higher, equal or lower ranking, when opposed to internal legislation.

However, the hierarchical debate is not adequate for the overriding issue. Accordingly, hierarchy (*lex superior*) arguments, as well as the *lex specialis* are formulae applicable to solve a typical problem of antinomy.

However, in the author's view, when one considers the relationship between double tax conventions and domestic legislation, discussions regarding the jurisdiction of the States must precede the concerns related to the prevalence issue.

International treaties and domestic legislation belong to different legal frames (international and national, respectively). Through international treaties, States enter into commitments, in the international level, regarding the limits of their jurisdiction. Hence, tax treaties aim at delineating the contours in which the tax legislator is allowed to operate.

Notes

69 See Franz Klein and Gerd Orlopp, *Abgabenordnung – einschließlich Steuerstrafrecht*, 4. ed., Munich, Beck, 1989, p. 15–16.

70 See Helmut Debatin, 'Die Abkommen der Bundesrepublik Deutschland zur Vermeidung der internationalen Doppelbesteuerung (Doppelbesteuerungsabkommen)', in Rudolf Korn and Helmut Debatin (Ed.), *Doppelbesteuerung – Sammlung der zwischen der Bundesrepublik Deutschland und dem Ausland bestehenden Abkommen über der Vermeidung der Doppelbesteuerung*, 8. ed., Systematik – III, Munich, Beck, 1989, p. 89.

71 See Hübschman and Spitaler, *Kommentar zur Abgabenordnung und Finanzgerichtsordnung*. 9. ed., Köln, Otto Schmidt, § 2, Anm. 15.

72 See Jörg Weigel, Das Verhältnis der Vorschrift des § 2a EStG zu den Doppelbesteuerungsabkommen, in *Recht der Internationalen Wirtschaft,* 1987, pp. 122–140 (124–125).

73 See Klaus Tipke and Heirich Wilhelm Kruse, *Abgabenordnung, Finanzgerichtsordnung: Kommentar zur AO 1977 und FGO (ohne Steuerstrafrecht).* 14 ed., Köln, Otto Schmidt, 1991, §2, Tz 1.

74 See Jörg M. Mössner, Zur Auslegung von Doppelbesteuerungsabkommen, In Karl Bockstiegel (Ed.), *Völkerrecht, Recht der Internationalen Organisationen, Weltwirtschaft – Festschrift für Ignaz Seid –Hohenveldern*, Köln, Carl Heymanns, pp. 403–426 (413).

75 In a 1989 Report, it was stated that '*the certainty that tax treaties bring to international tax matters has, in the past few years, been called into question, and to some extent undermined, by the tendency in certain States for domestic legislation to be passed or proposed which may override provisions of tax treaties*'. See OECD, *supra* n. 14, at 26.

76 In this document, the OECD Council suggests Member States: '*1. To undertake promptly bilateral or multilateral consultations to address problems connected with tax treaty provisions, whether arising in their own country or raised by countries with which they have tax treaties; 2. To avoid enacting legislation which is intended to have effects in clear contradiction to international treaty obligations*'.

77 As seen above, in the US, the 'treaty override decade' began with the enactment of the 'Foreign Investment in Real Property Tax Act' (FIRPTA), in 1980. Other treaty override situations were the enactment of the 'Tax Reform Act' (TRA), from 1986, the 'Omnibus Budget Reconciliation Act', from 1989 and the 'Technical and Miscellaneous Revenue Act' (TAMRA), from 1988. See Luís Eduardo Schoueri, Validade de normas internas contrárias a dispositivos de acordos de bitributação no Direito e na prática norte-americana (Validity of domestic legislation contrary to double tax treaties provisions in the U.S Law and practice), *supra* n. 64, at 119–121.

The exercise of jurisdiction in the national territory is a fundamental right of the States.[78] The jurisdiction, exercised by the State within its frontiers, may be characterized as general and exclusive: general, because the State exercises the legislative, administrative and judicial jurisdiction within its borders; exclusive, due to the fact that the State faces no competition with other jurisdictions, since it possesses the monopoly of the legitimate use of physical force (jurisdiction to enforce).[79]

Jurisdiction includes an expression of the state power, conceived as the capacity to decide and impose decisions. From the concept of power, one may affirm that the jurisdiction is the enforcement of the law by the State, which enacts the rules, apply them to real cases and may legitimately use physical force in the enforcement of its order.[80] It is therefore associated to sovereignty. The primary normative power of the State is the basis of sovereignty, and, at the same time, the contours of the use of this power will define the jurisdiction of that State.

