Report of the proceedings of the Fourth IATJ Assembly held at Amsterdam on August 30-31

The Fourth Assembly of the International Association of Tax Judges was held in Amsterdam on August 30 and 31, 2013. The proceedings took place partly at the premises of the International Bureau of Fiscal Documentation where the participants were welcomed by Sam van der Feltz, the CEO of the IBFD, and partly at the new building of the Palace of Justice of Amsterdam, where the participants were welcomed by Herman van der Meer, the President of the Court of Appeal. The Assembly was attended by 60 judges from all over the world. Prof. Stef van Weeghel and Timothy Lyons QC were invited as speakers.

The Assembly was opened by the organizer, judge Wim Wijnen.

The Assembly was divided into seven substantive sessions, which are listed hereunder in the order they were called.

1. Session on Tax Avoidance/Evasion
2. Session on Excise Duties in EU
3. Session on Indirect Taxation: Subjective Elements in VAT
4. Session on Objective Law and Subjective Judges
5. Session on Transfer Pricing
6. Session on recent Case Law on Treaty Override
7. Session on conclusive Force of Declarations of Foreign Authorities

Session nos. 1-4 were called on Day 1 of the Assembly and the remaining three sessions were carried forward to Day 2. The plenary discussions in the various sessions were introduced all together by 30 speakers.

Report on the Substantive Sessions

The following is a brief description of the presentations of the speakers at each of the substantive sessions of the Assembly.

1. Session on Tax Avoidance/Evasion

The Fourth IATJ Assembly opened with a session on tax avoidance/evasion. The session was chaired by Judge Frank Pizzitelli (Tax Court of Canada) and other speakers included Judge Malcolm Gammie (First-tier Tribunal, United Kingdom), Judge Pierre Collin (Conseil d'État, France), Prof. Stef van Weeghel (the Netherlands) and Judge Jurgen Brandt (Bundezfinanzhof, Germany).

In this session, the speakers gave a national insight into different aspects of the concepts of tax avoidance and evasion, as defined and understood in their own countries.

1.1. Canada

Judge Pizzitelli stated that whereas tax avoidance, which is further classified as a) acceptable tax avoidance/tax mitigation and b) abusive tax avoidance, is generally considered legal in Canada, tax evasion, which involves an element of fraud perpetrated upon the treasury by the taxpayer, is regarded as illegal. The Canadian courts employ the 'purpose of the statutory provision' test to distinguish acceptable tax avoidance from abusive tax avoidance and are frequently applying the General Anti-Avoidance Rules (GAAR) to control and curtail the latter.

According to Pizzitelli, an important feature distinguishing avoidance from evasion is the *mens rea* or the guilty intention accompanying the *actus reus* or the act of avoiding payment of taxes which are known to be owing. In order to make out an offence of evasion, there must be clear-cut tax liability, failing which the taxpayer cannot be charged with criminal evasion even though other charges may still be brought against him. Tax evasion being a punishable offence, the standard of proof required is higher (beyond reasonable doubt) than that required to establish tax avoidance (balance of probabilities).

1.2. United Kingdom

Judge Gammie pointed out that the UK's understanding of the two concepts was no different. He stated that whereas tax evasion is considered to be illegal, tax avoidance is regarded as perfectly legal; the latter phenomenon being further classifiable as tax planning and tax avoidance. To deal effectively with cases of tax avoidance (attracting civil financial penalty), which involve bending the tax rules to gain a tax advantage that Parliament never intended, and to reduce the uncertainty stemming from the use of "purposive construction of the statutory provision" test employed by the UK courts when dealing with cases of avoidance, Parliament introduced and implemented the GAAR. While speaking of the remedies available, Judge Gammie stated that the trend in the UK is for the HMRC to rarely press for criminal remedies in cases of evasion. Criminal investigation and prosecution is reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate.

Judge Gammie also mentioned about the phenomenon of "avoision". He described it as a difficult area falling somewhere between avoidance and evasion, and which is especially relevant in the case of "offshore" transactions where HMRC has difficulty in collecting information and persons outside the UK's jurisdiction may have no (enforceable) obligation to deliver information.

