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decem lustra

Essays and Personal reflections in honor of Kees van Raad

by his friends, colleagues and former students

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1. For the Tables of contents of Part II, see p. 587 ff.

and the sound administration of justice on the one hand, and the fundamental judicial rights of the persons concerned on the other.

The qualification of JCP in light of the Brazil-Netherlands double taxation treaty

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Contents

1. Introduction

Kees van Raad's undisputed worldwide leadership in international tax law has also echoed in Brazil. For several years, generations of Brazilian practitioners went to Leiden and construed an amazing network in the area. Personally, I have not had the privilege of having studied with Kees, but I first met him as a student, when Prof. Klaus Vogel took a group of his students to Leiden for a joint seminary with Kees. Whoever has met him will certainly understand that I immediately began to admire him. Over the following years, I dare to say that we became friends, and this is the only explanation why he honored me sometimes to teach in Leiden. I am happy to make a contribution in this book for Kees.

Kees van Raad's relationship with Brazil was not limited to students going to Leiden. On the contrary, Kees himself came several times to our country, where he was always welcomed by his alumni and friends, and where he immediately conquered new admirers. Furthermore, Kees also contributed to Brazilian literature.

It seems reasonable, therefore, that my contribution to this book shall take into consideration one of the several articles Kees wrote in Brazil. In 2021, Kees van Raad published an article in the *Revista de Direito Tributário Atual*, of the Brazilian Institute of Tax Law (IBDT), regarding the qualification of Interest on Equity (JCP) in light of the Brazil-Netherlands Double Taxation Treaty ('Treaty'). This article is amazing because it shows Kees' familiarity with Brazilian legislation and it is also a fantastic contribution to International Tax Law. In short, he argued that JCP falls under the definition of interest in Article 10 of the Treaty and questioned the possibility of qualifying them as income similar to income from loans, under the terms of Article 11.

Proposing an interesting interpretive exercise, Kees van Raad starts from the assumption that JCP could, in principle, qualify under both articles of the treaty (Article 10 and Article 11), due to its hybrid nature of both interest and dividends. He then analyses the possibility of the simultaneous application of both articles, noting the absence of antinomy between them.

In honor of Kees van Raad, this text dialogues with said article. First, it evaluates the nature of interest on equity in Brazil, as well as its qualification under the Brazil-Netherlands Treaty and the possibility of simultaneous application of more than one treaty article. Finally, it analyses the treatment that Dutch courts have given to the Mutual Agreement Procedure (MAP) between Brazil and the Netherlands for the purposes of qualifying JCP in the Treaty.

2. Nature of JCP in Brazil

The dispute over the qualification of Interest on Equity has always been intense in the Brazilian legal debate. On one side are those who advocate for its proximity to dividends. On the other, those who defend its proximity to interest. A third (and more convincing) position is not to search private paw concepts within the categories employed by the tax legislator. Under such perspective, tax law may have its own concepts, without any correspondence to private notions, to regulate taxation[1].

Initially, an important part of the doctrine argued that the reason for the advent of JCP lay in the repeal of the monetary correction of financial statements, carried out by Article 4 of Law No. 9,249/1995 with a view to eliminate the shadow of inflation that had troubled the national economy for so long[2]. However, the creation of JCP must be placed in a broader context, given that it accompanied the exemption of dividends. From this perspective, it seems possible to see JCP as a creative solution by the Brazilian legislator to tackle the practice of undercapitalization, or thin capitalization[3].

The central objective was to discourage partners from financing their companies exclusively through loans to obtain tax advantages. Instead, it ensured that the contribution of equity received tax treatment equivalent to third-party capital, in observance of the principles of equality and ability to pay.

In this context, an intense discussion flourished in the doctrine regarding the nature of JCP. As for those who believe in its nature as dividends, they argue that JCP is paid only to partners or shareholders, in proportion to their participation in the capital stock and only in the event of profit available for distribution. Furthermore, the amount paid as remuneration on equity can be imputed to the value of the mandatory minimum dividend provided for by Article 202 of Law No. 6,404/1976. They also point to the guidance issued by the Brazilian Securities and Exchange Commission (CVM), which, through Deliberation No. 207/1996, established that interest paid as remuneration on equity must be recorded in the retained earnings account[4]. Notable representatives of this view include Alberto Xavier[5] and Modesto Carvalhosa[6].