It is true that jurisdiction goes beyond enforcement and includes also the power to prescribe rules; in this case, however, a monopoly is not recognized, what, for purposes of taxation, can easily explain double or multiple taxation due to overlapping of jurisdictions, all of them with 'genuine link' to the situation

One of the main functions of public international law (*jus gentium)* is to set the spheres of validity of the various national orders. The relationship among States depends on the reciprocal recognition of limits of jurisdiction, whose extension is ruled by the international law. By the attribution of jurisdiction, it is determined how, when and to whom the national laws of the sovereign States may be enforced. Therefore, sovereignty is 'a precondition of jurisdiction' in a sense that the existence of the latter depends on the former.[81] Only after setting the jurisdiction, the States are able to enforce their own laws. Jurisdiction is a requisite of the enforcement of the law.

An example of the importance of jurisdiction on defining the enforceability of law may be found in the effects brought by the German reunification, in 1990, to the jurisdiction of the former Federal Republic of Germany (West Germany). The Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) was enacted in 23 May 1949, by the parliamentary council (formed by representatives of the states – *Länder*) of the West Germany. This legislation was intended to be the German Federal Constitution and provided for, in its Article 146, that it would lose its validity as soon as, upon reunification, a Constitution would enter into force in the whole German territory. Likewise, the designation of this legislation as 'Basic Law' (*Grundgesetz*) instead of 'Constitution' (*Verfassung*) reveals that both the legislation and the Federal State it established ('Federal Republic of Germany') were intended to be provisional solutions, which should (only) last until the reunification, given that in 1949, the reunification process was seen by the members of the Parliament of West Germany as a political event that would be completed in short term. The Cold War was responsible for an unexpected forty-year delay.

When the reunification finally started, the former East States adhered to the West German State under the (old) accession Article 23 of the 1949 Basic Law. Instead of enacting another constitution, as envisaged under the Article 146 of the Basic Law, it was decided that this Basic Law would be kept in force (with a few amendments, including the abolition of Article 23 and a modification of Article 146) and that it was, from now on, the constitution of the reunited Germany.

Such option implied an actual extension of the jurisdiction of the Federal Republic of Germany to the whole German territory, fulfilling the necessary requirement to the enforcement of the laws of the former to the reunited Germany. In other words, the laws that, due to a jurisdiction limitation, were only applicable within the West German territory, became enforceable also in the East states from the moment the jurisdiction was extended.

The same reasoning is also valid to tax law: once the jurisdiction is extended to the five new states, German tax legislation becomes also applicable therein. If, for instance, a state would cease to be a member of the Federation, the German jurisdiction would be limited, and German tax law would not be applicable to that state anymore. In summary, if the jurisdiction is extended, so does the range of the legislation; if the jurisdiction is restricted, the same occurs to the applicability of the legislation.

With respect to international tax law, the reasoning presented leads to the conclusion that *tax legislation of a given State is only applicable within the limits of its jurisdiction, so that the tax powers of this State cannot exceed the referred jurisdictional limitations.*

In tax law, territoriality in its broader sense is a general principle that limits the tax sovereignty of the States, so

**Notes**

78 See Celso D. de Albuquerque Mello, *supra* n. 35, at 432.

79 See José Francisco Rezek, *supra* n. 55, at 160–161.

80 Marília Machado Gattei, 'A importância da jurisdicionalização dos procedimentos de solução de controvérsias na OMC' (The importance of the jurisdiction of the WTO over settlement proceedings), in Alberto Amaral Júnior (Ed.), *Direito do Comércio Internacional*, São Paulo, Juarez de Oliveira, 2002, pp. 108–109.

81 Alberto Xavier, *Direito Internacional do Brasil*, 6th ed., Rio de Janeiro, Forense, 2004, p. 13.

that they can only tax events with which they have a nexus.[82]

A hypothetical situation seems to be interesting to clarify this basic issue. Imagine one State would wish to tax another State's property. Assume, for instance, that Brazilian Congress would enact a law according to which a tax would be levied on the property of other governments, for instance, a Brazilian tax on the property of the White House. Even though there is no express limitation in Brazilian Federal Constitution to such taxation, it is clear that the pretension to tax the White House would violate the limits of the Brazilian State jurisdiction. As a consequence, in this case, Brazilian domestic legislation on property tax would not be applicable. This example is enough to show that the domestic legislation of a given State cannot exceed the limits of the jurisdiction of that State, since the jurisdiction is a requirement for the application of such legislation.

