Cross-border Corporate Reorganizations and the Tax Treaty Policy

－Focusing on Reorganization Clauses Concerning Substantial Participations Clauses in Japanese Tax Treaties－

Shigetaka Nakamura*

Abstract:

Japan has only three tax treaties with reorganization clauses concerning substantial participations clauses. However, various reorganization clauses are to be found in tax treaties of other countries.

This article clarifies current issues of Japanese tax treaty policy for corporate reorganizations and considers a future direction of its policy, mainly based on an internationally well-known prior scholarly work.

From this study, it follows that Japanese tax treaty policy for reorganization clauses has two issues: (1) Positioning reorganization clauses as extremely rare clauses; (2) Lack of consideration of various reorganization clauses in tax treaties.

In conclusion, this study shows two following findings: (1) Need of good consideration to two issues with reference to the above-mentioned work; (2) Need of additional consideration to two issues from the Japanese tax treaty policy perspective.

It is worth noting that this article will be expected to bring not only the trigger of arguments for reorganization clauses in Japanese tax treaties as academic significance, but also the prospective strength of the flows of trade and investment between Japan and the contracting state as social significance.

Keywords:

reorganization clauses, non-discrimination provision, global tax neutrality, tax privacy, digital economy

* Professor of Tax Law at Kansai University school of Accountancy [mailto: s-naka@kansai-u.ac.jp]

I. Introduction

Tax treaty which Japan concluded in the beginning was Japan-United States tax treaty in 1954. Then, Japan-United States tax treaty, which was revised in 1971, showed shift of emphasis from taxation at the residence to taxation at the source, as Japan was getting a position from the state of capital import to the state of capital export[1]. Moreover, Japan-United States tax treaty, which was revised in 2003, showed that Japan had been in an overwhelming position as the state of capital export[2]. On the one hand, it reduced taxation at the source for interest, dividend, royalty, and so on[3]. On the other hand, it introduced limitation on benefit clause and arranged its application for hybrid entities[4]. It shows a direction of Japanese tax treaty policy[5].

By the way, Japan has only three tax treaties for corporate reorganizations. One of them is Japan-France tax treaty, which has a reorganization clause concerning a substantial participations clause. Japan-France tax treaty is estimated as an 'extremely rare' tax treaty[6].

Various reorganization clauses, however, are to be found in tax treaties of other countries. This article clarifies current issues of Japanese tax treaty policy for corporate reorganizations and considers a future direction of its policy, mainly based on an internationally well-known prior scholarly work (hereinafter; Professor Domingo's scholarly work)[7].

This article proceeds as follows. Part II of this article explains a legislative history for Japanese tax treaties with reorganization clauses and analyses them. Part III mainly introduces Professor Domingo's scholarly work. Part IV shows results for this article and discussion for such results. Part V provides concluding remarks.

II. Analysis of Japanese tax treaties with corporate reorganization clauses

1. Legislative history

Japan has only concluded three tax treaties for corporate reorganizations, and all of

1) Hiroshi Kaneko (eds), *Sozei Ho no Kihon Mondai* [*Basic Problems of Tax Law*], 574 (Yoshihiro Masui), 2007.
2) Hiroshi Kaneko (eds), *supra* note 1, 574-575.
3) Hiroshi Kaneko (eds), *supra* note 1, 574.
4) *Id*.
5) Tadatune Mizuno (eds), *Kokusai Kazei no Riron to Kadai 2* [*Theories and Issues of International Taxation*] (2th edition), 35 (Masatugu Asakawa), 2005.
6) Yoshihiro Masui and Yuko Miyazaki, *Kokusai Sozei Ho* [*Introdution to International Taxation*] (4th edition), 280, 2019.
7) Domingo Jesús Jiménez-Valladolid de l'Hotellerie-Fallois, Reorganization clauses in tax treaties, IBFD, 2013. He is a professor of financial and tax law at the Autonomous University of Madrid.

them are reorganization clauses concerning substantial participations clauses[8]. Table 1[9] shows such three tax treaties are represented in chronological order.

Table 1 Legislative history

Year	Contracting States	Article
1995	Japan and France	13.2
2006	Japan and United Kingdom	13.3; 5 (exchange of notes)
2008	Japan and Australia	13.3; 18 (protocol)

Reorganization clauses concerning substantial participations clauses are set up not only in domestic tax laws[10], but also in Japanese tax treaties[11]. However, it is said that the latter are minority[12].

Under Japanese tax treaty policy, the transfer of the alienation of substantial participations in the capital of resident companies (the so-called 'Jigyo Joto Ruiji Kazei'in Japanese) is subject to taxation at the source, as such transfer is regarded as trading of substantially such companies[13].