1.3. France

Judge Collin presented the French perspective. He stated that while tax evasion is the act of evading the tax liability by illegal means, tax avoidance involves legal use of the tax regime to reduce the tax liability. He stated that despite a clear theoretical understanding of the two concepts, in practice, it is often difficult to draw a line between the two. He further noted that since the majority of the cases before the French courts do not involve a direct and clear infringement of the law, the Courts have to determine whether it is a case of evasion or avoidance (inquiry), and for that purpose the French courts use a two-step approach, which is in the nature of finding answers to two different questions.

The two questions which must be answered by a French court entrusted with the inquiry are as follows:

a. Whether the impugned arrangement is designed solely to obtain a tax advantage? (subjective condition)
b. What is the underlying purpose of the provision in question? (objective condition)

1.4. The Netherlands

Prof. van Weeghel concurred with Judge Collin. He stated that whereas the distinction between tax evasion and tax avoidance may be apparently visible in some cases that may not be so in other cases; most cases typically falling in the latter category. He, in particular, dealt with the Dutch legislation of 1925, which authorised the Dutch courts to ignore a transaction if the predominant purpose of the transaction was to obtain a tax advantage and violate the purpose and spirit of the law. Prof. van Weeghel made a brief reference to the judicially developed doctrine of *fraus legis* (fraud of law) and to the fact that different criteria for the application of this doctrine applied, depending on whether it was a purely domestic situation or whether a tax treaty was involved.

As a closing remark, Prof. van Weeghel stated that the distinction between tax evasion and tax avoidance had further blurred, and major part of the lost tax revenue today was attributable to tax evasion.

1.5. Germany

Judge Brandt presented the German view on the concepts of tax avoidance and tax evasion. While expressing concurrence with the view taken by other panellists that tax avoidance is legal and tax evasion is considered illegal in Germany, Judge Brandt stated that Germany distinguishes between typical and non-typical arrangements. He further stated that even though the issue of tax evasion could arise both with respect to typical and atypical arrangements, the former did not require an inquiry into the existence of special economic reasons. However, the fact that an arrangement is a non-typical arrangement does not necessarily infer that it is infested with tax evasion. Judge Brandt mentioned that the German courts look at the facts as a whole to ascertain if there is a case of avoidance or evasion.

He further stated that in cases of typical arrangements, the burden of proof, in cases of alleged evasion, lies with the Tax Office. By contrast, in cases of non-typical arrangements, the burden of proof lies with the taxpayer. The taxpayer must demonstrate to the Court that there are economic reasons for entering into the arrangement. The existence of valid economic reasons can, according to Judge Brandt, absolve the taxpayer of the charge of evasion.

2. Session on Excise Duties in EU

Judge Harald Jatzke (Germany) spoke on the rather broad topic of excise duties in the European Union. The endeavour was to quickly familiarize the audience with the Union excise regime. After a brief discussion of the salient characteristics of excise duty, which according to Judge Jatzke are: a) an indirect levy; b) levied on consumables; c) collected from retailers, producers or importers; d) borne by the final consumer and e) a single stage levy (something which distinguishes it from a value added tax, which is levied at multiple stages in the distribution chain), the Judge spoke about the European Commission's partly successful attempt to harmonise national excise duties (only with respect to some goods) as the Member States refused full harmonisation and the principle of flexibility which authorises the Member States to maintain or introduce, for specific purposes, other indirect taxes on the harmonised excise goods provided they (taxes) comply with the Community tax rules applicable to excise duty or VAT. The Member States agreed on a tax rate of 0%.

Lastly, Judge Jatzke spoke about the "duty suspension arrangement" (DSP), a special procedure, which is aimed at facilitating trade between Member States by postponing the chargeability of goods to excise duty and thereby allowing economic operators to store and to carry excise goods without paying tax. The movement of the goods under the DSP is covered by the Electronic Movement and Control System, which is not yet the case for VAT goods.

3. Session on Subjective Elements in VAT

This session was chaired by Judge Friederike Grube (Bundezfinanzhof, Germany) and other speakers included Mr Timothy Lyons (Queen's Counsel, United Kingdom) and Judge Emmanuelle Cortot-Boucher (Conseil d'État, France).