If it is uncontroversial that taxation may not exceed a State's jurisdiction, it is also correct to say that domestic tax law may not provide for a matter which is not within the State's jurisdiction due to a limit of jurisdiction dictated by a tax treaty.

The sovereignty of the States must be compatible with international law. Ihering's doctrine, later endorsed by Jellinek, based the volunteer submission to the Law by the State and its subsequent limitations on the 'autolimitation rule'.[83] The external aspect of sovereignty, defined as the independence and equality among States, implies the acceptance of mandatory rules of international law.[84]

## 5 The Role of Tax Treaties

International treaties set limits to the jurisdiction of the contracting states, establishing a 'retaining wall' to the power of domestic legislature to regulate issues referred to in those treaties.

This may be illustrated by the following analogy. The Brazilian Civil Code is valid in the national territory. Argentina also has a Civil Code. There is no contradiction between such codes, because each one is valid within its State jurisdiction. The instrument that determines such jurisdiction is neither the Brazilian Civil Code, nor the Argentinean one. An international treaty sets the frontiers between the two States, and, consequently, their jurisdiction. One may not speak of a conflict between the Brazilian Civil Code and the frontier treaty between Brazil and Argentina. The matters are distinct, despite the former is only valid in the limits set by the latter. There is no antinomy between such legislation.

Analogically, as a frontier treaty, an instrument recognized by international law, sets the jurisdiction of States, also tax treaties operate on the delimitation of jurisdiction. As such, they are not in conflict with domestic legislation, since they solely set limits for the latter.

Distinct roles do not imply a hierarchical relation. Neither the international treaty prevails over domestic legislation, nor does domestic legislation prevail over the international treaty. If the international treaty effectively had a superior hierarchical position in relation to domestic legislation, then it could regulate issues reserved to domestic legislation. It would be the case to admit that international tax treaties could create taxes. But this does not occur: in countries where the principle of legality prevails, only domestic legislation is able to create a tax, not the treaty.

The contrary is not possible as well: a *lex posterior* cannot provide for the State's jurisdiction, enlarging the limits established by an international treaty. By signing an international treaty – and not enacting a statute –, the State binds itself in the international sphere, compromising its sovereignty.

Jurisdiction is thus the key to the polemical relation between internal and treaty law: the treaty provides for the limits to jurisdiction; if domestic legislation regulates this matter, it is outraging its competence. In the same sense, domestic law create taxes; if the tax treaty intends to play this role, it will be unconstitutional, for violating the principle of legality.

Tax treaties and domestic legislation deal with different matters, whose competence also differs.

As mentioned, one may not refer to state jurisdiction where there is no sovereignty. In this situation, the domestic legislation would not be applied, since a fundamental requirement would be missing.

In other words, it is not possible to enforce a law that is contrary to the tax treaty, which is an international law rule that sets limits – accepted by the State itself – to the national jurisdiction. Such enforcement would trespass the retaining wall responsible for preventing the domestic legislature from regulating issues provided for the treaty, which would be a violation to the jurisdiction of the State.

Alternatively, in case one (mistakenly) sustains that international treaties are also domestic rules, the conclusion would be the same: international treaties would

### Notes

82 See Luís Eduardo Schoueri, 'Princípios no Direito Tributário International: territorialidade, fonte e universalidade' (Principles of International Tax Law: territoriality, source and universality), in Roberto Ferraz (coord.), in Roberto Ferraz (Ed.), *Princípios e Limites da Tributação*, São Paulo, Quartier Latin, 2005, pp. 326–342.

83 See José Alfredo de Oliveira Baracho, Teorial Geral da Soberania (General Theory of Sovereignty), in *Revista Brasileira de Estudos Políticos*, No. 63/64, 1986, p. 27.

84 José Alfredo de Oliveira Baracho, *supra* n. 83, at 57.

be those rules that provide for the scope of the legal order in which they are inserted. Whether these are a part of the international order or not, tax treaties are the instrument to set the extent of national jurisdiction; once defined the jurisdiction, it is not possible that domestic legislation provides for the issue, due to the lack of competence for doing so.