Though Japan has some tax treaties concerning substantial participations clauses, only three tax treaties in Table 1 has special clauses for corporate reorganizations in substantial participations clauses.

Here, for reference, I would like to confirm the latest data for economic situations between Japan and such three countries. Table 2[14] shows outward direct investment flow for five years in Japan. Table 2 also shows the latest data for economic situations between Japan and United States (ranking I) and all countries (World) to compare with such three countries.

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8) Professor Domingo's scholarly work, *supra* note 7, 244.

9) Table 1 is made by the author, referring to Professor Domingo's scholarly work, *supra* note 7, 401-402.

10) Article 178, paragraph (1), item (iv), (b) and paragraph (6) of the *Corporation Tax Act Enforcement Order*. Article 281, paragraph (1), item (iv), (b) and paragraph (4) of the *Income Tax Act Enforcement Order*. Article 21, paragraph (4), item (ii) of the *Act on Special Measures Considering Taxation*.

11) For example, Article 13, paragraph (4), item (b) of Japan-Singapore tax treaty. Article 13, paragraph (2) of Japan-Vietnam tax treaty.

12) Kazuyoshi Yauchi, "*Jigyo Joto Ruiji Kazei no Tekiyo Hani* [*Scope of Application for the Transfer of the Alienation of Substantial Participations in the Capital of Resident Companies*]", Zeimujirei, Vol.46, No.3, 64, 2014.

13) Daisuke Fujii, "*Shin Nichiei Sozei Joyaku ni tuite* [*Concerning New Japan-United Kingdom Tax Treaty*]", Finance, Vol.42, No.9, 22, 2006.

14) Table 2 is made by the author, referring to Japan External Trade Organization (hereinafter; JETRO), Japanese outward direct investment by region and industry (based on the balance of international payments, net and flow) https://www.jetro.go.jp/world/japan/stats/fdi.html (last retrieved Feb. 18, 2022).

Table 2　Outward direct investment flow (million dollar)

	2016	2017	2018	2019	2020
France	1,037	1,830	1,262	1,757	573
United Kingdom	51,399	22,218	20,178	9,573	3,477
Australia	5,575	4,471	3,227	10,526	16,393
United States (ranking 1)	53,102	47,918	17,399	51,122	48,935
All countries (World)	178,533	173,768	160,267	258,449	171,123

Then, Table 3[15] shows inward direct investment flow for five years in Japan. Table 3 also shows the latest data for economic situations between Japan and United States and all countries (World) to compare with three such countries.

Table 3　Inward direct investment flow (million dollar)

	2016	2017	2018	2019	2020
France	4,539	3,636	2,384	1,588	1,315
United Kingdom	5,676	△ 3,808	4,336	2,742	30,457
Australia	742	244	1,214	432	△ 1,100
United States	6,847	5,948	6,264	17,124	21,058
All countries (World)	40,942	18,805	25,297	39,930	65,977

Firstly, Table 2 and Table 3 make it clear that outward direct investment flow is much larger than inward direct investment flow in Japan. Secondary, Australia is getting large for outward direct investment flow, Thirdly, United Kingdom is the largest for inward direct investment flow in 2020.

At the next part, I would like to introduce details of such three tax treaties.

2. Three tax treaties with reorganization clauses concerning substantial participations clauses

(A) Japan-France tax treaty

Japan-France tax treaty in 1995 has a reorganization clause concerning a substantial participations clause in Article 13, paragraph (2), item (b).

Article 13, paragraph (2), item (b) states:

‘b) Nonobstant les dispositions du a, lorsqu’une société qui est un résident d’un Etat contractant tire des gains de l’aliénation d’actions ou parts visées au a dans le

15) Table 3 is made by the author, referring to JETRO, Japanese inward direct investment by region and industry (based on the balance of international payments, net and flow) https://www.jetro.go.jp/world/japan/stats/fdi.html (last retrieved Feb. 18, 2022).

cadre d'une restructuration de sociétés, et qu'une attestation est établie par l'autorité compétente de cet Etat certifiant que ces gains font l'objet d'un report d'imposition conformément à la législation fiscale de cet Etat dans le cadre de cette restructuration de sociétés, ces gains ne sont imposables que dans cet Etat. Toutefois, la présente disposition ne s'applique pas lorsque l'opération est effectuée principalement pour s'assurer le bénéfice de cette disposition.'

I would like to illustrate functions of article 13, paragraph (2), item (b) with Figure 1[16]. When a Corporate shareholder in France transfers shares of JPKK involving a merger between JPKK and JP2KK, capital gains are subject to tax only by France, provided following requirements are met: (1) A corporate shareholder in France is a resident in France, from which Japan-France tax treaty may benefit; (2) A competent authority in France issues a certificate, which is allowed to give tax deferral treatment for such capital gains at the merger for the purpose of French tax law[17]; (3) Such merger is not undertaken primarily for the purpose of securing the benefit of this provision[18].