3.1. Germany

Judge Grube gave a short overview of the VAT system in general and thereafter proceeded to outline the reasons for introduction of subjective elements in VAT law. According to Judge Grube, abuse and improper use of VAT law by some selfish traders, which causes distortion of competition within the Union as well as entails loss of revenue, combined together with a desire to protect the interests of *bona fide* taxpayers, necessitate introduction of subjective elements into the VAT.

Judge Grube, while pointing to the most important subjective elements in the jurisprudence of the ECJ, indicated the recourse available to the Member States in respect of a taxable person who *knew* or *should have known* that he was participating in a transaction connected with fraudulent evasion of VAT. The Judge stated that according to the ECJ in such cases the concerned Member State may either refuse exemption for the intra-community supply of goods or refuse the right to deduct input VAT. In another set of cases representing wholly artificial arrangements, the concerned Member State may disregard the contractual terms.

3.2. United Kingdom

Mr Lyons gave a presentation on the elements in VAT related to intention. He stated that even though the concepts of "supplies" and "deduction" are objectively determined, evidence relating to intention assumes significance in the area of VAT, particularly in cases dealing with the right of deduction and abuse. As regards "deduction", he pointed to the ECJ's decisions of *Optigen* and *Kittel,* wherein it was held that an innocent trader who had "no knowledge" or "means of knowledge" should not be put to a disadvantage by refusing the right to deduct input VAT.

With respect to the subject of abuse, Mr Lyons stated that even though the essential aim of the transaction was objectively determined, an inquiry as regards the intention of the taxpayer to obtain a tax advantage contrary to the purpose of the tax system was conducted. If the taxpayer had such

intention, objectively determined, he was held to be in abuse of his rights. Referring to the *Newey* case, Mr Lyons remarked that the ECJ had ruled that in situations of purported abuse, contractual terms are not determinative; they can be disregarded if they do not reflect economic and commercial reality but are wholly artificial and set up with the aim of obtaining a tax advantage.

3.3. France

Judge Cortot-Boucher discussed the implications of the R judgment of the ECJ (7 December 2010, C-285/09) in French law and jurisprudence. In the R case, a German supplier of luxury cars had carried out a series of accounting manipulations to enable the Portuguese dealers to avoid payment of VAT, which was considered by the German tax authorities as sufficient ground for refusal of VAT exemption availed by the Germany company. The ECJ ruled in favour of the German tax authorities despite the fact that all the conditions laid down in the Sixth Directive for entitlement to the exemption had been fulfilled and refusal of exemption led Germany to collect VAT to which it was in principle not entitled. Judge Cortot-Boucher remarked that since an intra-community supply had taken place, it was much more difficult for the Court to introduce subjective elements in the application of VAT law.

Turning to the French law and jurisprudence, Judge Cortot-Boucher stated that Article 262 of the Code General des Impots furnished the legal basis to refuse exemption to a vendor who voluntarily or intentionally hides the identity of the buyer. A case involving the application of Article 262 has, however, so far not arisen before the French courts. As a closing remark, Judge Cortot-Boucher stated that the French courts had the occasion to resort to the use of the subjective elements while applying the VAT law in cases of fraud where no intra-community supply had taken place.

4. Session on Objective Law and Subjective Judges

This session was chaired by Judge Eveline Faase (Amsterdam Court of Appeal, the Netherlands). Speakers included Judge Geert Corstens (President, Hoge Raad, the Netherlands) and Judge Klaus-Dieter Drüen (Tax Court, Germany). Judge Richard Happe (Amsterdam Court of Appeal, the Netherlands) acted as the moderator.

4.1. The Netherlands

Referring to his speech titled “Objective Law and Subjective Judges” which was made at the Peace Palace, The Hague on its 100th anniversary, Judge Corstens reiterated his position that a Judge, whose duty is to administer justice, should endeavour to be as objective as possible in discharging his duty, as according to him, the element of objectivity lends greater legitimacy to his decisions. He stated that a judge should absolve himself, as much as possible, of subjective insights, convictions and views, though he admitted that it was not possible for a judge to *completely* dissociate himself from his social background, individual preferences, opinions and outlook. He stated that a certain method to attain objectivity was for a Judge to follow the letter of the law, and in cases of doubt or ambiguity, to consult the legislative history, which, by offering a certain threshold, could considerably lower the chances of a judge deciding the case on the basis of his own personal views and beliefs. Judge Corstens does not favour or encourage the Anglo-Saxon tradition of formulating decisions in the ‘I’ form, only for the reason that it is capable of conveying subjectivity.

