The history of international tax treaties from the Dutch perspective (9th November 2023)

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DOI: 10.54103/milanoup.243.c489

Abstract

The evolution of Dutch tax treaty law between the 19th and 20th centuries offers a unique perspective on the international scene. In the period between 1845 and 1904, the historical competition between France and Germany, both countries eager to consolidate their position and establish privileged economic relations with Belgium and the Netherlands, inevitably had an impact on tax policy. Germany attempted to assimilate the Dutch tax system, which today we would define as a tax haven, to its own, in the hope of a future economic union. After the Second World War, under the guidance of the economist Gijsbert Bruins, Dutch tax policy underwent a radical transformation, culminating in what is now the Base Erosion and Profit Shifting (BEPS) Project, through which the Netherlands became an active supporter of the fight against tax avoidance, regaining centrality and leadership in global tax regulation.

Keywords: Dutch tax treaty law; tax haven; BEPS Project; tax avoidance; global tax regulation.

[Prof. Marino]

Good afternoon, everyone, thank you for being here, all the students, friends, and colleagues, in present and via zoom from other places, and other universities. It is a great pleasure and honor to have with us this afternoon Prof. Peter Essers of the University of Tilburg in the Netherlands. Peter is an old friend, and I would also say a mentor because he has corrected a lot of papers from my end. He is also a tax law Prof., as well as a Senator of the Dutch Parliament. So, he has the sensibility to talk about tax law but also what is behind tax law, the political approach to taxation, and behind the political approach to taxation is also the personal approach to the political issues. You will be hearing how the personalities of Professors and eminent scholars, the growth, the history of the Dutch tax treaty policies is important in order to understand why a country, a small country is a big country for international taxation. And we always look at the Netherlands with a lot of curiosity, I would say also sometimes with a lot of ways to compete, but without having the same capability to compete with the Dutch tax system. And we will be listening what is changing in the Dutch tax system in the past, I would say in the present years. So, thank you again for celebrating with us the century of the Report on Double Taxation. I would say simply that he is the descendant of Prof. Bruins, that was the Dutch Prof. of the four economists, jurists that composed the commission who drew the Report on Double Taxation. So, we were listening, a couple of weeks ago, to a descendant of Prof. Seligman and now it's the time to listen to Peter Essers as a descendant of Prof. Bruins. So, thank you again, Peter, for being with us, it is a great pleasure.

[Prof. Essers]

Thank you very much, it's really an honor to be here, and to speak about the history of national tax treaties from the Dutch perspective. I think it was an excellent idea, really, to celebrate 100-year anniversary of this committee of the League of Nations. If you read that report which is very precise, and with the BEPS reports, you can't believe what's happening, and that you can make a very broad clear lines, picture of international taxation at the level that there was not much study about international taxation, but there's still a classic. And for me, I think it's still an example that you should need to think about principles. And then you think about technical aspects to work them out. But yeah, now we have more and more the impression that we start already with very technical aspects. And then we start to think, what about the principles? Well, I would like to show you some elements of the Dutch treaty policy, of course, you only have two hours, so we can't be too detailed, I'll give you a broad big picture. And as my dear colleague said, you know, I've been in the Senate for 16 years in the Netherlands. It's not a full-time position. It's one day/one day and a half. At the end of the year, when we deal with the tax bill, then it's more, but on average is one day and a half. So, I could stay at university, otherwise I wouldn't have done it because I like to be an academic. I've been a tax Prof. since 1991. And I've been a member of the Senate, the period between 2003 - 2015 and then after a break of four years between 2019 and 2023. So, this year, I finalized my work as a Senator. When I started being a Senator for the Christian Democratic Party, out of 75 Senators, we were 23 Christian Democrat Senators. Now there are only six, just to give you an idea of changes happening in the Netherlands. I've been Chairman of the Finance Committee, and I dealt with practically every tax bill that was brought before the Senate. Just to give you an idea, I don't know much about the Senate in Italy. But in the Netherlands, the Senate is very important because you do not have a Constitutional Court. So, you cannot test in the Netherlands tax bills against the Constitution. Because we are afraid for political interference of judges, that if you have no democratic estimation that might be dangerous. But others say, well, this is old fashioned, and we should have also a Constitutional Court, that is heavily debated. But because we don't have a Constitutional Court, the role of the Senate is more to deal with the taking care of the principles. So, we test the bills presented before the Senate against the constitutional principles, like equality, legal certainty. And we also look at their correspondence with international treaties. And that is the main task, I think, of the Senate, that we take over the position of a Constitutional Court. And the Senate is, of course, a political institution, but we try to be as neutral and objective in that perspective as possible. And this is especially important for tax laws, because then there is always a danger that there could be conflict with the equality principle, always the principle to have property. It is an enormous catastrophe that we don't have a Constitutional Court, although we have the Senate. If we have a bill pending, which is absolutely against the legal principles, we can, of course, always go to the European Court of Human Rights, because the treaty of human rights is positive law, and has a higher hierarchy than normal positive law. So Dutch persons can always go to the European Court of Justice in Strasbourg. Well, that's enough about this. What I would like to show you are the following aspects of the topic we are dealing with today, and my main question is, when we would have the four people of the committee as our guests now, what would be their reaction? Would they be proud? Would they be concerned? Or would they be very angry? Of course, what has happened with their report. That is the leading question I would like to ask, and we can't ask them anymore, they don't live anymore, but we might speculate a little bit about it. If you have questions, please interrupt me, no problem. I have enough to say, and we cannot deal with everything. But if you have some questions, please ask them. It is a combination of the general policy aspects. And also as Prof. Marino said, the personal aspects, because if you want to understand some developments, you should understand the people that were responsible for these developments, what are their characters, what have they experienced, and especially we will see that the influence of the First and Second World War has been very important for the topic we are dealing with. That goes for my country, the Netherlands, a small country with a lot of international relationships. But it also goes for those who were members of this committee. I would like to start with Prof. Bruins, because Bruins was the Dutch member of the committee, I will tell you something about his career and about his personality. And then I will start with the early history of Dutch tax treaty policy. And then I will introduce you with the characteristics of the treaties at that time, and especially the influence Germany had on these treaties. Germany was very much opposed against France at that time, and Germany wanted to conclude as much as tax treaties with its neighboring countries. Firstly, we look at the period from 1845 till 1904, and then the period just before the Second World War. Then we have a closer look at the Dutch and German negotiators at that time, because at that time the Germany - Netherlands double tax treaty was negotiated. And on the Dutch side, the negotiator was J. Sinninghe Damsté who was the Director General of the Ministry of Finance. And at the German side, it was Herbert Dorn. He was an important civil servant working at the Ministry of Finance, and he became the Chairman of the German Finance Court. So, he was a very important person, but at that time, he was negotiator for the Ministry of Finance in Germany. Then we look at the tax treaty policy of the Netherlands after the Second World War until BEPS, the famous Base Erosion and Profit Shifting project. And then we look at some case law of the Dutch Supreme Court. Because it is very important to know what the Supreme Court judged about tax treaties. Because I know the Netherlands hasn't always received the best reputation, aggressive tax planning, always looking for the best sign for the taxpayers. That also has something to do with the attitude of the judges of the Supreme Court.

