

# TRENDS AND SOURCES OF INTERNATIONAL TAXATION

## TENDENCIAS Y FUENTES DE LA FISCALIDAD INTERNACIONAL

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**Abstract:** International Tax Law has grown significantly and this has caused a considerable increase in the importance of the legislative production affecting it, through both national and international rules. Within those rules of international origin, conventions intended to avoid international double taxation stand out, essentially those following the OECD model. Along with this and also within European Union law, there has been a significant structuring of the rules involving international taxation. That said, we can never lose sight -upon the basis of the dogmatic structuring of international taxation- of the General International Law rules affecting it. These may occasionally be overshadowed by the rules of the countless international conventions on the matter, but the former rules cannot cease to be taken as the basis. Therefore, the globalized structuring of international taxation cannot ignore the general principles upon which it will be based, either as direct sources in matters of international tax law, or as a sub-discipline within tax law proper. Indeed, the national structuring of international tax law cannot be carried out just by taking into consideration the legislative results of globalization, but also by never losing sight of the principles that lead to general international law tax matters. Even though globalization as a process begins to play a greater role in tax law issues, the country's national examination of international tax law cannot divert from the general basis of this tax law sub-discipline.

**Keywords:** international taxation, Financial and Tax Law, International Tax Law, General International Law, sources of Law.

**Resumen:** La fiscalidad internacional ha experimentado un gran crecimiento, aumentando considerablemente el volumen de producción normativa que le afecta, ya se trate de normas de origen internacional o de normas de origen interno. Dentro de las fuentes de origen internacional que le afectan, destacan especialmente los convenios para evitar la doble imposición internacional, esencialmente siguiendo el Modelo de la OCDE. Junto a ello, también dentro de la disciplina jurídica de la Unión Europea se ha producido un importante desarrollo de las normas que afectan a la fiscalidad internacional. Ahora bien, en la base de la construcción dogmática de la fiscalidad internacional no se deben perder de vista las normas de Derecho Internacional General que le afectan, ensombrecidas a veces por las normas de los numerosos convenios internacionales en la materia, pero que éstos no pueden dejar de tomar como base. Así pues, el desarrollo globalizado de la fiscalidad internacional no puede desconocer los principios generales que le deben servir de base, ya sea como fuentes directas en materia de fiscalidad internacional, ya sea como bases esenciales sobre las que conformar la fiscalidad internacional, como subdisciplina dentro de la disciplina tributaria. Incluso el desarrollo a nivel interno de la fiscalidad internacional no se puede hacer sólo tomando en consideración los resultados normativos del fenómeno de la globalización, sino que debe hacerse también sin perder nunca de vista los principios que derivan en materia tributaria del Derecho Internacional General. Aunque el fenómeno globalizador cobre un espe-

cial protagonismo en materia tributaria, la contemplación interna de la fiscalidad internacional no puede alejarse de las bases generales de esta subdisciplina tributaria.

**Palabras clave:** fiscalidad internacional, Derecho financiero y tributario, Derecho internacional tributario, Derecho internacional general, fuentes del derecho.

**Summary:** I.Introduction. II. International Financial and Tax Law. III. Organized Growth in Tax and Financial Matters from an International Perspective. IV. General Guiding Principles and Branches of International Tax Law. V. The Structuring of International Tax Law. VI. Different Origins of International Tax Law Rules. VII. The Consideration of the Idea of Sovereignty as the Essential Element of the State and its Impact on International Tax Law. VIII. The Territorial Dimension of Tax Sovereignty. IX. Essential Elements of International Tax Law. X. Conclusion.

## I. Introduction

1. When the conventions to avoid international double taxation were not as numerous as they are nowadays, the international tax doctrine had to pay more attention to the General International Law rules which had an impact on this matter, be they either general rules of International Law that could be applied to taxation, or be they the few laws specifically related to taxes.

2. When the structuring of International Tax Law gave rise to an enormous growth in the international conventions made to avoid double taxation, the doctrine, within International Tax Law, focused essentially on the analysis of this phenomenon<sup>1</sup>, especially on its structuring following the consecutive versions and modifications of the OECD Model, in order to avoid double taxation on income and estate and in order to prevent tax evasion<sup>2</sup>. Almost every international convention that exists, aiming to avoid double taxation, is based on- and has been based on- the subsequent versions of the said Model of convention. With time, the international focus on double taxation has been accompanied by an increased focus on international cooperation in taxation -essentially in matters of international exchange of information with tax significance or in matters of cooperation regarding tax debts, of which other States are beneficiaries. Within the structuring of international tax law, the structuring of the European Union Law has been of great significance, given the different fields in which the Community institutions have competence, also resulting, inside this field, in rich, tax law literature<sup>3</sup>.