Further, Judge Corstens pointed out that a judge was only required to interpret and apply the law as legislated by the legislature, and to not take over the role of the legislature. A judge, whose aim must be to render impersonal justice, must not have a political agenda or political affiliations. His decisions must further the cause of justice and not his own cause. As a closing remark, he mentioned that he does not favour awarding judges a bigger role to compensate for the reduction in legitimacy of the legislator arising from a decreased participation by citizens in the political process.

4.2. Germany

Judge Drüen opened his presentation by putting a question to the audience: is objectivity a goal of law? Judge Drüen considers attainment of complete objectivity to be a utopian concept. In view of this impossibility, he instead favours and supports inter-subjectivity, which according to him, is a rational aim, capable of attainment and which may be used as a legitimate starting point for any inquiry. A major focus of his presentation was that subjectivity is not synonymous with arbitrariness, there being ample safeguards in law against unlimited subjectivity. These safeguards, inter alia, he pointed out,

are in the nature of: a) supervision of the institutions among themselves; b) need for giving reasons for a judicial decision, which are published and discussed; c) review of decisions by higher courts.

Judge Drüen also briefly spoke about the objective and subjective theories of interpretation. The aim of the objective interpretation is to find out the real intention of the law, whereas subjective interpretation aims at ascertaining the intention of the legislator. Judge Drüen pointed out that there is considerable debate among scholars as to the real nature of each of the two theories. He remarked that scholars argue that subjective interpretation, really speaking, involves an objective standard since the intention of the legislator acts as a threshold for the judge. On the other hand, objective theory of interpretation is in fact subjective because the judge is interpreting what he thinks was the intention of the law, introducing subjectivity.

5. Session on Transfer Pricing

This session was chaired by Judge Philippe Martin (Conseil d'Etat, France) and other speakers included Judge Gerald J. Rip (Tax Court of Canada), Judge Vineet Kothari (High Court, India), Judge Stefan Wilk (Tax Court, Germany) and Judge Nadia Djebali (Court of Gelderland, the Netherlands).

5.1. France

Judge Martin gave a presentation on the interaction and relationship between Article 9 OECD MC, the French transfer pricing provision contained in Article 57 of the French Tax Code, which authorises adjustments on indirect transfers of profits in cross-border situations between related enterprises when a situation of *dependence or control* exists, and the doctrine of abnormal management, which applies also to cases of profit adjustments between unrelated enterprises. Judge Martin discussed the *Sovemarco* decision of the Conseil d'Etat wherein it was held that adjustments could be made by the French tax authorities under the doctrine of abnormal management even when it was determined that no such adjustment could be made, for absence of dependence of control, under Article 9 of the MC or Article 57 of the Code.

Against the backdrop of the outcome in *Sovemarco* case, Judge Martin raised an interesting issue regarding the purpose, if any, of Article 9 of the MC. The concern was that since adjustment could anyway be made (under the said doctrine), did Article 9 of the MC serve any significant purpose or was it a useless provision? Judge Martin stated that Article 9 did serve a significant purpose in that the Article 9 criteria of *participation in the management control or capital* directly influenced the domestic test of *dependence or control* incorporated in Article 57. In that sense, Article 9 does restrict domestic transfer pricing law. However, Article 9 does not and cannot restrict domestic law that falls outside its scope such as the doctrine of abnormal management which applies not only to associated enterprises but also to (un) associated enterprises.

5.2. Canada

Judge Rip gave a talk on the status of the OCED Transfer Guidelines (1995) in the judicial determination of transfer pricing disputes by Canadian courts. Judge Rip remarked that despite the longstanding domestic transfer pricing provisions (Sec 247(2) and the repealed Sec 69(2) of the Income Tax Act) there were very few decisions of the courts dealing with the substantive issues of transfer pricing. Regarding the role and status of the OECD Transfer Pricing Guidelines, Judge Rip referred to, inter alia, the cases of *GlaxoSmithKline, General Electric* and *Alberta Printed Circuits.*

Judge Rip relied on the observations of the Canadian Supreme Court in *GlaxoSmithKline* case to point to the most recent trend adopted by the Canadian judiciary towards the OECD Guidelines. Judge Rip stated that Guidelines can serve to be a useful aid to interpretation only in situations where the statute is ambiguous or deficient. Where the statute is clear and complete, the Guidelines have no role to play. The OECD Guidelines cannot be taken as a substitute for the law.