And then finally, the tax policy of the Netherlands after BEPS where we completely changed our attitudes, we, the Netherlands. Before BEPS, the Netherlands was rather aggressive, the bad boy in town. But after BEPS, we became the best boy we've ever seen. That's politics also.

Now let's start with Gijsbert Bruins. He was an important man in the Netherlands. He started as a lawyer, he had a Dissertation in Law at the University of Leiden, but then he went into the economic field, he became the professor of economy. He was an expert in monetary policy, coinage policy. That was a very important thing and if you remember, in the 20s, there was a huge issue about inflation in Germany, directly after the First World War. This was an important task for Bruins to be engaged with how to deal with hyperinflation. In 1921, he became member of the League of Nations, Economic and Financial Commission. But mind you, he was not a tax expert. He was an economist. Of course, he knew a lot about macro-economic effects of taxation. But he was not a tax law professor, knowing all the technical details and so on, he looked at the broad outlines. Well, in 1924, he went to the League of Nations, then to the issuance committee, the committee that dealt with monetary issues, and he spent a lot of time in Germany at the Deutsche Reichsbank. In 1926 he became commissioner of the Dutch Central Bank. And in 1934, he became a CEO of Dutch Clearing Institute, responsible for the international division and payment issues. Well, then, in 1940, he became the CEO of the Foreign Exchange Institute. And during the Second World War, he had a rather important resistance role, because he became Chairman of the Committee of the Dutch Association for Tax Science, and he was chairing a committee thinking about the new tax system after the war during the occupation of Germany. So, they were already thinking about what will happen if the Germans go out of the country.

Well, he ended his career as IMF governor for the Netherlands and South Africa. As you can see, he didn't have a very high age in 1948. In fact, he was meant to become the president of the Dutch Central Bank. But for some political reasons, that didn't work out. So that was his disappointment. But he had a very big influence on the tax system, after the war and before the war, and, of course, also on the international tax arena. Well, he, of course, had influence on the development of the Dutch tax treaties. First of all, in the period between 1845 and 1904, we had the dominance of France and Germany, they were opposing each other. And a very important target was Belgium because Belgium was rather rich, and both France and Germany wanted to be very close to Belgium. And the same was true for the Netherlands. They also wanted to be very close to Belgium. Because the Netherlands was that rich at that time, and they really needed Belgium to have more economic strength. Until 1830, Belgium and the Netherlands were one country. But in 1830, the Belgian said, we are fed up with this and we want independence, then the Netherlands tried to find arrangements with Belgium. That was in 1845, a mutual agreement, the assistance agreement between the Netherlands and Belgium. And the most important tax treaty at that time was the tax treaty between Prussia and Austria-Hungary. That was also a model for the Netherlands. Because the Netherlands wanted tax treaty with the neighboring countries, they were also very interested in a tax treaty with Germany, a tax treaty to prevent double taxation. Well, they already had these plans, in the beginning of the 20th century, but because of the First World War, that was delayed. You might know that the Netherlands was neutral in the First World War.