On the other hand, there are those who believe in its nature as interest. Among them is the tax administration itself. Article 29 of Normative Instruction SRF No. 11/1996, in addition to referring to such amounts as interest, establishes in its 4th paragraph the recording of JCP by the corporate beneficiary in a financial income account. In the same vein, Article 30 determines that the payer of JCP must record it against financial expenses.

Ricardo Mariz de Oliveira states that the provision in question has the character of interest, since the entire legal regime to which they are subject would indicate

> 'that it is properly interest remunerating capital, although with specific characteristics, and distinct from the participation in results that the law regulates as dividends'[7].

1. Luís Eduardo Schoueri, *Juros sobre Capital Próprio: natureza jurídica e forma de apuração diante da "nova contabilidade"*, in: Roberto Quiroga Mosquera & Alexsandro Broedel Lopes (coord.), Controvérsias jurídico-contábeis (aproximações e distanciamentos) (Dialética, 2012). v. 3.
2. In this sense: (i) Ives Gandra da Silva Martins and Fátima Fernandes Rodrigues de Souza, *A figura dos juros sobre o capital próprio e as contribuições sociais do PIS e da Cofins*. Revista Dialética de Direito Tributário, São Paulo, n. 169, p. 73, 2009; (ii) Eliseu Martins, *Um pouco da história dos juros sobre o capital próprio*. Boletim IOB: temática contábil e balanços, São Paulo, n. 49, 2004; (iii) Modesto Carvalhosa, *Comentários à Lei de Sociedades Anônimas*. 4th ed. São Paulo: Saraiva, 2002. v. 1, pp. 215-217.
3. Luís Eduardo Schoueri, *Juros sobre Capital Próprio: natureza jurídica e forma de apuração diante da "nova contabilidade"*, in Roberto Quiroga Mosquera and Alexsandro Broedel Lopes, (coord.), Controvérsias jurídico-contábeis (aproximações e distanciamentos) (Dialética, 2012). v. 3.
4. 'I. Interest paid or credited by public companies as remuneration on equity, pursuant to article 9 of Law No. 9, 249/95, must be recorded directly in the Retained Earnings account, without affecting the results for the period'.
5. Alberto Xavier, *Natureza jurídico-tributária dos juros sobre o capital próprio face à lei interna e aos tratados internacionais*. Revista Dialética de Direito Tributário, São Paulo, n. 21, pp. 7-11, 1997.
6. Modesto Carvalhosa, *Comentários à Lei de Sociedades Anônimas*. 4th ed. (Saraiva, 2002) v. 1, pp. 215-217.
7. Ricardo Mariz de Oliveira, *Juros de remuneração do capital próprio*. Revista Direito Tributário Atual, São Paulo, n. 15, p. 114, 1998.

Similarly, João Dácio Rolim understands that JCP corresponds to financial expenses for the company that pays them and remuneration of capital (interest) for those who receive them[8].

From this brief exposition, it remains clear how intense the debate over the legal nature of JCP is. Both currents have strong arguments to support their positions. However, both take as a premise the idea that the institute of JCP must necessarily be anchored in pre-existing concepts already qualified within the scope of private law, such as dividends and interest.

As previously foreshadowed, it is proposed here that the tax legislator is not limited to pre-existing private law concepts. One cannot take Articles 109 and 110 of the National Tax Code (CTN) as commands that would give prevalence to private law, leaving tax law a subordinate role as a mere overlapping law. The term 'employed' in tax law does not have the exact same meaning as in private law.

When the tax legislator defined the institute of JCP in Article 9 of Law No. 9,249/1995, it did not contemplate any pre-existing institute in private law, notably interest and dividends. Thus, the old discussion surrounding the qualification of this institute as interest or dividends proves misplaced: one must investigate JCP as a specific concept employed by the tax legislator.

