Chapter 1

The Domestic Law Perspective

by Klaus Vogel[1]

1.1. Tax treaties being leges speciales

Tax treaties are instruments of international law. Their purpose – or, to be more exact, their main purpose – is to avoid double taxation of income, capital and estates by modifying the domestic law of the contracting States. Under the theory of "moderate dualism", which seems to be generally accepted nowadays, international and domestic law are two spheres which exist separate of each other (save for some exceptions). To exercise their intended influence on domestic law, treaties therefore have to be implemented by the domestic legislator. Thus, they receive the force of domestic law.

Being restricted to cross-border taxation of residents of the two contracting States, tax treaties are equivalent to special legislation (*leges speciales*) compared to the contracting States general tax law (*lex generalis*). Thus according to the old rule *"Lex specialis derogat legi generali"* ("special legislation overrides general legislation"), treaties override the domestic tax law that is effective at the time of their implementation. Under a supplementary rule of *"Lex posterior generalis non derogart legi priori speciali"* ("later general legislation does not overrule earlier special legislation"), changes of domestic tax law normally will not affect existing treaties. This latter rule does not apply, however, if the legislator, when changing the general law, expressly or implicitly intended to repeal the special law. General law then overrules the special (domestic) legislation. A legislation that contradicts an existing international treaty, however, is a violation of international law.[2] The question of whether on the level of domestic law general legislation may override a special rule that was introduced by a treaty is the subject of the following paragraphs.

1.2. Three ways of implementing international treaties

The effect of a treaty override on domestic tax law depends on domestic constitutional law; more exactly, it depends, at least to some extent, on the degree to which, under a States constitution, the legislature is involved in the negotiation, conclusion and implementation of treaties. Roughly three types of such involvement can be distinguished:

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[2] OECD, *Tax Treaty Override*, 1989, No. 7. The report, adopted by the OECD Council on 2 October 1989, is reproduced as Chapter R(8) in *Model Tax Convention on Income and on Capital*, Vol. II, Paris: OECD, loose-leaf.

First, negotiation and conclusion of a treaty may be reserved to the executive and the legislature is responsible only for implementation. Thus, in the United Kingdom the conclusion of international treaties is considered a "royal prerogative", which means that treaties are concluded by the executive,[3] the prime minister, or, in the case of tax treaties, the Commissioners of Inland Revenue, who are empowered to conclude treaties by Sec. 788 of the Income and Corporation Taxes Act 1988. In either case, the treaty is normally concluded without the participation of Parliament. This conclusion makes the treaty binding under international law but its provisions do not become part of UK domestic law until they are incorporated by Parliament through specific legislation, in the case of tax treaties by secondary legislation (an Order in Council approved by Parliament pursuant to the same Sec. 788). Parliament is free, at least according to constitutional law, to pass such legislation or to reject it, or, in the case of tax treaties, free to accept or reject a Draft Order in Council. From this it follows that it is this legislative act and not the treaty itself that changes existing tax law. It seems logical that under these rules, Parliament may also amend such legislation at any time. If it rejects the treaty from the outset or if it overrides the treaty at a later time, a conflict arises between domestic and international law. It is a matter of the executive then to resolve this conflict in some way or other, e.g. by renewed negotiations with the treaty partner. Similar rules apply in Ireland and Malta,[4] and in non-European common law States, e.g. Australia. As regards Canada, see Chapter 3.

Second, where the legislature consists of two separate bodies, such as the House of Representatives and the Senate in the United States (or the House of Commons and the House of Lords in the United Kingdom) it is possible that only one of these two bodies is involved in treaty-making. This is the case under the US Constitution under which the president is empowered to ratify a treaty only after it has received approval by the Senate.[5] Once in force, self-executing treaties automatically obtain equal status with federal laws and are internally applicable.[6] According to the case law of the US Supreme Court, being equivalent to other federal legislation implies that a federal law enacted after conclusion of the treaty may invalidate it or may deviate from it, which, though violating an international obligation, is said to have binding effect domestically. Nevertheless, under US law conclusion of a treaty is not legislation proper, for

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[3] Lord Hailsham of St. Marylebone, *Halsburys Laws of England* (4th ed., 1974), Vol. 8, at 629 (Para. 985). Volume 10 of the same work, now by other editors (managing editor Brown, P.), adds (at 10), however, that whenever the right of the Crown to conclude a treaty without the consent of Parliament is doubtful, Parliament passes a law of ratification; the most important example is the UK's accession to the European Communities.

[4] In both of these countries, however, in exceptional cases certain treaties need to be approved in advance by Parliament; see Council of Europe & British Institute of International and Comparative Law, *Treaty Making – Expression of Consent by States to be Bound by a Treaty* (2001), at 194, 217; and Simmons, C.R., Ireland, in Eisemann, P.M. (ed.), *The Integration of International and European Community Law into the National Legal Order* (1996), at 317, 319.

[5] Art. II, Sec. 2, Cl. 2.

[6] Under Art. VI, Cl. 2 of the US Constitution the treaty is part of the "supreme law of the land".

the House of Representatives is in no way involved. Similar, though not identical, rules applied in Germany before 1918 – but this is now history.

Third, in many – if not most – democratic States, conclusion of an international treaty by the executive requires previous approval by the parliament as a whole, either in the form of legislation or in some other way, for example, by resolution. This principle applies under constitutions of continental Europe, as well as under those of many overseas States. In these cases, the preceding consent to the treaty by the legislature would make an additional implementation after its conclusion redundant. Being approved by the legislature beforehand, the treaty, as soon as it becomes effective under international law, becomes applicable on the internal plane as well. At least such is German constitutional law, and I presume that it is not very different under similar constitutions of other States.

Such involvement of a parliament in the conclusion of a treaty raises the question whether it may – like a legislature which is not thus involved and which, therefore, is not bound to implement the treaty (as in the UK) – legislate at some later time in contradiction to the treaty on other grounds than those provided by the treaty (e.g. its termination) or by general international law. The consent of parliament was part of the treaty-making procedure; by passing legislation that is in conflict with the treaty, it would break its proper word. This is true even when the members of the parliament have been replaced in part or completely by elections, for it is the institution of parliament, not its individual members, which originally approved the conclusion of the treaty.