In 1917, we already had the first draft treaties, and they were passed by Sinninghe Damsté, the Director-General Taxation. And he was later judge of the Supreme Court, and he had worked out this tax treaty with the German negotiator Herbert Dorn. But they didn't find an official agreement. In 1926, Germans did another proposal, a counter proposal, and this was signed by the Dutch Embassy in Berlin. However, what was the issue? Before the Second World War, the Netherlands was the kind of tax haven, tax paradise. The taxation of capital and income from capital was very low, compared to the taxation of income from labor, so that the income tax on interest but also the net wealth taxes were, compared to Germany, very low. But even more important was that there was bank secrecy. So, the Netherlands did not give any information to other countries about the bank accounts of foreigners having accounts in the Netherlands. And that, of course, was not something the Germans very much likes because they saw millions of Deutsche Mark going into the Netherlands, and they couldn't tax it, because they didn't get the information. Well, Sinninghe Damsté, whom I will tell you something more about in the next slide, he was rather authoritarian personnel. He was in charge, and he was really also someone who had written a lot of books on taxation. He was an authority. No one dared to say something against him. But yeah, he would show keen in finding an agreement with his German counterpart, Herbert Dorn, that he accepted the clause to exchange information on the accounts. And yeah, that would mean the ends of the bank secrecy in relation to the Netherlands and Germany. So, that was not very clever of Sinninghe Damsté. He couldn't expect a lot of political rumors because of this situation. And at a certain time, the taxpayers, the enterprises, they knew about this. And they started protesting, saying this is very bad for our competitive position. And they said, we have not been informed about these negotiations, that's really bad because it's our interest, and we are very much against it. The Council of State took over this protest, and said, this is not wise, we are now living in a situation of crisis in the 30s, we are not in a very favorable economic position, so we should not introduce this Article about exchange of information right now. And in the end, nothing happened. So, the treaty was not concluded officially. There were some treaties with Belgium, Sweden, UK, and Hungary, but no treaty with Germany. It lasted until the 50s before we had a treaty with Germany. However, in 1940, the Germans invaded the Netherlands as you know, and that is a very big story, because they had many goals, political goals, but also tax goals. And one of their tax goals was we want to make the Dutch tax system alike to the German tax system. They still had hopes that Germany and the Netherlands would be brother and sister nations, and that they would be members of the German nations. And you could not afford to have different taxes within this community of Germans. So, the idea of the Germans was that we would like to have the same tax system in the Netherlands compared to Germany. Well, there were a lot of negotiations about that. But in the end, civil servants, Dutch civil servants, they approved. The government was away in London, but the highest civil servants at the Ministry of Finance, in the end, agreed with the goals of the Germans to assimilate the Dutch tax system to the German tax system. I always wondered, first, why would they agree with that. But this assimilation was done in less than two years, where there was a complete change of the Dutch tax system. Which tax? Corporate income tax, personal income tax, dividend tax, there was no tax law that was get untouched. The reason for this attitude of the Dutch civil servants was frustration because they wanted to change the Dutch tax system already before the war, but they did not get a chance to do so. And if you've seen the example of the draft tax treaty with Germany, they have been member of the committee and they wanted to change, to modernize the Dutch tax system. But the second chamber, and the government didn't give them the opportunity. So, when the Nazis came in, they said, well, you've already developed excellent laws, and now the parliament isn't here anymore, you're not bothered by politicians anymore, we give you the freedom to do whatever you want. And of course, there were some discussions because they said, they, the Dutch civil servants said, we don't want any political interference in our tax laws. But on the other hand, the civil servants should also know that for the Germans, it was very important to keep the Dutch tax administration intact, and not to interfere all kinds of Dutch National Socialists in the Dutch tax administration, because then those people would resist. But by keeping the Dutch tax administration intact, people would say, well, nothing has changed. So, the result was that the budgetary income increased tremendously. But what they forgot is that what is a good measure in peacetime is probably a very bad measure in wartime. Because Germans said, thank you very much, and they took all this extra money to Germany to finance the war with Russia. And I'll come back to that, there was much more that happened. First of all, is that the Germans said, hey, we don't have yet a treaty with the Netherlands on the relationship between the Netherlands and Germany, but let's do it now in our way. So, you have a unilateral Decree, saying that the bank secrecy, information from the Netherlands towards Germany, would be canceled. And there was opposition against that. But they accepted a compromise given by the Nazi saying, we asked you to waive the secrecy, so we will never do it by ourselves, we will never ask a bank or a Dutch tax inspector to give us information, now we ask it to you, and you should ask the authorities to give it. That was the beginning of the end as you will see. So, full exchange of information was the result. And in the end, the story was even worse, because the Nazi also used the information of the tax administration to know what the financial position of the Jews is. As of 1941, it's not to persecute the Jews, first by demanding them to put their home capital, all their belongings in a central bank, the Lippmann Rosenthal, that was a former Jewish bank. But the Nazi had transformed this bank into robbery bank. So, the Jewish taxpayers, the Jewish citizens had to deliver their belongings to this bank. And they received the kind of bank account as if it was a normal bank account. But in reality, they could not dispose of this bank account, only with special permission of the German authority.

The Nazi said, Jews can be allowed to emigrate, but one of the conditions is that they should have brought all their belongings to Lippmann Rosenthal bank, and secondly, we need a declaration by the Dutch tax authorities that they have paid their tax debts. So, before they could emigrate formally, before they could get this formal allowance, there was a special delegation of the Dutch tax administration that had to give allowance, that they have paid all the tax debts. And well, if you have brought all your money to this robbery bank, you cannot pay tax debts either. So that was the reason for the Dutch Finance department to make an agreement with Nazi, saying that we want the tax debts of the Jews to be paid from these accounts of this special bank. And they knew already that the usual accounts will be canceled, the counts used to finance the deportation of the Jews. And the Dutch tax administration raised this deal with the Nazis to get a lump sum payment for the Jewish taxes. So yeah, that was the result of this view with the Germans.