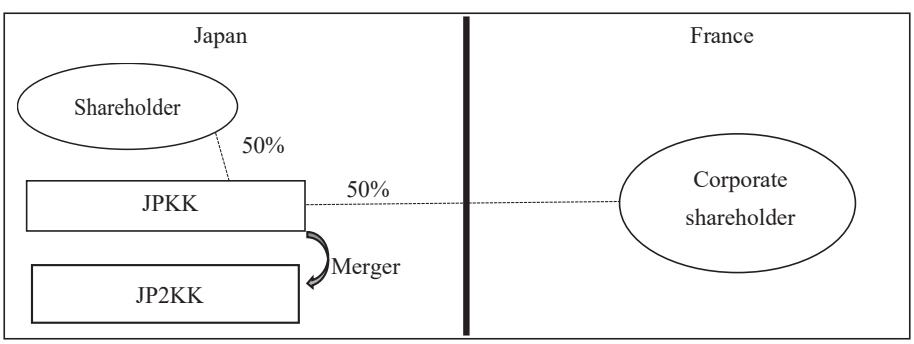

Figure 1 Alienation of substantial participations in the capital

As mentioned above, article 13, paragraph (2), item (b) enables not only allowance of tax deferral treatment for such capital gains like a domestic merger in France in spite of an international merger, but also only taxation at the residence at the tax treaty level[19]. Article 13, paragraph (2), item (b) is estimated as having effect to neutralize direct investments between contracting states in spite of differences in domestic tax laws concerning corporate reorganizations[20].

16) Figure 1 is made by the author, referring to Yoshihiro Masui and Yuko Miyazaki, *supra* note 6, 276, Figure 12-1.
17) Yoshihiro Masui and Yuko Miyazaki, *supra* note 6, 279-280.
18) The second sentence of Article 13, paragraph (2), item (b) in Japan-France tax treaty.
19) Yoshihiro Masui and Yuko Miyazaki, *supra* note 6, 280.
20) *Id*.

However, Japan-France tax treaty is estimated as an 'extremely rare' tax treaty[21].

(B) Japan-United Kingdom tax treaty

Though Japan-United Kingdom tax treaty was concluded in 1970, it was revised in 2006, as it was inappropriate for then economic relation between both countries[22]. In those days, United Kingdom was ranked fourth, after United States, Netherland, and China for outward direct investment flow[23]. Then, United Kingdom was ranked seventh for inward direct investment flow[24].

A reorganization clause concerning a substantial participations clause was set up in article 5 of 2006 Exchange of notes in connection with article 13, paragraph (3) of the tax treaty.

Article 5 of 2006 Exchange of notes states:

'5. With reference to paragraph 3 of Article 13 of the Convention:

It is understood that gains are to be regarded as subject to tax if they are subject to tax in the same way as other gains derived from the disposal of shares by a resident of a Contracting State.

It is further understood that where, in the case of schemes of reorganisation of companies, the laws of a Contracting State allow for the taxation of the gains arising from the disposal of shares in a company to be deferred, such gains will be regarded as subject to tax unless any part of the deferred gains is as a result of a later disposal or reorganisation subject to a statutory exemption under the laws of that Contracting State.'

This article was introduced for the purpose of preventing cross-border corporate reorganizations as much as possible[25]. This article seems to be functionally similar to article 13, paragraph (2), item (b) in Japan-France tax treaty, though texts of this article are different from texts of article 13, paragraph (2), item (b) in Japan-France tax treaty.

(C) Japan-Australia tax treaty

Though Japan-Australia tax treaty was concluded in 1970, it was revised in 2008. According to the website[26] of Ministry of Finance, JAPAN, summaries of a new tax treaty are described as follows: (1) In order to promote active investment exchanges between Japan and Australia, mitigation of taxation for investment income by the state of the

21) *Id*.
22) Daisuke Fujii, *supra* note 13, 13.
23) *Id*.
24) *Id*.
25) Daisuke Fujii, *supra* note 13, 23.
26) Ministry of Finance, JAPAN, 31 January 2008, 'A new tax treaty with Australia has been signed' https://www.mof.go.jp/tax_policy/summary/international/tax_convention/press_release/sy200131au.htm (last retrieved Feb. 18, 2022).

source. Then, clarification and rationalization of taxation relations in both countries, such as real estate income and capital gains; (2) A new tax treaty is expected to not only promote further investment exchanges between Japan and Australia, but also revitalize the Japanese economy.