The tax concept of JCP thus starts from the economic notion of opportunity cost, understood as the renunciation by the economic agent of benefits derived from a certain investment in favor of the superior profit potential envisioned in a different application. In such a context, business profit, from an economic perspective, could only be determined if the profit on capital is disregarded.

Thus, from an economic and tax point of view, it becomes reasonable to consider JCP payments as remuneration of capital, which is deductible. That is, JCP presents itself as if the partner had 'lent' money to the company and received interest from it, ensuring, due to the principle of equality, treatment equal to that given to companies that use third-party financing, which is also deductible[9].

Having understood the nature of JCP as a specific institute of tax law, without a necessary counterpart in private law, its qualification must be analyzed in light of the Double Taxation Treaty between Brazil and the Netherlands.

3. Qualification of JCP in the Brazil-Netherlands Treaty

For the qualification of JCP in the Treaty, there are potentially two applicable articles: Article 10 (dividends) and Article 11 (interest).

The Treaty's definition of dividends comprises three types of income: (i) income from shares or enjoyment rights; (ii) income from other rights participating in profits; and (iii) income from other corporate rights assimilated to income from shares by the tax law of the State of which the company making the distribution is a resident.

As Kees van Raad argues, the fact that JCP is deductible for the paying entity is not relevant to its qualification as dividends in the application of the Brazil-Netherlands Treaty. In any case, due to the final part of the definition of dividends in the treaty, he concludes that JCP falls under the definition of dividends in Article 10(3) of the Treaty[10]. One should note, however, that Brazilian tax law does not assimilate JCP to income from shares; on the contrary, its domestic treatment is equivalent to interest. Should one advocate for its qualification as dividends, then one should claim for Article 10(1) since JCP is paid to those owning shares of the company.

The definition of interest in the Treaty, Article 11(4) is derived from the definition of interest in the 1963 OECD Model Convention, which differs in an essential point from the

8. João Dácio Rolim, *Remuneração do capital próprio das pessoas jurídicas - aspectos fiscais*, in Valdir de Oliveira Rocha (coord.), Imposto de renda - alterações fundamentais (Dialética, 1996), pp. 114-116.
9. Luís Eduardo Schoueri, *Juros sobre Capital Próprio: natureza jurídica e forma de apuração diante da "nova contabilidade"*, in Roberto Quiroga Mosquera and Alexsandro Broedel Lopes (coord.), Controvérsias jurídico-contábeis (aproximações e distanciamentos) (Dialética, 2012). v. 3.
10. Kees van Raad, *A Qualificação dos Juros sobre o Capital Próprio à Luz do Tratado de Bitributação Brasil--Holanda: Análise do Decreto do Secretário de Finanças da Holanda de 4 de Agosto de 2020 (n. 2020-14853)*, Revista Direito Tributário Atual, São Paulo, n. 45, p. 173-181, 2nd semester 2020.

current Model Convention. The difference is found in the final part of the 1963 Model definition, present in the Treaty, which was removed from the definition of interest in 1977:

> 'as well as any other income assimilated to income from money lent by the tax law of the Contracting State in which the income arises'[11].

According to Kees van Raad, JCP cannot be qualified under the general definition of interest in Article 11(4) of the Treaty ('debt-claims of every kind'), since they are not 'debt-claims'. However, one must investigate whether JCP distributions are 'assimilated to income from money lent' by Brazilian tax law. Thus, the treatment given to JCP by Brazilian tax law is not decisive for its qualification in the Treaty, but rather whether Brazilian tax law defines JCP as 'income similar to income from loans'[12].

As seen in the section above, JCP is a specific concept used by the tax legislator, without a necessary correspondence in private law institutes like dividends and interest. From an economic and tax point of view, it is mere remuneration of capital. That is, the situation presents itself as if the partner had 'lent' money to the company and received interest from it. Thus, based on the provisions of Law No. 9,249/1995, it is possible to conclude that JCP is income assimilated to income from loans. Consequently, it also falls under the definition of interest in Article 11(4) of the Treaty.