Well, a person who had very much to do with that was J. Sinninghe Damsté, the negotiator with the Germans. And he was also the Director - General of taxation. But in the war, he was a member of the Supreme Court of the Netherlands. And he dealt with all the tax cases brought before the Supreme Court. The Supreme Court simply went on during the war, as if nothing had happened. Sinninghe Damsté, I already told you, he was an authority in taxation, and he had many tax books. And he was a very formal man. And well, there are a lot of stories about him. But he was not really a man of real life. He didn't look at society as it really was. And he didn't recognize either the real character of the Nazi doctrine. He was one of the judges who decided a case, which I still feel ashamed that Dutch Supreme Court decided this case. This had to do with the Lippmann Rosenthal bank. There was a Jewish civil servant, sorry, not a civil servant, a Jewish taxpayer, who was a journalist; he had to pay taxation on his net wealth. And his statement was, to the Dutch tax administration, I cannot pay that wealth tax if I cannot dispose of my wealth, because I cannot and I do not have entrance to the accounts. So, he went to court and finally he went to the Supreme Court with Sinninghe Damsté. And the question was, should we consider this account at the Lippmann Rosenthal bank as a real account, as a normal account? Or should we say no, in fact it's not a real account, so you cannot dispose of it. And that was what the Supreme Court with Sinninghe Damsté said, that in 1944, I looked at records and I saw that the address, the place where this taxpayer was unknown. In fact, he was already killed by the Nazi. In 1944, there were hardly any Jewish citizens anymore in the Netherlands. And still, they decided that, according to us, this is a normal account, and you have to pay the tax. And well, if there was one chance to show an act of resistance, this was the chance.

Then the story of another negotiator Herbert Dorn, born in 1887, and died in 1957. He started a career as a civil servant at the Ministry of Justice. And then, after the First World War, he was the assistant of the famous Enno Becker. Enno Becker is the inventor of the economic way of interpreting law. He was very famous, Enno Becker, but when the Nazi took over the power, they said to Becker, we would like to transform your theory into state theory and we would like to amend it a little bit. What do you mean? Well, we would like to amend it in such a way that if there is a doubt about the meaning of an Article in a law, you should always find a solution using the National Socialist doctrine. And Becker was so flattered, I'm not talking about Dorn, I was talking about Becker, that he accepted this honor, and that ruined his reputation. Going back to Herbert Dorn, he was really a brilliant civil servant. And he became an absolute tax expert, internationally recognized, he became the tax treaty negotiator on behalf of German.

You might know that after the First World War, Germany was not a member of the League of Nations, but since 1926 until 1933, they go by Hitler. They were member of the League of Nations, and they played a very important role. If you want to understand the history of international tax law, you should look at the influence of the Germans during the Weimar Republic. Well, in 1929, he became an Honorary professor at the Handelshochschule in Berlin. And then his big step in 1931, he became president of the Reichsfinanzhof, the Fiscal Court in Munich. And he contributed to international tax law, model tax treaties, transfer pricing, source taxation, exchange of information, exit tax, all issues dealt with by Herbert Dorn. And the exit tax, well, that was in Germany, the Reichsfluchtsteuer. At the end of the First World War, a lot of rich people tried to evade Germany. And well, they had to pay taxes, but no one did. And so, Herbert Dorn, and others invented this exit tax for people who were evading Germany because of the war. Sadly enough, the Nazi took over this idea and used this exit tax to tax Jewish citizens who wanted to flee from Germany. And they had to pay enormous amounts of tax, even if they were not planning to go away. But then they said, well, we think you are planning to do so, so you have to pay already. The story of Dorn is very sad, because his grandparents were Jewish, he was forced to go away as president of the Reichsfinanzhof. Can you imagine? A very important person. He had to go away, he was fired as president of the Reichsfinanzhof. But he didn't accept it. He thought no, this is nonsense. So, he simply went on during his work in an office. But in November 1938, he was arrested. And yeah, he realized, I have to go away because there was a death threat. And yeah, in November 1939, he emigrated to Switzerland, after having paid the Reichsfluchtsteuer invented by himself, so he had to pay a large amount to be able to emigrate to Switzerland. His mother was deported to Lodz and murdered in Chelmno. He emigrated to Cuba, and finally he became a tax professor at Delaware University. And in 1952, he became the American nationality. And during a trip to back to Berchtesgaden in Germany, he died. It was in August 1957.