5.3. India

Judge Kothari gave a presentation on the legitimacy of the use of secret comparables in the field of transfer pricing. Pointing out jurisdictions which both permit (Mexico, Japan, India) and prohibit (Australia, the Netherlands, the UK) the use of secret comparables in transfer pricing enquiries, Judge Kothari submitted that allowing of income adjustments by determining arm's length price on the basis

of comparison with secret comparables or cherry picking is not a healthy assessment practice. He stated that it is a costly, time-consuming and cumbersome process, which in majority situations, ends up favouring the tax gatherer's case.

Judge Kothari then, with the help of some Indian judicial decisions, elaborated the position regarding the use of secret comparables in India. He stated that in India although collection of secret comparables from other entities is permitted, the taxpayer must be afforded reasonable opportunity to rebut the same. Speaking of an ideal situation, Judge Kothari remarked that the use of secret comparables should be banned all over uniformly and comparables available in the public domain should only be used.

5.4. Germany

Judge Wilk gave a presentation on a topic similar to Judge Martin's i.e. the interaction between Article 9 of the OECD Model and the German domestic transfer pricing provisions. As a general remark, Judge Wilk mentioned that the arm's length principle is recognized as the standard in the German transfer pricing law.

With respect to the relation between Article 9 and German domestic law, Judge Wilk referred to a specific decision of the BFH (Bundesfinanzhof) dated 11 October 2012 which involved the conflict between Sec 8(3) KStG (hidden distribution of profits) and Article 9 of the OECD MC. Judge Wilk pointed out that the Court referring to the transfer pricing article of the Germany-Netherlands treaty ruled that the article has a limiting effect on the specific conditions (formal requirements) imposed for the controlling shareholder under the principles of a hidden distribution of profits for affiliated companies established by the BFH in its consistent past decisions. However, according to the German understanding, Art. 9 is not "self-executing" and therefore requires the existence of domestic law provisions including, for example, regulations on how to actually assess the adequate transfer price. Therefore the regulations concerning the transfer pricing documentation requirements – as opposed to the formal requirements applicable for business dealings with a controlling shareholder – do not breach Article 9 of the OECD MC (although the BFH has not yet confirmed this explicitly). Ultimately, non-compliance with the law referring to the documentation requirements may result in a higher taxable income than that declared.

5.5. The Netherlands

Judge Djebali focussed on the procedural aspects of transfer pricing, in particular the efficacy of the alternative Transfer Pricing Dispute Resolution framework, comprising of the Advanced Agreement Agreements (APAs), Mutual Agreement Procedure (MAP) and the Arbitration Procedure over the traditional legal framework, i.e., the national courts. After a brief description of each of the three procedures, Judge Djebali put forth some interesting and challenging questions, one among which related to the role of the national courts in resolving transfer pricing disputes, particularly in light of the fact that it breeds uncertainty and use of the traditional legal framework may increase the risk of double taxation since decisions passed by national courts of one state do not carry any binding value for the courts of the other state. Consequently, a corresponding secondary adjustment may not be ordered to be made, resulting in double taxation of profits, thus making it more lucrative for the taxpayers to use traditional legal methods as remedies of last resort.

In contrast to this, a taxpayer opting for the alternative framework has more room for negotiation and thus greater chances of obtaining a more favourable outcome, even though the taxpayer enjoys less legal protection since he has, unlike judicial procedures, no formal status in the alternative procedures. However, the use of the alternative framework involves addressing concerns such as the confluence of the national legal remedies with the alternative procedures, strengthening the alternative framework by implementing higher legal norms in the transfer pricing field to guarantee legal protection of the taxpayer and carrying out improvements at the national and the international levels regarding application of the alternative framework in a more transparent and consistent way.