The impossibility of changing the provisions of the treaty by means of domestic legislation is not based on hierarchical relations, but rather on a limitation to the jurisdiction of the contracting States. One should thus admit that addressing the treaty override based on the hierarchy between tax treaties and domestic legislation is a false solution to the problem.

## 6 Vogel's mask: the relation between domestic and international legislation

According to Vogel's enlightening explanation, double tax conventions may be understood as a mask, which is put over the domestic law, blocking parts of it. The domestic law provisions that remain visible, for meeting the holes of the mask, are applicable; the others are not. It is not important if the discovery starts from the mask or from the text, since the result is the same; logically, there is no precedence, and the discovery shall follow, in each case, the most convenient path.[85]

Helmut Debatin, claiming that the internal law serves as basis for the tax obligations, while a double tax convention, as *lex specialis*, suits to limit them, created a debate with Vogel. Debatin contended that the logical conclusion would be that first the *lex specialis* (the treaty) should be examined. Only after concluding that the State has the jurisdiction to tax the domestic law should be examined, in order to determine if the taxation shall occur.[86]

Responding to the critics, Vogel argued that such distinction would have no practical effect, showing, even though, that there would be no logical rule imposing that the discovery should start from the treaty, and not from domestic legislation.[87] Debatin published a response,[88] which was not replied by Vogel, for solely bringing the same arguments.

Later, the matter would be discussed again by Mössner. Resorting to accurate definitions from legal methodology, he argues that, in relation to domestic legislation, a double tax convention is not *lex specialis*, in its strictest sense. In order to be considered *lex specialis* in relation to another, a legislation must address a complete tax event, adding especial requisites to it. Double tax conventions rules are incomplete, since they demand a complement, which is extracted from domestic legislation. Even though, he concludes, agreeing with Vogel, the question regarding from where the discovery should start is irrelevant.[89]

Therefore, the analysis may start from domestic legislation or from the tax treaty, according to the specificities of each case. Only if: (i) there is internal tax legislation, providing for the taxation in the case under analysis; and (ii) there is not a double tax convention rule excluding such taxation, one may conclude for the taxation in the particular case.

## 7 A treaty is not *lex specialis*

It is clear, therefore, that Mössner's reasoning regarding the impropriety of speaking of *lex specialis* when addressing double tax treaties must be upheld. After all, if it were the case of a *lex specialis*, the double tax convention would be applicable *instead* of the domestic law. As the double tax convention does not create taxes, it is not possible to apply it in the absence of domestic tax legislation.

It must be highlighted that the reasoning based on *lex specialis* does not proceed. A double tax treaties does not set forth *lex specialis*, which is the one that contains all the elements provided by the *lex generalis* and some others elements that characterize it as *lex specialis*. In other words, in order to consider a rule as *lex specialis*, one must analyse if it concerns the same matter as the *lex generalis*, attributing a distinct treatment to a determined situation.

Double tax treaties do not concern the same matter as domestic tax legislation. Only the latter creates taxes. A double tax treaty does not create taxes, since only the law may do so, as demanded by the principle of legality. If a double tax treaty contained *lex specialis*, it would be enough to create a tax in a given situation, which is not the case. If there is no domestic legislation providing for the tax, the State may not invoke the double tax treaty to levy it.

José Souto Maior Borges, analysing the Brazilian tax system, contends that the international treaty is part of the national legal order and, as such, must be observed by the ordinary tax legislation, since the latter belong to partial

**Notes**

85 See Klaus Vogel, *supra* n. 68, at 121.

86 See Helmut Debatin, 'System und Auslegung der Doppelbesteuerungsabkommen', in *Der Betrieb*, Nr 39, 1985, p. 2.

87 See Klaus Vogel, 'Zu einigen Fragen des Internationalen Steuerrechts', in *Der Betrieb,* No. 10, 1986, p. 507.

88 See Klaus Vogel, *supra* n. 87, at 510–513.

89 See Jörg Manfred Mössner, *Neue Auslegungsfragen bei Anwendung von oppelbesteuerungsabkommen*, *Hefte zur Internationalen Besteuerung,* No. 38, Hamburg, Institut für Ausländisches und Internationales Finanz- und Steuerwesen – Univesität Hamburg, 1987, p. 7.