But he was an important man, that if you talk about the people, members of the League of Nations Committee, he should be mentioned. Okay, then, let's go now to the situation after the Second World War. Then there was an idea of the Dutch government, we should change our policy. So don't be afraid to conclude all kinds of tax treaties which could be dangerous for the position of Dutch citizens, think of exchange of information, but we should think about benefiting our country from an economic perspective. The Netherlands, small scale, is very much dependent on the foreign affairs, it's a very small internal market, open economy and very service oriented. So, the idea was we should emphasize free international trade. And therefore, they need to conclude tax treaties to avoid double taxation. So, they started to open all kinds of negotiations with countries all over the whole world. At present, we have 200 double taxation treaties, which is, of course, very good if you want to do trade with other countries, if you can rely on tax treaties, you have more certainties. And what has been from the beginning, the principle of the Dutch government in tax treaty policies was to follow as much as possible the Bruins reports. We apply capital import neutrality for active income. So, for business income, for labor income, meaning that we fully accept, we, the Netherlands, fully accept the taxation abroad. So, we are not going to interfere in the tax burden in other countries. If you have a Dutch subsidiary doing work in another country, we're not going to levy extra Dutch tax, we accept the levy of taxation abroad. For passive income, for income out of capital, there we apply capital export neutrality, saying that we want the same treatments for people in one country, either they invest abroad, or either they invest in the Netherlands, then you only want to give the kind of credit, the credit for the tax you have paid abroad. And that's a totally different approach. It's interesting to read in the Bruins report, that there has been a lot of discussion about should we apply the exemption method, should we apply the credit method, should be apply apportionment, all kinds of principles were dealt with. And in fact, they concluded to a mixed system. They said, it depends on the income item, what is going to be done for the prevention of double taxation. Very important in this Bruins report is that they realized that you should tax the ability to pay, not only in a national way, but also in an international way. And that was quite revolutionary. In the Netherlands, we say you should not put all your eggs in one basket.

You are producing wealth, then you are possessing wealth, you have the wealth itself, and then you're consuming wealth. And the fourth aspect is that you dispose of your wealth without having it consumed. And they said all these four parts of the ability to pay should play a role in the tax system. So, you should tax the revenues out of the production of wealth, the possession of wealth, the consumption of wealth, and disposal of wealth when you die, the inheritance. And that should be dealt with in different ways. And I think this is still very important to realize that it's not only about income taxes, it's also about consumption taxes, and it's about inheritance, and gift taxes. And these all play a role in the international tax arena. What is important to understand the position of the Netherlands is that we did not like and still do not like withholding taxes on interests or withholding taxes on royalties, because we say, well, that always leads to double taxation, a lot of administrative burdens, so no withholding taxes on interest and royalties. That is the reason why in the Netherlands you find so many companies or famous popstars like Rolling Stones. They all have companies because they don't want to pay interest withholding taxes. So go to the Netherlands, they can save that. That's also the reason why we have so many letterbox companies. Because if you accept a letterbox company for treaty purposes, you can save a lot of money. So, treaty shopping is part of this deal, no withholding taxes on interest and royalties. By the way, as of 2021, we do have withholding taxes on interest and royalties, but only if they are paid to countries which do not tax or have a very aggressive tax policy. They are exceptions, the rule is still no withholding tax on interest and royalties. The only withholding tax we have is the dividends withholding tax, that used to be 25%, it's now 15%.

Important also for the Netherlands is the active advance ruling policy. I think that goes now for many countries, but for a long time, the Netherlands has been quite exceptional, that if you have an issue as a tax advisor, about what are the consequences of international tax planning, the tax inspector gets you clearance. But a lot of people think, well, you get this clearance for issues outside the boundaries of the rules, you can have deals about tax rates, for instance, you can have deals about tax exemptions. That is not true. It's only applicable if you stay within the boundaries of the law. So, if you think you can get a ruling, saying, well, the normal corporate income tax is 25.8% when you get it for 20%, that's wrong. But of course, in between, you can always, because it's not only about the rate, it's also about the base. And the base is always more flexible to negotiate. But in any case, that was very important.

And also, we have cooperative compliance, meaning that we do not consider the tax advisor as an enemy towards the tax inspector, they should work together. And only if you realize that this tax advisor is not honest, then rules change. But if you deal with each other on a horizontal level, and you deal with technical issues, you get clearance beforehand with tax inspector, but as a taxpayer, you are honest about your situation. Yeah, that is also a big advantage for companies. Companies are used to taking risks but they don't like to take risks if it is about tax issues. They want to have certainty. And if you have to pay, okay, let's do it. But they want to have certainty. And these are very important Dutch elements. But I realize that the reputation of the Netherlands is not always good because of these issues, actually, because a lot of countries think that we want to attract foreign investors, and we give away all kinds of tax situations. But the only idea is to give clearance beforehand, but yeah, in practice, it could be different. Well, there is also an important role of holding companies and conduit companies. You see a lot of issues with holding companies, and you will surely see that after the break. Because of the case law at the Supreme Court, there is not much leeway in interpreting the tax treaty in a way that is favorable for the tax administration. Dutch Supreme Court is very formal in applying abuse provisions with respect to tax treaties. Well, to conclude this, we more or less accepted international aggressive tax planning because if you apply capital import neutrality, you accept that you fully follow the tax rates, the tax burden outside the Netherlands, so that gives leeway to intelligent tax advisers to minimize the tax burden. And also, the Netherlands tries to promote activity, the attractiveness of the Dutch business and tax climate, and in the end about 200 tax treaties we have with respect to direct taxes. So that means that if you have the tax treaty with the Netherlands, you have the tax treaty. Okay, let's have a break, and then we'll come back with this case law on how it works in practice. Thank you.

Okay, now I will show you some specific cases. Some are still postponed, others are not, but this is just to give you an idea how the reasoning of the Supreme Court affects our issues about how to deal with tax treaties. And we're talking about aggressive tax planning situations, abusive situations. And the first case I would like to deal with is the following case of 15th of December 1993, the holding structure. I said holdings are very popular in the Netherlands, not only for tax purposes, but also for other purposes. And we also have very flexible company law, and we have investment agreements where all economies can play a role. But this is a case, a tax case. The situation is as follows. We have Shareholder X. Well, he lives in, let's say, Belgium. And we have state B, the Netherlands, and there is an operating company, and the shareholder has emigrated from the Netherlands to Belgium. Suppose that there was no borrower. And this operating company has a tax property because they have been successful, and all the profits reserves are within.