In summary, JCP may qualify simultaneously under more than one article of the Treaty.

4. The (in)existence of antinomy between allocation rules of double taxation treaties

At first, one might think this is a case of antinomy, which would be resolved by the criterion of specialty (*lex specialis derogat legi generali*). In this sense, both articles should be analysed until one is considered special in relation to the other.

However, Kees van Raad proposes a different and very innovative solution: if contracting states sign treaties in which income can be contained in more than one article, such states must accept the simultaneous application of more than one article. Since double taxation treaties do not allocate the right to tax, but rather limit the jurisdiction of the contracting states, in the event that two rules are simultaneously applicable, both states must follow the limitations resulting from these two rules[13]. There would be, therefore, no antinomy in the event that a certain income qualifies under more than one allocation rule of the treaty, provided that they result in the application of the same method for avoiding double taxation.

Accordingly legal antinomy is the

> 'opposition that occurs between two contradictory norms (totally or partially), emanating from competent authorities within the same normative scope, which place the subject in an unsustainable position due to the absence or inconsistency of criteria capable of allowing them a way out within the framework of a given legal order'[14].

Thus, to characterize an antinomy, it is a necessary – though not sufficient – condition that the prescriptions given by the norms to the behavior of the recipient contradict each other. That is, to obey them, one must also disobey them.

Therefore, there will be contradictoriness whenever two norms have

> 'opposite operators (one permits, the other prohibits) and their contents (acts and omissions) are the internal negation of each other (that is, one prescribes the act, the other the omission)'[15].

11. *Idem*
12. *Idem*
13. *Idem*
14. Tercio Sampaio Ferraz Junior, *Introdução ao estudo do direito: técnica, decisão, dominação*. 10th ed. rev. updated and enl. (Atlas, 2018).
15. Idem

In other words, there will be contradictoriness only between norms whose deontic modals are opposite and if their prescriptions are simultaneously incompatible with each other. Within the scope of double taxation agreements, specifically regarding the qualification of JCP under Article 10 and Article 11 of the Brazil-Netherlands Treaty, there is no such contradictoriness.

In the case of qualifying JCP as dividends, Article 23(4)(a) of the Treaty prescribes that the State of residence shall grant a matching credit of 25%. In the case of qualifying JCP as interest, Article 23(4)(b) of the Treaty prescribes that the State of residence shall grant a matching credit of 20%. Firstly, there is no opposition of deontic modals regarding the prescription of an act to the contracting State (giving a certain amount of matching credit). Both norms function based on the deontic modal 'it is mandatory that', which already disqualifies the antinomy.

Secondly, in addition to the deontic identity regarding the prescription (it is mandatory for the State to give a certain amount of matching credit), there is no incompatibility between the content of their prescriptions. The prescription 'it is mandatory to give a matching credit of 25%' is fully compatible with the prescription 'it is mandatory to give a matching credit of 20%'. That is, by observing the norm that mandates the 25% matching credit, one simultaneously observes the norm that mandates the 20% matching credit. Therefore, in situations like this, where both norms prescribe the same method to avoid double taxation but in different amounts, one must opt for the more beneficial norm, since its prescription is not the internal negation of the other norm, but also *ensures its observance*.

It is important to clarify that the same reasoning would not apply to cases where the classification of a specific item of income under different articles of a Treaty would imply different methods for avoiding double taxation. For instance, let us assume that the classification of JCP as dividends would result in the exemption method (Rule 1), while its classification as interest would result in the credit method (Rule 2). On one hand, we would have a rule requiring the State of residence to grant credit; on the other, a rule requiring it to grant an exemption, both of which would be mutually incompatible.

Before a juridical double taxation, a tax treaty prescribes a specific method to avoid double taxation for each taxable situation. For the sake of logical consistency and to avoid double non-taxation, a treaty cannot simultaneously accommodate distinct methods to avoid the same instance of double taxation. Therefore, from Rule 1, one would derive the obligation to grant an exemption and the permission not to grant a credit. Conversely, from Rule 2, one would derive the obligation to grant a credit and the permission not to grant an exemption. In this case, there would be an antinomy between the rules.