A reorganization clause concerning a substantial participations clause was set up in article 18 of the accompanying protocol in connection with article 13, paragraph (3) of the tax treaty.

Article 18 of the protocol states:

'18. With reference to subparagraph 3 of Article 13(Alienation of Property) of the Convention:

It is understood that where, in the case of schemes of reorganisation of companies, the laws of a Contracting State allow for the taxation of the gains arising from the disposal of shares in a country to be deferred, such gains shall be regarded as subject to tax unless any part of the deferred gains is as a result of a later disposal or reoraganisation subject to a statutory exemption under the laws of that Contracting State.'

This article seems to be functionally similar to article 13, paragraph (2), item (b) in Japan-France tax treaty and article 5 of 2006 Exchange of notes of Japan-United Kingdom tax treaty, though texts of the protocol is different from texts of article 13, paragraph (2), item (b) in Japan-France tax treaty and texts of article 5 of 2006 Exchange of notes of Japan-United Kingdom tax treaty.

3. Preceding studies and their limits

Firstly, regarding positioning of this article with the respect to the whole research in Japan, Professor Masui and Miyazaki have picked up on article 13, paragraph (2), item (b) in Japan-France tax treaty in their book[27]. Though that book is a preceding study for this article, it is different on the way of treatment of article 13, paragraph (2), item (b) in Japan-France tax treaty. The former mainly introduces functions of article 13, paragraph (2), item (b) in Japan-France tax treaty, as the former is regarded as one of the best fundamental text for international taxation in Japan. On the other hand, the latter (i.e. this article) solely utilizes article 13, paragraph (2), item (b) in Japan-France tax treaty as one of research materials.

Secondary, regarding positioning of this article with the respect to the whole research except for Japan, a preceding study is Professor Domingo's scholarly work. This work focused on problems for corporate reorganizations in tax treaties, and proposed reorganization clauses that could be implemented in treaty models.

Naturally, however, such work describes nothing about a future direction of Japanese tax treaty policy, though above-mentioned three tax treaties in Japan are listed up at the

27) *See* Yoshihiro Masui and Yuko Miyazaki, *supra* note 6, 278-280.

appendix[28] and are also described at some footnotes in this work. Therefore, this article examines a future direction of Japanese tax treaty policy in the light of such survey by Professor Domingo's scholarly work.

III. Introduction of Professor Domingo's scholarly work

1. Object and method

The objectives of Professor Domingo's scholarly work are, firstly, to analyse the consequences of corporate reorganizations in the context of tax treaty; secondly, to analyse the existing reorganization clauses in the tax treaty network and, thirdly, to eventually propose reorganizations clauses that could be implemented in treaty models[29].

As Professor Domingo's scholarly work constitutes comprehensive analysis of the tax implications of mergers and reorganizations in the context of tax treaties, details omitted because of the limited number of pages. This article, therefore, mainly introduces above-mentioned analyses of existing reorganization clauses in the tax treaty network (i.e. the second object).

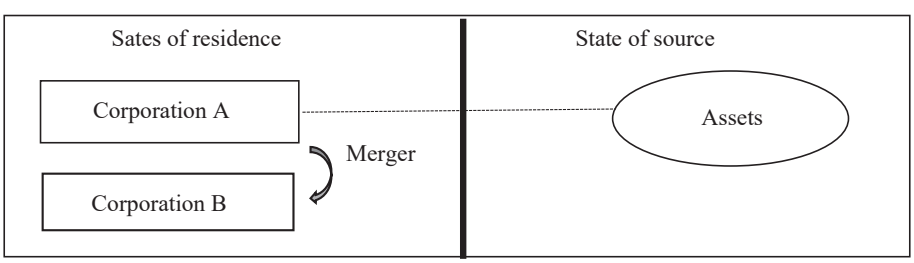

Figure 2 Foreign-to-foreign merger

Then, Professor Domingo's scholarly work is primarily targeted at foreign-to-foreign transactions because experience in the context of bilateral tax treaties is mostly limited to foreign-to-foreign structures, as strict cross-border structures would also involve the taxation of the proceeds derived by residents in a purely domestic situation, an aspect which is not regulated under most tax treaties[30].

Figure 2[31] shows a typical example of foreign-to-foreign transactions. Though these transactions are to be considered to be purely domestic reorganizations from subjective perspective, these transactions can also have some cross-border effects where the transferring

28) Professor Domingo's scholarly work, *supra* note 7, 401-402.
29) Professor Domingo's scholarly work, *supra* note 7, 383.
30) Professor Domingo's scholarly work, *supra* note 7, 387.
31) Figure 2 is made by the author, referring to Professor Domingo's scholarly work, *supra* note 7, 110, Table 12 (Foreign-to-foreign merger).

company also has investments that can be taxed by a state other that of the residence of the participating companies, which might eventually give rise to problems of double taxation and cases where neutrality will be absent[32].