Mr. X wants to benefit from these profit reserves. He sees a lot of money, but it is in the account of this company, of the operating company, and the company has paid corporate income tax, no problem, but this X wants to get this money out of this company. How to do so? The most logical way is to pay himself the dividends. So, pay himself the dividends of 1 million euro, and then he can benefit from the profits reserves. But if you do so, you have to pay dividends withholding tax, you have to pay income tax. So, that is not really the issue and at that time, the rates were very high. So, they thought about the following situation, Mr. X establishes a holding company and this holding company, he has all the shares in this holding company, and this holding company buys the shares in the operating company. So, Mr. X sells the shares in the operating company to the holding company. And then this structure arises, the holding has the shares of the operating company, and X has all the shares of the holding company and holds indirectly the shares in the operating company. Well, what is the idea behind it? If you sell your shares to this holding company, then you realize a capital gain on the shares in this operating company. You have bought the shares for the cost price and now the value is much higher because the profits reserves, so the shares have grown in value. By selling the shares, you will realize this profit. But how? The holding company doesn't have any money. So, you buy these shares against the debts. But wait a minute, the operating company can pay all its profit reserves to the holding company. And if you do so, this can be done tax free. Because we have a participation exemption. So, this profit transfer can be done without any taxation. And the next step is that the holding company pays back the loan to the shareholder by using his money, you see, by the operating company. Then we have the repayment of a loan, and the repayment of the loan is not taxable in the Netherlands. So, what you've done is you have changed a dividend distribution into capital gains followed by repayment of a loan. And that could be done either tax free or at a very low tax rate. If you did this within a pure national situation, a Dutch company with Dutch shareholder, this would trigger the abusive law doctrine. And the Supreme Court said, listen, the only motive you have selling these shares is for tax motive, you want to save tax money. The second aspect is that you are doing now an exercise.

In the operating company, you've only changed the direct interest into the indirect interest, and this is so close to a normal dividend distribution. We tax you as if you had paid the dividend. Okay. But now, Mr. X has emigrated to Belgium, state A. And now the treaty between the Netherlands and Belgium is at stake. And there we have the same situation, if you have distributed dividends directly to Mr. X living in Belgium, you have to pay dividend withholding tax, 15 - 25% the dividend withholding tax. But if you transfer the shares in the operating company into the holding company, you have a capital gain, and then this capital gain is not taxed. The tax administration said that is applying literally the tax treaty between the Netherlands and Belgium, that says that if Mr. X makes a capital gain, and this capital gain is allocated to Belgium, and Belgium doesn't want to tax. And what people like to do is applying the doctrine, in the same way, before the tax treaty, what we have done nationally, we should also do internationally. But then the same Supreme Court came in and said, yeah, I know I have decided that this should be treated as dividend in national situations. But if the tax treaty is involved, this is only possible if both treaty partners, Belgium and the Netherlands agree, in the text of the treaty, that this situation should be seen as a dividend distribution. And since this is not part of the treat literally, this wasn't allowed. So here you see it, very formal approach of the Dutch Supreme Court. But the reason behind is that the Supreme Court accepts this treaty as something special. It's not a unilateral national situation, here you have two states. And if the other state is not involved in this similarity, then you cannot tax.

So, this is an example of how we apply very formally tax treaties. Because of that, this has changed. No more specific rules, and the Netherlands has applied the principal purpose approach to tax treaties. If you can show that the principal purpose of this scheme is to save taxes, and if you can show that this is against the object and purpose of the treaty, this is taxed. But before BEPS, this was fully accepted, and we always said, you only pay dividend withholding tax if you are a very lousy taxpayer, or lousy tax advisor, because this is very easy to circumvent dividend withholding tax. But this is the respect of Supreme Court towards a tax treaty. The same is true for treaty shopping. In this case, we have the operating company with a lot of shareholders, the families owning the shares, and the shareholders they live in the Netherlands, Belgium, Switzerland, and well, the operating company has a lot of profit reserves. They want to distribute, but when they do so they have to pay dividend withholding tax.