6. Session on Recent Case Law on Treaty Override

This session was chaired by Counselor Joao Bianco (Administrative Council of Fiscal Appeals, Brazil) and Judge Manuel Hallivis Pelayo (Tribunal Federal de Justicia Fiscal y Administrativa, Mexico) and

other speakers included Judge Pramod Kumar (Income Tax Appellate Tribunal, India), Judge Jennifer Davies (Federal Court, Australia), Judge Ulrich Schallmoser (Supreme Tax Court, Germany), Peter Darak (Curia of Hungary, Hungary), Judge Anthony Gafoor (Tax Appeal Board, Trinidad and Tobago).

6.1. Mexico

Judge Pelayo presented against the backdrop of Article 10 of the US-Mexico tax treaty, the Mexican Courts' view on the issue of treaty override. Judge Pelayo discussed a Mexican case which was concerned with different obligations regarding withholding tax on dividends arising under the treaty and domestic law. Basically, the Mexican company paying dividends to a US resident was obliged, under Article 10 of that treaty, to withhold tax at the rate of 5% of the gross amount of the dividends. By contrast, under Article 152 of the Income Tax Law, the obligation was to withhold tax at the rate of 5% but after multiplying the gross amount by a factor of 1.5385, which according to the Mexican tax authorities was necessary to reconstruct the taxable base. The Mexican company complied with the domestic law obligation, but later on filed a request for refund with the tax authorities, which was however rejected. The issue before the Court therefore was whether the Mexican company was obliged to follow the treaty law or the domestic law.

Judge Pelayo stated that the Court held the denial of the refund by the tax authorities as being illegal. The Mexican Court took the position that a treaty should always prevail in case of an attempted treaty override. If both the treaty and domestic tax law define a particular term, the treaty definition must be adopted.

6.2. India

Judge Kumar dealt with the Indian position on treaty overrides. At the outset of his presentation, Judge Kumar expanded on the Indian understanding of the concept of treaty override, which is at variance with the international understanding of the term. He pointed out that in India, the expression ''treaty override'' often refers to a situation where the provisions of a tax treaty prevail over the inconsistent provision(s) of domestic law. He further stated that even though under the present tax law, i.e. the Income Tax Act, it is not permitted to override tax treaties by enacting inconsistent domestic law since the pertinent provision (S. 90(2)) codifies the 'more beneficial' rule which accords preferential status to tax treaties over the Act, instances of rules constituting direct treaty overrides could be found in the Direct Tax Code Bill.

After discussing the statutory provisions relevant to the issue, Judge Kumar focussed attention on the judicial approach to treaty overrides in India. Besides the celebrated decision of the Indian Supreme Court in *Azadi Bacaho Andolan*, Judge Kumar made reference to the *Mashreqbank* case wherein the issue involved centred on reverse discrimination. In this case the Court (ITAT), citing Canadian Federal Court in *Utah Mines v The Queen*, refused to allow certain expenses to the taxpayer on the ground that allowance would result in reverse discrimination, even though the taxpayer claimed protection of Article 7(3) of the relevant (India-UAE) tax treaty.

6.3. Australia

Judge Davies gave a short talk on the Australian Courts' position on the phenomenon of tax treaty override. Judge Davies stated that Australia is a dualist state and treaties cannot per se take effect in the Australian legal system. Treaties are incorporated into domestic legal system by an Act of Parliament which expressly provides that treaties prevail over domestic law **other than** where the general anti-avoidance provision applies.

Judge Davies stated that there had been no cases before Australian courts where the Tax Office has applied the anti-avoidance provision to override the intended effect of a treaty, but the Tax Office has stated that it will do so in an appropriate case. The other instance of treaty override relates to Australia's taxing rights under the alienation of real property article in Australia's pre-1998 treaties. That legislation has never been challenged though at the time of introduction the Government recognised the potential for challenge, citing the US decision in National Westminster Bank PLC v United States.