3. It is logical therefore that with the reasonable structuring of the conventions made to avoid international double taxation and the structuring of the rules of European Union law, one cannot forget that in the structuring of international tax law it is necessary to take into account the general rules of International Law, which served as a base for the beginning of its structuring, as they can never cease to be the basis of its evolution. This paper focuses on the individualization of the essential elements which must always be featured in the structuring policy of international tax law.

<sup>1</sup> In this sense, see, inter alia, F.SAINZ DE BUJANDA, : «La interpretación de los Tratados internacionales para evitar la doble imposición», in *Memoria de la Asociación Española de Derecho Financiero*, 1960, page 92; FISZER, J.: «International double taxation relief», in *European Taxation*, 3, 1995, page 78; BANTECAS, I.: «The mutual agreement procedure and arbitration of double taxation disputes», in *ACDI – Anuario Colombiano de Derecho Internacional*, Vol. 1., 2008, page 182; KAHLBERG, C.: «Prevention of double non-taxation: an analysis of cross-border financing from a german perspective», in *Intertax*, 3, 2015, page 218.

<sup>2</sup> In this regard, see S.BRUNS, : «International Taxation and non-discrimination: clarification and reconsideration by the OECD», in *European Taxation*, Vol. 48, 9, 2008, page 484; J. ZORNOZA PÉREZ/ A.BÁEZ MORENO, «The 2003 revisions to the commentary to the OECD Model on tax treaties and GAARs: a mistaken starting point», in *Cuadernos de Derecho Transnacional*, Vol. 2, 1, 2010, page 288.

<sup>3</sup> In this field, see M.LANG, : «Double Taxation Conventions in the Case Law of the CJEU», in *Intertax*, Vol. 46, 3, 2018, page 181.

## II. International Financial and Tax Law

4. International Tax Law covers an extraordinarily large field<sup>4</sup>, covering a great range of aspects, some of which can be used with either more technical concepts or in practice, with more widespread designations. Some of the latter are used in a broader sense, whilst others are used in a rather stricter sense.

5. Once the general principles of International Law have been conferred upon Tax Law, its reality becomes one of the most complex. Bearing in mind the social, international and juridical reality of international tax law, it is fairly difficult to explain the discipline that reality is based upon. The arrangement of international tax law as a “sub-discipline” within Tax Law, throughout the last decades, seems to have been carried out either as a particular rule or as a specific issue.

6. With time, the concern for a “global” perspective of every International Tax Law issue has vanished. Beyond the OECD Model of international convention to avoid double taxation on income and estate and prevent tax evasion –and the almost forgotten other OECD Model of international convention, aimed at avoiding double taxation on heritage and endowment–, and apart from the jurisprudence of the Court of Justice of the European Union regarding tax issues, fundamental issues on tax harmonization and, thus, the main community directives on taxation, together with some other international texts, occasionally from the OECD –for example on the fight against fraud or other matters concerning the European Union– on many issues, there is no concern to define a global and harmonized structuring of the major principles of international tax law and of the dogmatic structuring of International Tax Law.

7. When the European Communities, later the European Union, did not yet exist, when there were not yet as many international conventions on taxation, essentially in the first half of the last century, the doctrine of taxation and that of foreign policy tried to find other means to act and frame international law, which only consisted in investigating whether there were general principles, general rules or a customary international law suitable for International Tax Law. The doctrine tried to find a General International Law on taxation.

8. It is true that the modern nature of a State’s tax system in terms of international tax law is seen by the amount of international tax conventions signed by that State, but this should not prevent them from investigating whether there are or whether there are not general principles of international tax law which are applicable to the States in terms of taxation, to be used as working rules of the International Community or Society, beyond simply their consent.

9. There are certain States where international conventions have not worked out, precisely because they do not sign such conventions. They are essentially tax havens<sup>5</sup> that to a large extent –it could be said– live off being so, and off being fiscally isolated, never signing tax conventions, being fiscally opaque and concealing tax evasion, at the cost of many other sovereign States.