At that time, it was more or less, not too much anymore the tax. And then the relationship between operating company in the Netherlands and the Netherlands Antilles, they don't pay any dividend withholding tax. So, by interposing this holding company, you realize a situation where you don't have to pay dividend withholding tax. The question to the Supreme Court was, do you consider this as dividend distribution? And again, these people said no, not even the fact that this holding company is a resident of tax haven, nor the fact that dividend has been declared but not been made payable yet. That is not the issue. We have to respect the tax treaty as meant between the Netherlands Antilles and the Netherlands. So, this is the basic example for treaty shopping. You can use treaties approved by the Netherlands to avoid taxation. Last example, that is the dividends stripping example where the concept of beneficial ownership is involved. Please try to follow me, we start from shell company, Royal Dutch company. They are now resident of UK. At that time, they were still resident of the Netherlands. They wanted to distribute dividends, and they had declared these dividends. But dividends were not made payable yet. And you're only taxed at the moment they are paid, made payable. The shareholder of this Royal Dutch company was a Luxembourg S.A. And between the Netherlands and Luxembourg, it was agreed that there would be a full dividend withholding tax of 25%. When these dividends were paid to the Luxembourg S.A. it was very special regime. And 25%, Luxembourg S.A. was not very happy with that, and they thought, can we think about the solution. And the solution was the fact that there was a UK stockbroker. And this UK stockbroker bought dividend coupons from Royal Dutch, sorry, from the Luxembourg S.A. and they paid 80% of the gross dividend. So, they bought these coupons before they were made payable yet. And, at the moment that the dividends were paid to the UK stockbroker, the treaty between the Netherlands and the UK was applicable, and they only had to pay 15% dividend withholding tax. So normally it's 25%, and now they only have to pay 15%. This is dividend stripping. Because if you look at what the Luxembourg S.A. now receives 80 the price for the dividend coupons paid by the UK stockbroker, they get 80. Normally, they would have received 75 because then they had to pay 25% dividend withholding tax. So, they have an extra five and what's in it for the UK stockbroker? They receive a hundred dividends from the Royal Dutch, and they paid only 15% dividend withholding tax because of the treaty with the Netherlands, so they earn 85. So, what has happened? Both Luxembourg S.A and the UK stockbroker have divided the reduction of the dividend withholding tax. Question, of course, is this possible? And, in the end, the Supreme Court said yes, this is possible, because the broker had become the beneficial owner of the dividend coupons. They didn't see any reason to doubt that they looked at the beneficial ownership concept from a very formal aspect, you could freely dispose of the dividend coupons.

Now, after BEPS, this has become much more difficult, and we have also agreed that in our legislation, that's still the ideas, the way Supreme Court looks at this case, although it's obvious that you want to save taxes, still they look in a very formal way with this concept of beneficial ownership. Last example, not a concrete example, but in Dutch tax law, you have many fictions. If you are a shareholder, if you take a loan as a shareholder from your own company, if it exceeds a certain amount, the extra amount, the excessive amount is considered to be a dividend. Question? Are these national fictions also applicable for the tax treaties? The answer is no, only if the two treaty partners agree to accept these fictions also in the tax treaty, and also this gives leeway to the tax advisors. Is that clear? However, now we have a new situation of BEPS. And the Netherlands has changed completely its character from the bad boy, they have become the best boy in town. And that's really the situation because this specific position of the Netherlands with holding companies, letterbox companies, with all kinds of cases where we apply the treaty in a very formal way, do not apply abusive law situation. That was very bad for the political situation of the Netherlands all over the world, everyone was looking at us from a very peculiar perspective. It's also the small country against big countries, big countries are annoyed with the position of the Netherlands. And well, I've given many courses abroad, and I've always tried to defend the Netherlands by saying, the fact that we don't have any withholding taxes on interest and royalties, we have very good reasons for that. That is because of the economist Jan Bruins who said this is very bad for international trades, it leads to all kinds of administrative burdens, that can lead to double taxation, all the source taxes, so you should get rid of the source taxes, and do not blame us. Rulings, the same story, if you get clearance beforehand, to who company wants to be sure what are the consequences of their plans, what is wrong with this? As long as you stay within the boundaries of the law. And you have Starbucks case where they applied different systems in Europe, compared to the United States.

If you have a parent company giving a loan to a subsidiary, but the parent company doesn't charge any interest on this loan because that's good for the economy of the subsidiary. So, you have an interest of zero. If you calculate the profits of the subsidiarity, yeah, in fact, you have to deal at arm's length. And you have to take care at arm's length interest by determining the profit of the subsidiary. Because otherwise you tax the subsidiary too high. But you only want to tax them for what they have earned from their business. So, we call this an informal tax. You couldn't deduct the interest that you did not pay, perfect concept. But yeah, if you have another country on the other hand, that doesn't tax the deducted interest. But the Netherlands says, we apply our own concept and we're not responsible for what's happening outside. But in fact, we apply this doctrine, but this has changed after BEPS, because now BEPS says, we're not allowed to deduct if there's not an extra profit. So, yeah, that brings us to the fact that the Dutch government is now the champion of fighting international tax avoidance. So, they raise emphasis on international, multilateral measures. The Netherlands always accepted BEPS measures, although you can criticize them. And they always choose the most aggressive form to attack the abuse. So, they have effectively implemented ATAD and are very much in favor of Pillar 2. In fact, the Netherlands was the first country that has already accepted this minimum taxation bill, accepted by the second chamber. And I guess the same will happen with Pillar 1, the transfer price for digital economy. The Netherlands endorses the necessity of the EU Wide Plan to fight abuse of shell companies and wants to become a front runner in that. If necessary, unilateral measures. But, if possible, we apply multilateral measures. Also, the Netherlands wants to pay more attention for a special position of developing countries. And they do so by assisting them, or better say, to give them an opportunity to ask professional assistance by the Dutch tax administration, they send people to developing countries to help them in their tax treaty. And that is also important, they stress the own responsibility of businesses and tax advisors. Multinational businesses, tax advisers, they all have their codes, their codes of ethical behaviors. If you don't do it, you are seen as a kind of criminal in tax affairs. So, shareholders, lobby groups, they all look at what's happening in the multinationals. So, if you apply for aggressive tax planning, then you could have problems with these ethical codes.