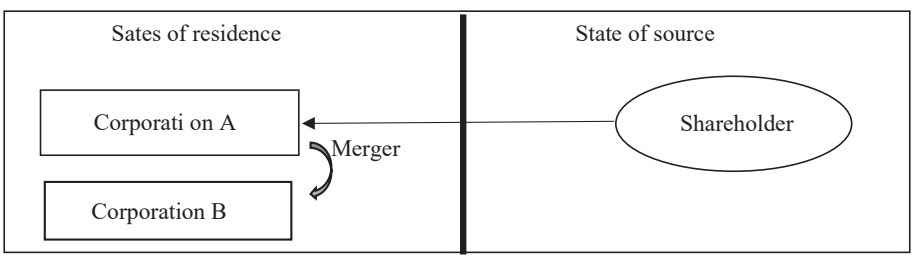

Figure 3　Foreign-to-foreign merger − Non-resident shareholder perspective

Figure 3[33] shows another example of foreign-to-foreign transactions. In the course of the merger, the shareholder will exchange its shares in a non-resident company for shares in another non-resident company[34]. Professor Domingo points out the two problems as follows: (1) Even within the context of the OECD Model, there is some room for these situations to face certain cross-border tax obstacles; (2) In the framework of other model tax treaties, the situation might give rise to more problems due to the allocation of taxing rights on gains and income derived from shares[35].

2. Full picture of existing reorganization clauses in tax treaties

Table 4 is same as Table 15 (List of classifications of reorganization clauses), which is showed in Professor Domingo's scholarly work[36]. It seems that Table 4 shows full picture of existing reorganization clauses in tax treaties as one of findings of Professor Domingo's scholarly work.

32) Professor Domingo's scholarly work, *supra* note 7, 110.
33) Figure 3 is made by the author, referring to Professor Domingo's scholarly work, *supra* note 7, 111, Table 13 (Foreign-to-foreign merger−Non-resident shareholder perspective).
34) Professor Domingo's scholarly work, *supra* note 7, 111.
35) *Id*.
36) Professor Domingo's scholarly work, *supra* note 7, 219-220, Table 15 (List of classifications of reorganization clauses).

Table 4 List of classification of reorganization clauses

Category	Subcategories
Reorganization clauses depending on their object	Reorganization clauses regarding registration duties
	Reorganization clauses regarding the alienation of shares in immovable property companies' participations
	Reorganization clauses regarding the alienation of shares in resident companies
	Comprehensive reorganization clauses
Reorganization clauses depending on the procedure for their application	Procedural clauses
	Self-executing clauses
Reorganization clauses regarding on the distributive/material nature of their content	Reorganization clauses applicable at corporate level
	Reorganization clauses applicable at shareholder level
	Reorganization clauses applicable at both corporate and shareholder levels
Reorganization clauses regarding the method to define transactions to which they apply	Reorganization clauses containing an autonomous definition of the transactions to which they apply
	Reorganization clauses that expressly refer to the law of the state of residence of the participant companies
	Reorganization clauses that do not include either a definition or a renvoi to the law of any of the contracting states
Reorganization clauses regarding the international/domestic subjective scope of the relief envisaged	Reorganization clauses that are exclusively applicable to foreign-to-foreign (domestic) reorganization
	Reorganization clauses whose scope might provide grounds for their application to cross-border transactions
Reorganization clauses limited to intra-group transactions	intra-group reorganization clauses
	Non-intra-group reorganization clauses
Reorganization clauses whose relief depends on the tax treatment of the transaction in the state of residence of the transferor	Reorganization clauses that explicitly subject the relief envisaged to the application of preferential tax treatment to the transaction in the state of residence of the alienator
	Reorganization clauses that do not subject the relief envisaged to the application of preferential tax treatment to the transaction in the state of residence of the alienator
Reorganization clauses which do or not include specific anti-abuse measures	Reorganization clauses that include specific mechanisms to combat abuse or evasion
	Reorganization clauses that do not include anti-abuse rules

However, it should be noted that a reorganization clause in the tax treaty may have more than two categories, as Table 4 can be classified in several ways depending on the aspect on which the classification focuses[37].

37) Professor Domingo's scholarly work, *supra* note 7, 218.

3. Reference to three tax treaties in Japan

According to Professor Domingo's scholarly work, it seems that such reorganization clauses in Japanese tax treaties with France, United Kingdom, and Australia have six following categories of eight categories in Table 4, though such work is not always described about three tax treaties together.