Regarding the granting of the exemption, Rule 1 would carry the operator 'it is mandatory' and the prescription 'to grant exemption', while Rule 2 would carry the operator 'it is permitted' and the prescription 'not to grant exemption'. Both would possess opposing deontic modals, and their contents would be internal negations of one another. Regarding the granting of the credit, Rule 1 would carry the operator 'it is permitted' and the prescription 'not to grant credit,' while Rule 2 would carry the operator 'it is mandatory' and the prescription 'to grant credit.' Again, both would have opposing deontic modals and mutually incompatible prescriptions. Thus, the conclusion reached in the case of classifying JCP simultaneously as interest and dividends within the Treaty would not extend to cases where the rules in question would prescribe different methods for avoiding double taxation.

In short, the qualification of JCP in light of the Brazil-Netherlands Treaty leads to a situation where the same income falls under two allocation rules in the Treaty, each with its own prescription. Given the absence of antinomy between them, both may be applied, obliging the State of residence to grant the higher matching credit, namely, that of 25%.

5. The MAP between Brazil and the Netherlands for the qualification of JCP in light of the treaty

Notwithstanding the conclusion above regarding the specific nature of JCP and the possibility of its simultaneous qualification under Articles 10 and 11 of the Treaty, this is not a settled issue in Brazilian law. As seen above, a significant portion of the doctrine defends its qualification as dividends, while an equally significant portion defends its qualification as interest.

The Brazilian debate over the qualification of JCP is so intense that, after the publication of Law No. 9,249/1995, most double taxation treaties entered into by Brazil began to include specific provisions in the Protocol regarding the qualification of JCP as interest, such as the treaties with Portugal (2000), Chile (2001), Ukraine (2002), Israel (2002), Mexico (2003), South Africa (2003, modified in 2015), Venezuela (2005), Peru (2006), Russia (2004), Turkey (2010), Switzerland (2018), Singapore (2018), and the United Arab Emirates (2019).

An example of the persistence of such controversy was the recent Interpretative Declaratory Act No. 3, of March 9, 2026, published by the Federal Revenue of Brazil, determining that JCP qualifies as interest in light of Article 11 of the Brazil-Spain Treaty.

In this context of intense debate over the qualification of JCP, in August 2020, the Dutch tax authorities published Decree No. 2020-14853, reaffirming their position that JCP should be qualified as interest for the purposes of interpreting the Brazil-Netherlands Treaty.

Two years after the publication of said decree, in 2022, the Federal Revenue of Brazil and the Dutch tax authorities concluded a Mutual Agreement Procedure (MAP) agreeing that JCP should be qualified as interest, falling under Article 11 of the Treaty.

In May and December 2023, the Dutch Lower Court (*Rechtbank Zeeland-West-Brabant*) published two decisions in which the Dutch tax inspector, based on Decree No. 2020-14853 and the MAP concluded between Brazil and the Netherlands, adopted the position that JCP received in 2018 qualifies as interest in light of the Brazil-Netherlands Treaty[16].

The Dutch Court decided that ambiguities in the text of a Double Taxation Treaty concern risks assumed by the contracting States. It would not be admissible, therefore, that in case of reasonable doubt, the treaty be interpreted by the contracting States to the detriment of taxpayers. In 2018, the year JCP was received, there was reasonable doubt regarding the qualification of JCP in the Treaty. Given this uncertainty, the Court decided that the subsequent interpretation of the Treaty through the 2022 MAP could not be invoked to the detriment of the taxpayer. Thus, the Court decided that the 25% credit relating to JCP should be applied[17].

Recently, in March 2025 and July 2025, respectively, the Dutch Courts of Appeal in The Hague and 's-Hertogenbosch decided that JCP qualifies as dividends in light of the Brazil-Netherlands Treaty. Both Dutch Courts of Appeal confirmed that the MAP between Brazil and the Netherlands does not apply retroactively. The Dutch tax authorities have filed an appeal against the court decisions, which are pending before the Dutch Supreme Court[18].