I think this is all good development, but it is too much emphasizing. And we also forget that if you look at the Bruins reports, first we have to start with the principles, what are the principles in tax in international arena. Then you have to look for the exceptions, and then you have to look for anti-abusive situations. But if you look at BEPS, we start with anti-abusive situations and that you can have problems because then you can go too far. So, this is for tax development, international tax evolution, every evolution starts with killing the old source. I want also to say that these are all measures that have been implemented for the last 15 years to show the Netherlands as a place of passive conduit companies, that we really want to attack the conduit companies. We don't want to be a country with billions of euros getting through the economy. So, these are all substance issues. Holding company doesn't have much substance. If you don't have substance, you cannot get, for instance, rulings anymore, that's also important. In the past, holding companies would get rulings. Now this is very much difficult.

Well, conclusions. At the beginning of the 20th century, bank secrecy was very important in relation to the exchange of information. It was a crucial topic in early Dutch tax treaty policy. We wanted to keep, more or less, the tax haven situation, and we wanted to keep the *status* of the position before BEPS, and the tax treaty policies were adapted to that. We had the very strong influence, first, of the Ministry of Finance, but later more influence of stakeholders because they saw important developments were going on in international taxation. And after Second World War, the attitude changed. Well we need tax treaties to benefit for our international position, to benefit for our service-oriented situation, to offer security, to offer certainty, to companies. But the price was that we accepted because of the emphasis on the capital import neutrality. And now you see with Pillar 2 that this idea of capital import neutrality is for a big part away because we also tax for income activities that cannot be allocated to the Netherlands.

The main question was how do you think? Experts would say, if they were here, would they be happy? I haven't said already my biggest concern. You know I have been in the Netherlands Senate, but what about the democratic legislation? You see what happened and I really admire the work of the OECD, it was enormous with BEPS. Many people thought that they would never succeed but they did. But what about the legislation? Now we are dealing with the minimum taxation, Pillar 2. This is very technical, they have copied, in fact, the directive into the law. So now we have to wait and see how it will work out in practice. But what about the influence of the national sovereignty? Well, it affects tax sovereignty of all the countries. You always see the concerns of the developing countries. But also, if you are a full member of the OECD, who dares to say no against the directive? I always have to point at countries like Ireland, Portugal, Greece which have to implement all kinds of tax policies. I would say that is my biggest concern. All these technical aspects, well you can change them and over emphasize them. But OECD has no democratic legislation at all as an association of tax administration. But also the fact that we depend on the IRS in directives, we depend on the association of tax accountant, accounting firms. So that is my biggest concern. What about democracy? Thank you very much.

[Prof. Marino]

It is a surfing into the history of international taxation from 1923 to 2023, and I agree with Peter about the lack of principles. Probably it is a matter of age: back in 1923, the report was just a few pages, very simple but very heavy, that is giving you the direction of what is going on. An Anglo-Saxons direction, for sure, with the lack of reasonings behind. So, I fully agree with the idea that within the second part, double non taxation, maybe principles should have come first, rather than technical actions. And then, of course, the democratic legitimacy. We've been working on the politics of international taxation: no taxation without representation, taxation without representation, no representation without taxation, and representation without taxation. We are indeed going into the direction where we do not know. Actually, we know where the power of taxation is going, and it is indeed going with the OECD. And the OECD was clever enough in challenging the international community with the prisoner dilemma basically. Because it said, okay this is the chess, now it is up to you to play, if you do not want to play, you are going to lose money, so everybody now has to play. That's a very fascinating way to be sort of a barycenter into this international tax chess. So, thank you very much again. I wonder if there are questions from students. Please feel free to ask, any curiosity? Actually, I have a question, just to break the ice, is it true, as you said, that the Netherlands is becoming a good boy? Actually, I think that from the policies, from the outside, the Netherlands is now making an upgrade in its tax reputation because you are selecting all the holding companies, conduit companies that for the past years have been feeding into the Dutch tax system, but this operation is very heavy. So, when you said the substance, now that means the place of management of the company must be in the Netherlands with a lot of people, with a cost of employees.

I think this is indeed a way to evolute the Dutch tax system. And then where I see the bad boy? No longer in tax law, but in corporate law. It is fascinating, the way how Dutch corporate law system is attracting a lot of corporations and a lot of ownerships from other countries, at least from Italy that is a family business country. There are a lot of businesses emigrating in the Netherlands, not really for taxation but because of corporate law. Because you have the opportunity of having just one share to voting rights. So, family businesses are going there because they can sell portions of shares, portions of shareholdings, but by keeping the control. So, I think this is a very interesting evolution into the field of competition, not really tax competition, but corporate law competition. What do you think about it?

[Prof. Essers]

I think that the two points that you made are really interesting. The first point is that there is a dilemma, we used to have very strict rules about what are substance, how much equity to you need. But once you put that exactly in the law, it is quite easy to convince because these tax advisors are very intelligent persons. So, the answer could be, don't make it too concrete, but make it an open norm. But then, legal certainty is the victim because then you never know if it is enough, and you depend on the vision of the authorities about that. So that's the problem we're facing. Taxpayers want to have certainty. But on the other hand, you know you can never get certainty of this kind of aspect, you always have to look from case to case and the idea behind is corporate compliance. And then the family businesses, we are now discussing whether we should have more rules to protect family businesses. Because they are, also in the Netherlands, very important. I don't believe in the competition between family businesses but we could still need some special rules to protect them. But then there is always the issue if this is against the equality principle because we give special rules to small businesses and enterprises. So, there are many questions, but, I think, we should protect family businesses.

[Prof. Marino]

Any questions? Well, thank you, Peter.