(1) Reorganization clauses depending on their object (the first category and the third subcategory in Table 4)[38].

(2) Reorganization clauses depending on the procedure for their application (the second category and the first subcategory[39] in Table 4)[40].

(3) Reorganization clauses regarding on the distributive/material[41] nature of their content (distributive clauses[42] in the third category and the third subcategory in Table 4)[43].

(4) Reorganization clauses regarding the method to define transactions to which they apply (the fourth category and the second subcategory in Table 4)[44].

(5) Reorganization clauses whose relief depends on the tax treatment of the transaction in the state of residence of the transferor (the seventh category and the first subcategory in Table 4)[45].

(6) Reorganization clauses which do or not include specific anti-abuse measures (the

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38) *See* Professor Domingo's scholarly work, *supra* note 7, footnote 819. Such three Japanese tax treaties are described together.

39) Procedural clauses mean clauses, which require a specific procedure for their application. Professor Domingo's scholarly work, *supra* note 7, 225.

40) *See* Professor Domingo's scholarly work, *supra* note 7, 226. Only Japan-France tax treaty is described as follows:

'Finally, other treaties, e.g. those signed by France with Austria, Israel, Japan, Spain and Sweden, which include exceptions to the application of the substantial participation clause, can only be regarded as self-executing since although implicitly requiring a specific procedure before the tax administration of the state of source, the only requirement for their application is that the competent authority verifies the concurrence of certain circumstances.'

41) Material clauses mean clauses, which do not distribute the taxing rights among the contracting states regarding the income or gains derived in the course of a reorganization, but rather envisage material rules on how income or gains will be taxed by the contracting states. Professor Domingo's scholarly work, *supra* note 7, 231.

42) Distributive clauses mean clauses, which distribute the taxing rights on certain items of income or gains between the contracting states in the case of a merger or similar transaction. Professor Domingo's scholarly work, *supra* note 7, 228.

43) *See* Professor Domingo's scholarly work, *supra* note 7, footnote 837, 2013. Such three Japanese tax treaties are described together.

44) *See* Professor Domingo's scholarly work, *supra* note 7, footnote 856. Only Japan-France tax treaty is described.

45) *See* Professor Domingo's scholarly work, *supra* note 7, footnote 893. Such three Japanese tax treaties are described together. However, it seems that 'Japan-United States (2006)' is mistakenly written 'Japan-United Kingdom (2006)'.

eighth category and the first subcategory in Table 4)[46].

4. Professor Domingo's opinions in relation to existing reorganization clauses

For existing reorganization clauses, Professor Domingo describes as follows:

'…although some reorganization clauses are justified on the foundation of the elimination of double taxation, it can hardly be argued that the underlying aim of these clauses is to eliminate (normally) economic double taxation arising in the course of these transactions but rather to ensure that the tax-neutral is not jeopardized by the state of source levying its taxes at the time the transaction takes place. In this regard, it is difficult to consider these clauses as being among the primary objectives of tax treaties except for, eventually, their inclusion within the scope of the non-discrimination principle. In the author's view, they can only be considered in the framework of the secondary objectives of tax treaties for the enhancement of legal certainty and the promotion of flows of investment between the contracting states as they can support capital export neutrality.[47]'

From above-mentioned Professor Domingo' opinion, it is understood that reorganization clauses have a relation with the non-discrimination principle. For example, 2012 Japan-New Zealand tax treaty〔subparagraph 15(f) of the Protocol with the non-discrimination clauses〕is described as follows:

'A similar provision is included in the 2012 tax treaty between New Zealand and Japan…in order to exclude the application of the non-discrimination clause to the preferential tax regime for amalgamations envisaged in New Zealand's domestic legislation so long as its application does not derive in a different tax treatment of residents in Japan compared to residents of third states.[48]'

Then, Professor Domingo describes as follows:

'Concerning the particularities of reorganization clauses found in bilateral tax treaties, it should be noted that most of them include only a partial relief specially aimed at certain particular gains or taxation. The most interesting clauses are those which extend relief to all gains or income derived from these transactions, i.e. the comprehensive reorganization clauses. The main advantage of these clauses is that they are applied to any income or gains, therefore, applying to cases where the paramount preconditions for giving relief in this context can be met, i.e. both the possible subsequent collection of deferred taxes together with a business justification for the relief from

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46) *See* Professor Domingo's scholarly work, *supra* note 7, footnote 907. Only Japan-France tax treaty is described as follows:

'which states that "this provision shall not apply if the operation is carried out primarily to obtain the benefits of this provision".'

47) Professor Domingo's scholarly work, *supra* note 7, 387.

