Editorial

'Treaty overrides'

It is an established principle of the US legal system that when a statute is enacted subsequent in time to a treaty, and is inconsequent with the treaty, the statute nullifies the treaty to the extent of the conflict. There is, however, an important limitation, as the US Supreme Court stated: '... the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by the treaty to supersede the whole or part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or the treaty' (United States *v.* Lee Yen Tai, 185 US 221 (1902)).

The US legal system is, in this regard, by no means unique. Most countries hold the view that treaties have equal rank with statutes and that hence the *lex posterior* rule applies. The point, however, is that these national precedence rules have only domestic validity. As Mr. O. Donaldson Chapoton, Deputy Assistant Secretary of the US Treasure put it: '... unilateral abrogation of a treaty by subsequent legislation, though effective as a matter of domestic law, is a violation of international law. Vienna Convention on the Law of Treaties Art. 27'.[1]

The Swiss Federal Court has taken this relationship between the domestic precedence issue and international law explicitly into consideration. The Court (decision of 22 November 1968, BGE 94 I 678) ruled that national law must be interpreted in conformity with public international law, i.e. in such a way that no contradiction with public international law arises. It must, therefore, be assumed that the federal legislator wishes a treaty which has been validly concluded to remain in force. A latter federal law has precedence over an earlier treaty only if it was the express will of the federal legislator to enact national law, which is contrary to public international law. *Since it is hardly the intention of the legislator to create such laws*, it can be assumed that in practice the treaty has always precedence over federal laws.[2] I have stressed the above words, since they refer to the essence of the problem: in most countries the precedence issue never arises because the legislator would not for a moment consider to breach treaty obligations of the country. Not only because of considerations of international law, but also, and perhaps primarily, because a country which would engage itself in such a practice can hardly expect to be treated as a reliable and therefore attractive partner for future treaties.

What then, one wonders, drives a country like the United States to unilaterally override its own treaties as it did during recent years with increasing frequency?

The process has now even accumulated to the point that the proposed Technical Corrections Act of 1988, in addition to intentional treaty overrides, bluntly states that in any other (not foreseen) cases of conflict between the Act and treaties, the Act's provisions are to apply notwithstanding any treaty obligations. The provision (section 112 (aa)) is known as the 'residual treaty override' provision.

The origin of this serious problem seems to lie with the House of Representatives. The House, and especially its Ways and Means Committee, does not give the impression to be very sensitive to US tax treaty obligations. There are probably two reasons for this attitude. Firstly, under the Constitution the power to enter into treaties is given to the President, who shall have the advice and consent of the Senate. It seems that the House, not involved in the treaty making process, is therefore inclined to reject limitations on its legislative authority resulting out of treaties. Secondly, revenue considerations easily lead towards an increase of the tax burden on those who are not represented in Congress ('foreigners do not vote').

In the absence of any effective legal remedies, one can only hope that political pressure may contribute to a solution. The letter (20 April 1988) by 13 major US trading parties and the Commission of the European Community to Congress, is a good start. The issue should, however, be brought much more under the attention of the general public in the United States. It can hardly

[1] Statement of O. Donaldson Chapoton, Deputy Assistant Secretary (Tax Policy) Department of the Treasury, Hearing on S.1350, the Technical Corrections Act of 1987, on 22 July 1987 before the Subcommittee on Taxation and Debt Management, Committee on Finance, United States Senate, p. 6.

[2] *See* A.A. Knechtle, *Basic Problems in International Fiscal Law*, Kluwer, Deventer 1979, p. 173.

be expected that US citizens will welcome a new reputation of their country as a 'treaty breaker'. The international law principle *pacta sunt servanda* does have its equivalent in ordinary life in sayings like *a man a man a word a word.* After all, what is at stake here is at heart a matter of plain old fashioned decency.

In this second double summer issue of *Intertax* Messrs. Becker and Würm discuss the treaty override issue in a memorandum sent to both Houses of the US Congress. I expect you will find the contents of interest. In addition we offer you a number of excellent articles on a variety of topics. To our monthly sections has now been added 'World Tax Scene' edited by Mr. David A. Kenning and I welcome him on board.

Fred C. de Hosson
Amsterdam, 12 August 1988