The Dutch Advocate General issued his opinion on the appeal filed against the decision of the Hague Court and the 's-Hertogenbosch Court, arguing that the MAP cannot have any interpretive effect, since there is no clarity in the qualification of JCP in light of the Brazil-Netherlands Treaty. Thus, a MAP could not be considered a binding agreement between the parties nor part of the context of the Treaty. Therefore, an interpretive MAP could not alter or establish treaty obligations without democratic approval[19].

However, the position adopted by the Dutch Advocate General is open to criticism. Despite the understanding of the Dutch competent authority that resolution via MAP would constitute a gentleman's agreement, incapable of binding the contracting State beyond a political commitment,[20] such an understanding deserves to be contested. Since mutual agreements are based on

16. Loyens & Loeff. *Update on developments Dutch qualification Brazilian 'Interest on Net Equity'*. Amsterdam, 13 Mar. 2024. Available at: *Update on developments Dutch qualification Brazilian 'Interest on Net Equity'*

17. *Idem*

18. Loyens & Loeff. *Update: Dutch Advocate General confirms IoNE qualifies exclusively as dividend under NL-Brazil tax treaty*. Amsterdam, 23 Dec. 2025. Available at: *Dutch Advocate General confirms IoNE qualifies exclusively as dividend under NL-Brazil tax treaty*

19. *Idem*

20. G. Groen, *Arbitration in Bilateral Tax Treaties*, Intertax, [s. l.], v. 30, p. 6, 2002.

a previously ratified tax treaty, they 'are also treaties, and the Vienna Convention on the Law of Treaties applies to them'[21].[22]

The designation of competent authorities by a tax treaty that was previously and formally ratified by the contracting States constitutes a framework of delegation for the international representation of such States. In this way, any mutual agreement reached is obtained by the authorized representatives of these States. Thus, the MAP expresses the consent of both contracting States through their representatives and binds the parties as an international treaty. In other words, it can be said that MAPs are treaties that derive their strength from other tax treaties[23].

Thus, the competent authorities to sign a MAP are designated by a previous, solemnly agreed treaty, which operates as a delegation of power, given that the designation was approved by the Legislative Power when analyzing the relevant tax treaty and subsequently ratified by the Head of State[24].

Especially in the case of 'interpretive' MAP provisions, Brazilian literature recognizes that a solution obtained by competent authorities, although it binds the country as an international treaty, does not require the participation of Congress[25]. It does not require legislative approval, as it is intended to interpret the provisions of a tax treaty already in force. If the competent authorities interpret a previously ratified tax treaty, the constitutional power to enter into treaties does not require the Legislative Power to renew its approval: Congress has already authorized the country's international commitment[26].

Therefore, the MAP has the status of an international treaty and legally binds the participating States, being subject to adjudication by governments internationally and by taxpayers locally. Consequently, the opinion issued by the Dutch Advocate General that an interpretive MAP cannot alter or establish treaty obligations without democratic approval, does not seem correct.

It is necessary, however, to note that a MAP – like any international (tax) treaty – may not have a retroactive effect. Accordingly, the interpretive MAP is only admitted when a reasonable doubt exists, i.e., when both interpretations would be acceptable, but the authorities choose one of them and reject the other one. This is the case concerning JCP which, as already seen, may be qualified both as interests and dividends and, as noted by Kees van Raad, there would be no antinomy if both were applied simultaneously. In this sense, a MAP brings a final solution to the case, excluding the (previously fully admissible) application of Article 10.

This solution, however, should not be applied to taxpayers who took their decisions before a MAP was signed. In this sense, one must agree with the argument that if Contracting States were not able to reach clarity in their treaty, this should not jeopardize taxpayers' rights. As already seen, MAP is an international agreement, which has its authority deriving from the tax treaty. Like any international (tax) treaty, it may not retroact.

6. Conclusion

Institutes created by the tax legislator do not necessarily have a correspondence in private law, since tax law is an autonomous branch of law. This is the case with interest on equity. Thus, the entire doctrinal debate surrounding the qualification of JCP as dividends or interest starts from

21. K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation*, Bulletin for International Fiscal Documentation, [s. l.], v. 54, n. 12, p. 613, sec. II, 2000. Journal Articles & Opinion Pieces IBFD.