48) *Id*.

the state of source perspective.[49]**'**

In addition, Professor Domingo describes as follows:

'…clauses based on the approach followed by Canada and United States can be considered as examples of best practices and coordination between states. The approach followed in these clauses subjects tax deferral in the state of source to taxpayer going through a specific MAP and reaching an agreement with the competent authority.[50]**'**

'…reorganization clauses should provide a degree of flexibility in order to facilitate elimination of double taxation on a case-by-case basis and foster neutral tax treatment of these transactions in a cross-border context. Recourse to the competent authority seems reasonable in this context provided that the competent authorities a positive approach and a sufficient degree of sophistication needed to deal with these transactions.[51]**'**

From above-mentioned Professor Domingo' opinion for reorganization clauses, it is understood that Professor Domingo puts emphasis on (article 13, paragraph 8 of 1980) Canada-United States tax treaty, as such article has enough flexibility to solve the issues arising from reorganizations at the international level[52].

It is further understood that Professor Domingo puts emphasis on recourse to the competent authority[53].

IV. Result and Discussion

1. Result

From this study, it follows that Japanese tax treaty policy for reorganization clauses has two issues: (1) Positioning reorganization clauses as extremely rare clauses; (2) Lack of consideration of various reorganization clauses in tax treaties.

There seems to be two reasons behind such issues. One reason is immature of arguments for corporate reorganizations as Japanese tax treaty policy, confirmed from the fact that there are few preceding studies for this field in Japan. Another reason is insufficient recognition of existence itself for various reorganization clauses, confirmed from the fact that current reorganization clauses concerning substantial participations clauses in Japan are lumped as the so-called 'Jigyo Joto Ruiji Kazei'in Japanese. However, as mentioned above, such reorganization clauses in Japanese tax treaties with France, United Kingdom, and Australia

49) Professor Domingo's scholarly work, *supra* note 7, footnote 705.

50) Professor Domingo's scholarly work, *supra* note 7, 390.

51) Professor Domingo's scholarly work, *supra* note 7, 394-395.

52) *See* Professor Domingo's scholarly work, *supra* note 7, 394.

53) *See* Professor Domingo's scholarly work, *supra* note 7, 395. Professor Domingo describes as follows:

'A possibility would be the inclusion of a clause such as that of the Canada-United States tax treaty in the context of article 25 of the OECD Model, providing for a specific competent authority procedure in these cases.'

have six categories of eight categories in Table 4. Existence itself of these categories seem not to be sufficiently recognized in Japan.

Then, solution tips against such issues can be found in Professor Domingo's scholarly work. For the first issue, solution tips seem to be in the field of non-discrimination doctrine and capital export neutrality, as there is a possibility that the estimation called 'extremely rare clauses' can be changed to 'normal clauses'. For the second issue, solution tips seem to be in the field of comprehensive reorganization clauses and recourse to the competent authority, as they are one of findings in Professor Domingo's scholarly work.

Table 5 Summaries of results

	Issue	Solution tips
1	Positioning reorganization clauses as extremely rare clauses	Non-discrimination doctrine
		Capital export neutrality
2	Lack of consideration of various reorganization clauses in tax treaties	Comprehensive reorganization clauses
		Recourse to the competent authority

Table 5 shows summaries of above-mentioned results, comparing two issues with solution tips for such issues.

2. Discussion

(A) Finding 1－Need of good consideration to two issues in reference to Professor Domingo's scholarly work

As Table 5 shows, Professor Domingo's scholarly work gives solution tips for two issues. Therefore, it seems to be better for Japan to consider to two issue in relation to such solution tips.

Firstly, for the non-discrimination doctrine, 2012 Japan-New Zealand tax treaty〔subparagraph 15(f) of the Protocol with the non-discrimination clauses〕is described in Professor Domingo's scholarly work. This tax treaty seems to be useful as a solution tip for the first issue.

Secondary, for the capital export neutrality, it also seems to apply to Japan, as Japan is now in an overwhelming position as the state of capital export, though Japanese measures against international double taxation are composed of credit method[54] and exemption method[55].

Thirdly, for comprehensive reorganization clauses, Professor Domingo puts emphasis on (article 13, paragraph 8 of 1980) Canada-United States tax treaty, which is one of tax treaties with comprehensive reorganization clauses. Such comprehensive reorganization

54) Article 69 of the *Corporation Tax Act.*
55) Article 23-2 of the *Corporation Tax Act.*

clauses need more consideration in Japan, as it seems to be useful as a solution tip for second issue.