6.4. Germany

Judge Schallmoser presented the German view on treaty overrides. Judge Schallmoser discussed a recent case (IR 66/09) involving treaty override of the employment income provision of the Germany-

Turkey tax treaty by Section 50(d)(8) of the German Income Tax Act. Although the BFH is of the view that section 50(d)(8) is unconstitutional, a reference has been made by the BFH to the German Constitutional Court to examine the constitutionality or otherwise of treaty overrides. Judge Schallmoser pointed out that a shift could be seen in BFH's approach to the phenomenon of treaty overrides. Earlier, even though the BFH considered overriding of treaties by domestic law as politically incorrect, it accepted override as lawful in terms of the constitutional law since the prevailing conception was that tax treaties are not directly enforceable in German legal system and must be set in force by a national legislation in accordance with Article 59 (2) of the Constitution. Since the treaty was endowed with the same status as a statute, the legislator was competent to override treaty obligations by subsequently enacting an inconsistent domestic law.

However, the recent trend is for the BFH is to follow the jurisprudence of the Constitutional Court which has expressed favourable attitude to international law. The decision of the Constitutional Court is still pending and it will be only after the decision is made that it will be possible to state with certainty the Germany approach to treaty overrides.

6.5. Hungary

Judge Darak discussed three Hungarian cases to bring out the position taken by the Hungarian courts on the issue of treaty override. Judge Darak stated that Hungary is a dualist state and treaties must be incorporated into the domestic law before they can take effect in the legal system. He further stated that even though the Hungarian Constitution requires that the legal system of Hungary accept the generally recognised principles of international law and shall harmonise the country's domestic law with the obligations assumed under international law, the judicial bodies have a huge discretion regarding the qualification of international legal rules as generally recognised principles of international law, which can lead to different outcomes in similar situations.

Judge Darak expressed his view that not only the legislature but the Courts can also commit treaty overrides.

6.6. Trinidad and Tobago

Judge Gafoor spoke on the issue of treaty override as observed and perceived in the Commonwealth Caribbean. Judge Gafoor stated that, as a legacy of the British colonisation, most Caribbean states except some such as Haiti and St. Lucia operate under the dualist theory. Since the treaties are transposed into the domestic legal system by way of legislative intervention, the transposing statutes do not enjoy a special status in relation to other statutes. The theory of parliamentary sovereignty makes it possible for the Parliament to enact and override prior treaty obligations by subsequently enacting an inconsistent domestic law. He further stated that unless expressly excepted, Courts would, on the basis of the doctrine of lex posterior, give effect to the latest rule. Judge Gafoor pointed out that despite the legal framework, the notion of treaty override is rare in the context of Caribbean states.

After a general overview, Judge Gafoor outlined several reasons for paucity of case law dealing with instances of treaty override in the Caribbean states. He stated that not too many cases involving the issue of override had arisen, firstly, because the Caribbean states are not willing to be so aggressive in their approach to third countries as to commit treaty override, and secondly because treaty obligations do not often get transposed into domestic law, extinguishing chances of litigation involving such obligations.

6.7. Brazil

Councilor Teixeira presented the Brazilian view on the phenomenon of treaty overrides by discussing two recent (Brazilian) cases, popularly known as the CSLL and the CIDE- Royalites cases. Under the CSLL case, the issue concerned a contribution, which was created subsequent to the signing of the tax treaties with Austria and Spain. The issue before the Court was whether the concerned tax treaties were applicable to the contribution, which the Revenue argued, did not partake the nature of a tax. The Federal Administrative Council of Tax Appeals – CARF, after determining that the essential characteristics of the contribution closely resembled the features of an income tax, concluded that the contribution was, in fact, a tax and in view of Article 2(4) of the OECD Model, the tax treaties which were signed before the creation of the so called contribution (tax), were applicable to that tax.

The CIDE – Royalties case, which has still not been submitted to the Court for opinion, involves a bifurcation of the Brazilian withholding tax on royalties of 25% into a withholding tax of 15% and a royalties contribution of 10%. Again, here the dispute would be with regard to the second element, namely the royalties contribution. Councilor Teixeira remarked that it was not difficult to see that the contribution is, in fact, a tax and that the tax treaties would apply.

7. Session on Conclusive Force of Declarations of Foreign Authorities

This session was chaired by Judge Robert J. Koopman (Hoge Raad, the Netherlands). Speakers included Judge Emilie Bokdam-Tognetti (Conseil d'Etat, France), Judge Petri Saukko (Administrative Court of Kuopio, Finland) and Clement Endresen (Supreme Court, Norway).