legal orders, which renders to the national legal order.[90] Such reasoning overcomes the antinomy matter, which is an assumption of the *lex specialis* reasoning. Affirming that a law must observe the limits imposed by another law does not imply that both regard the same matter. Neither does it mean that the problem requires a hierarchical solution.[91]

In the same sense, it is unreasonable to discuss hierarchy when facing a double tax treaty. The treaty is not 'above' or 'below' the domestic legislation. Double tax treaties are instruments whereby the States set their own tax jurisdiction. Domestic legislation, on the other hand, operate within each jurisdiction. The clear evidence of the inexistence of hierarchy between international treaty and domestic legislation is that double tax treaties may not create taxes: as set forth by the principle of legality, only the internal law may create taxes. Also, the ordinary statute is not the adequate instrument for the State to establish the limits to its jurisdiction in the international community.

The consequence is immediate: if a double tax treaty restricts the possibility of a State taxing given situation, then the law that intends to tax such situation is operating outside the jurisdiction of the State, being, therefore, invalid. The mere fact that the double tax treaty attributes to a State the jurisdiction to tax certain event does not imply that this event will be taxed, since only the internal legislation may impose the taxation.

The jurisdictional approach is not solely an international law solution. Actually, the jurisdictional approach relies on an assumption made by the major Constitutions: the States are capable of restricting their own jurisdiction through international conventions.

Such restrictions demand intense negotiations, turning each signed treaty into a unique piece of legislation, which deals with very specific, concrete and opposed stakes. As described by Vogel, the negotiations on the limits of each State's jurisdiction involve a persistent and artful struggle, which may not be disregarded.[92]

If a contracting state unilaterally overrides a given provision of the treaty, keeping the others in force, the whole process of negotiation becomes useless. The initial balance of the convention, as it was negotiated, is completely jeopardized by such conducts. If a contracting state waived its jurisdiction with respect to a given circumstance, it is clear that it intended to maintain its jurisdiction over the other taxable events, as provided by the treaty. It is not possible to fix an unsuccessful negotiation by simply enacting further domestic legislation. If the conditions of the treaty are not satisfactory, then renegotiating or terminating are the only legal solutions.

## 8 Conclusion: A Common Approach to Tax Treaty Override

Once accepted that treaties are an internationally recognized instrument to limit jurisdiction, one will immediately agree that no taxes may be created through tax treaties; on the other hand, taxes may only be enacted within a tax jurisdiction.

Tax treaty override represents, therefore, an attempt to extend taxation beyond the jurisdiction limits a State agreed with its treaty partners. In other words, by means of a tax treaty override, a State legislates beyond its own jurisdiction.

Irrespective of whether one adopts a monist or dualist approach to the relation between international law and domestic law, it is clear that domestic law may not reach facts or circumstances beyond a State's jurisdiction. Whether these limits derive from international law, or from internal constitutional law, limits are in any case defined by means of international treaties. While these are in force, jurisdiction is limited by them. Of course a State may revoke a treaty, but this would not be a treaty override. If, however, a treaty is valid and in force, tax jurisdiction is limited by it.

This approach seems also correct independent of the legal system involved. Different from the traditional hierarchical solution, whereby the 'position' of a treaty would depend on the internal domestic law concerned, the jurisdictional approach may claim to be valid for any tax system, thus avoiding different solutions for the same case. From an international perspective, the uniformity of solutions and the clear repugnance to the tax treaty overriding seem to indicate that this approach should prevail.

### Notes

[90] See José Souto Maior Borges, 'Isenções em Tratados Internacionais de Impostos dos Estados-Membros e Municípios' (Exemptions in tax treaties regarding taxes of States and Municipalities), in Celso Antônio Bandeira de Mello (Ed.), *Estudos em homenagem a Geraldo Ataliba*, São Paulo, Malheiros, 1997, p. 166–178.

[91] See José Souto Maior Borges, *Lei Complementar Tributária* (Tax Complementary Law), São Paulo, Revista dos Tribunais, 1975, p. 25.

[92] Klaus Vogel, Abkommensvergleich als Methode bei der Auslegung von Doppelbesteuerungsabkommen, in *Steuerberater-Jahrbuch* 1983–1984, Koln, Otto Schmidt, pp. 377–378. The author narrates negotiations in which the commissions of the States resort to time pressure, or even to physical resistance in order to achieve their aims in a negotiation.