22. Luís Eduardo Schoueri and Mateus Calicchio Barbosa, *Practicability, Enforcement and Legitimacy: Tax Treaty Dispute Resolution at a Crossroads*, in: G.W. Kofler, R. Mason and A. Rust (Eds.), Thinker, Teacher, Traveler: Reimagining International Tax – Essays in Honor of H. David Rosenbloom (IBFD, 2021), cap. 37.

23. *Idem*

24. *Idem*

25. A. Xavier, *Direito Tributário Internacional do Brasil*, 7th ed. (Forense, 2010), p. 169.

26. Luís Eduardo Schoueri and Mateus Calicchio Barbosa, *Practicability, Enforcement and Legitimacy: Tax Treaty Dispute Resolution at a Crossroads*, in: G.W. Kofler, R. Mason and A. Rust (Eds.), Thinker, Teacher, Traveler: Reimagining International Tax – Essays in Honor of H. David Rosenbloom (IBFD, 2021), cap. 37.

the mistaken premise that this institute must necessarily refer to a pre-existing concept in private law.

In fact, it seems more reasonable to treat it as a specific institute created by the tax legislator, which possesses characteristics of both interest and dividends. As such, it can qualify under both Article 10 and Article 11 of the Brazil-Netherlands Treaty. In view of such situation, one concludes that both articles apply simultaneously without constituting an antinomy, given the compatibility of the prescriptions resulting from both qualifications. However, it should be noted that the same conclusion would not apply to cases where the qualification of the same income under different articles would result in distinct methods for avoiding double taxation.

Finally, the qualification of JCP in light of the Brazil-Netherlands Treaty is pending decision in the Dutch Supreme Court. Regardless of the interpretive option adopted by the MAP between Brazil and the Netherlands, the fact is that it is a convention with the nature of an international treaty, binding between the parties. Thus, if the tax administrations have agreed that JCP should be qualified as interest, this must be the interpretation given to the treaty, under penalty of breaching an internationally agreed pact. Such agreement, however, should not have a retrospective effect, like any rule on tax matters.

Treaty override and underride and the international rules-based order

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Contents

1. International rules-based order

At a time when respect for international law by some very large and powerful states is at its lowest point, perhaps since the Second World War, it is appropriate to reflect on the status of tax treaties as binding legal obligations.

The role of treaties as part of an international rules-based order is recognised in the Preamble to the Vienna Convention on the Law of Treaties:

> 'the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems'.[1]

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized, the central governing principle that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith' is set out in Article 26 of the Vienna Convention.

In the tax context, the core objective of tax treaties is the avoidance of double taxation to reduce tax obstacles to cross-border services, trade and investment resulting from the interaction of tax systems.[2] Tax treaties have other important functions such as the prevention of discrimination and enhancing tax cooperation between states.[3] Failure to adhere to treaty obligations by domestic legislation by disapplying rights granted by tax treaties was condemned by the OECD more than 35 years ago.[4]

Two very recent decisions by the Australian and Canadian courts have considered the relationship between tax treaties as a result of domestic legislation purporting to override tax treaties, in the case of Australia, and non-implementation into domestic law in Canada.

1. Vienna Convention on the Law of Treaties (the Vienna Convention), Preamble, 2nd paragraph.
2. OECD 2017 Model Tax Convention on Income and on Capital (OECD Model), Introduction, paragraph 15.2 in light of self-evident harmful effects of double taxation on the development of economic relations between countries (Introduction, paragraph 1). See also: United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 (UN Model), Introduction, paragraphs 5 and 6.
3. Enhance cooperation in tax matters, is recognised as an aim of tax treaties in the preambles to the 1988 Joint Council of Europe/OECD Convention on Mutual Administrative Assistance In Tax Matters, Article 6(3) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting, 2017 OECD Model, the 2017 and subsequent UN Models.
4. OECD, Tax Treaty Override (2 October 1989).