Fourthly, for recourse to the competent authority, Professor Domingo puts emphasis, as he insists as follows:

'…reorganization clauses should provide a degree of flexibility in order to facilitate elimination of double taxation on a case-by-case basis and foster neutral tax treatment of these transactions in a cross-border context.[56]**'**

Such recourse to the competent authority needs more consideration in Japan, as it seems to be useful as a solution tip for the second issue.

To summarize above, the first finding of this article is need of good consideration to two issues in reference to Professor Domingo's scholarly work.

(B) Finding 2－Need of additional consideration to two issues from a viewpoints of Japanese tax treaty policy

The second finding of this article is need of additional consideration to two issues from a viewpoints of Japanese tax treaty policy, as it is essential to consider situations peculiar to Japan as a future direction of Japanese tax treaty policy.

For example, firstly, for the non-discrimination doctrine, tax treaties other than 2012 Japan-New Zealand tax treaty〔subparagraph 15(f) of the Protocol with the non-discrimination clauses〕should be also analysed, such as Japan-United states tax treaty, which is said to indicate a direction of Japanese tax treaty policy[57].

Secondary, for the capital export neutrality, there are few arguments[58] about global tax neutrality for cross-border corporate reorganizations in Japan, as the general view of the Japanese *Companies Act* states that direct reorganizations between domestic corporations and foreign corporations is not possible[59]. However, global tax neutrality seems to need more consideration in Japan to consider a future direction of Japanese tax treaty policy.

Thirdly, for comprehensive reorganization clauses, their discussion must pay attention to differences between of Canada-United States tax treaty and Japanese tax treaty, as their discussion requires preconditions.

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56) Professor Domingo's scholarly work, *supra* note 7, 394.

57) Tadatune Mizuno (eds), *supra* note 5, 35 (Masatugu Asakawa).

58) *See* Shigetaka Nakamura," *The Study for the Tax System of Cross-border Corporate Reorganizations－Focusing on the EU Merger Tax Directive for Considering the Future Direction in Japan－*", JOURNAL of ACCOUNTANCY, ECONOMICS and LAW, No. 14, 14, 2020. The present author conducted research, assuming that there were no restriction under the current Japanese *Companies Act*.

59) *See* Takayasu Okushima, Seiichi Ochiai and Michiyo Hamada (eds), *Shin Kihon Ho Konmentaru Kaisha Ho 3* [*New basic law Commentary Companies Act 3*] (2th edition), 239 Hougaku Seminar Bessatsu, 344 (Junko Ueda), 2015. Professor Junko Ueda describes as follows: Regarding the possibility of mergers or stock exchanges between foreign corporations and domestic corporations, we may consider analogy by reciprocal interpretation or review for provisions of the Japanese *Companies Act* when the subordinate law of such foreign corporations recognizes such corporate reorganizations with foreign corporations.

Fourthly, for recourse to the competent authority, tax privacy[60] seems to need more consideration in Japan, as interaction between expansion of the scope of discretion by the competent authority and developments of exchange of information system under the digital economy will bring problems of tax privacy for tax information provided[61].

Table 6 Summaries of discussions

	Issue	Solution tips	Additional consideration
1	Positioning reorganization clauses as extremely rare clauses	Non-discrimination doctrine	Non-discrimination doctrine on tax treaties in Japan
		Capital export neutrality	Global tax neutrality
2	Lack of consideration of various reorganization clauses in tax treaties	Comprehensive reorganization clauses	Differences between of Canada-United States tax treaty and Japanese tax treaty as preconditions for discussions
		Recourse to the competent authority	Problems of tax privacy for tax information provided under the digital economy

Table 6 shows summaries of above-mentioned discussions, adding additional consideration to Table 5.

V. Conclusions

This article clarifies current issues of Japanese tax treaty policy for corporate reorganizations and considers a future direction of its policy, mainly based on Professor Domingo's scholarly work.

From this study, it followed that Japanese tax treaty policy for reorganization clauses has two issues: (1) Positioning reorganization clauses as extremely rare clauses; (2) Lack of consideration of various reorganization clauses in tax treaties.

In conclusion, this study shows two following findings: (1) Need of good consideration to two issues with reference to the above-mentioned work; (2) Need of additional consideration to two issues from a viewpoints of Japanese tax treaty policy.

In my opinion, it is worth noting that this article will be expected to bring not only the trigger of arguments for reorganization clauses in Japanese tax treaties as academic significance, but also the prospective strength of the flows of trade and investment between Japan and the contracting state as social significance.

60) For the concept of tax privacy, *see* Adam B. Thimmesch, TAX PRIVACY?, TEMPLE LAW REVIEW, Vol. 90, No. 3, 375-426, 2018.

61) Recently, a feature article on privacy rights and taxation was published in Japan. *See* Zeiken, Vol. 36, No. 6, 29-61, 2021.