7.1. France

Judge Bokdam-Tognetti gave a presentation on the French Jurisprudence dealing with the approach taken by the French courts when confronted with the use of secrecy clauses incorporated in the tax treaties by the French tax authorities in tax matters. Secrecy clauses may either specifically mention courts as falling within the scope of persons to whom the information obtained from foreign authorities may be disclosed or may omit to include courts. According to Judge Bokdam-Tognetti, in all cases where secrecy clauses are invoked, the extent to which the Tax Judge can firstly, access and secondly, use that information assume significance. As to a Judge's accessibility, it is settled position after the *Weissenburger* case that even secrecy clauses which omit to specifically include courts do not preclude communication of the information to the judge.

After discussing the question of accessibility, Judge Bokdam-Tognetti shifted attention to the other aspect of the use of information by the judge. On this aspect, she noted that it had to be seen whether the constitutional principle that every proceeding before the French courts must be of an adversarial nature could be reconciled with the use of the secrecy clause precluding communication of the information to the taxpayer. Citing the *Societe Sparflex* and *Weissenburger* decisions, Judge Bokdam-Tognetti stated that a French Judge was obliged to communicate the information/documents to the taxpayer if he wished to take them into account while arriving at a decision.

7.2. Finland

Judge Saukko gave the Finnish perspective on the exchange and exploitation of information by the Finnish tax authorities. Judge Saukko began with a purely domestic scenario. He stated that all physical and legal persons had an obligation to report information to facilitate the tax assessment of appeal processing of another taxpayer, unless there were legal impediments to reporting such information. He further added that Finnish tax authorities enjoyed broad powers in as much as they may oblige a taxpayer to supply more information than requested by the foreign authority. On this specific point, he relied on the SAC 2006 no. 434 (2) case, whereunder the Finnish tax authorities considerably expanded the scope of the information requested by the Russia authorities by asking for information comprehensively from the taxpayer.

Judge Saukko stated that in cross-border situations, limitations imposed by the foreign authority on the use of the information supplied may act to narrow the exploitation of such information by the Finnish tax authorities. As regards illegally obtaining information Judge Saukko pointed out that there currently is no case law available whether such information could be effectively used for tax purposes. Finnish tax authorities could be fined for using information against the specific orders of foreign authorities. As a closing remark, Judge Saukko mentioned Finnish Court's right to access the information supplied or received has not been subject to any limitations.

7.3. Norway

Judge Endresen presented the Norwegian perspective. As background to a better appreciation of the Norwegian perspective, Judge Endresen outlined the necessary procedural rules which vest the Norwegian courts with wide powers to summon evidence from parties to the proceedings as well as from other persons. Judge Endresen pointed out that there is a specific provision in the relevant law (The Dispute Act, 2005) empowering the court to disallow improperly obtained evidence in court proceedings. The acquisition of evidence, he stressed, need not be illegal; it is sufficient if it is improperly obtained. However, the law also requires special circumstances, and evidence of this

nature is more often allowed than not. Further, the courts are empowered to disallow presentation of evidence if the court finds it necessary that the evidence ought to have been presented in a different manner. Judge Endresen also spoke of the Norwegian law on client-attorney privilege as capable of raising interesting issues vis-a-vis the exchange of information provisions.

Judge Endresen concluded his presentation by discussing the taxpayer's rights against the Norwegian tax authorities' receipt (from another state) or supply (to another state) of incorrect information. Judge Endresen noted that in the case of receipt of incorrect information, the taxpayer could submit relevant documentation to the Norwegian tax authorities to counter the information and the tax authorities may have an obligation under the Disputes Act to ask for additional information should the taxpayer request so. In the case of supply of information by Norwegian tax authorities to a foreign state, the taxpayer cannot prevent, by means of an injunction, the Norwegian authorities from supplying information to the other state. Should the tax-payer be in position to substantiate that the information given is incorrect, he could ask the courts to confirm that the tax authorities have an obligation to correct the information provided to the other state, or he could, under certain circumstances, seek damages. Neither option is at all practical.

All presentations were followed by a lively and productive plenary discussion.

Sachin Sachdeva
Wim Wijnen
IBFD October 2013