10. Let us say that in this sense, after many years, the OECD, the European Union and even the intervention of the USA, have somewhat failed and tax havens exist at the expense of other States.

11. Sometimes, such tax havens are areas which are subject to the sovereignty of another developed State, with which the evolution of the issues related to them can be much more hopeful, by means of putting pressure on that State.

12. The problem might be mostly related to those areas with their own sovereignty as States, which are tax havens, as long as they are not subject to or in need of a strong bond with other States that could put pressure on them in that sense. This would help stop their behaviour as tax havens.

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<sup>4</sup> See F.SERRANO ANTÓN, *et al.*: *Fiscalidad internacional*, 6ª ed., CEF, Madrid, 2015, Vol. 1-2.

<sup>5</sup> Normally small-scale States.

13. But precisely in relation to such “small” tax havens that have to defend their identity as sovereign States, as the OECD and the European Union have somehow failed in their purpose, maybe now is the opportunity or time for action of the United Nations to come into play. It is the most comprehensive international organization which could be presented precisely as the major guarantor to their identity as Independent States.

14. With this, the delimitation and the precise framing of the general principles of International Tax Law are more than ever needed.

### **III. Organized Growth in Tax and Financial Matters from an International Perspective**

15. The construction of the international tax law legislation must have some general and clear legislative parameters to serve as a base, given the dimension required by the rising importance of international tax law.

16. Only clear, complete and exhaustive parameters coming from a general perspective of international finance and tax law could lead to an organized growth of the international discipline of Financial Law, in such a way that all possible extremes of reference are covered, doing away with possible areas under neglect, which the doctrine has forgotten about many times -simply because they were not the most practical and usual matters.

17. Within the international contemplation of Financial Law, a fiscal and non-fiscal perspective can be distinguished. Let us think, for example, of the budget discipline of international organizations, especially of the European Union. Obviously, just like on a national scale, on an international scale the demand for tax investigations is much greater than those concerning non-tax laws. For example, one could think far beyond the budget of the European Union, of matters such as the community’s own non-tax resources, or of the control carried out by the European Court of Auditors.

18. Therefore, not only a general, dogmatic structuring of the international perspective of Tax Law is necessary, but also of Financial Law, including the non-tax branches of it. But the first step in this ambitious goal is a general, dogmatic structuring of International Tax law.

### **IV. General Guiding Principles and Branches of International Tax Law**

19. The most frequent type of normative texts within International Tax Law is undoubtedly represented by the bilateral agreements which aim at avoiding both international double taxation on income and heritage and tax evasion. These texts are carried out in accordance with the OECD Model. This type of agreement has become preminent in international fiscal relations between any kind of State, leading to the development of a large network of bilateral agreements which provide legal security in terms of taxation regarding international and economic relations and investments.

20. Despite the fact that other international organizations -especially the United Nations- have created other types of bilateral agreements in order to avoid double taxation, especially taking into consideration the relations between developed and developing countries, these alternative models have not proved to be successful enough. In the long run, developed and developing countries also end up signing bilateral agreements intended to avoid international double taxation following the OECD Model. This Model, however, is meant for agreements between two States with reciprocal investments; yet, these agreements are also signed in situations where only one of the two States is exporting capital to the other, which causes an imbalance. This situation can only be explained bearing in mind the effects of globalization.

21. Because of this, we must focus on the other two great International Tax Law branches, namely, European Union legislation regarding tax law and, especially, General International Law regarding the aforementioned area. The latter should be reinforced to protect the interests of those States less favored in the negotiations of international bilateral agreements.

22. General International Law could be said to consist of general principles and international customs. Obviously, its scope is much shorter than that of other International Tax Law branches. But we should consider to what extent the development of globalization could make some international rules regarding tax relations change into rules of International Tax Law, beyond the States' express consent. Hence comes the need to redefine General International Law in terms of tax law.

## V. The Articulation of International Tax Law

23. The examination of the influence of International Law in the field of tax law is usually carried out from two different standpoints. On the one hand, there is the perspective of Conventional International Law, that is, the one related to the international conventions regarding this field. On the other hand, there is the European Law –or the current European Union Law- where, together with the Primary Law, we find the Secondary Law. The first of these two, Primary Law, consists of Treaties, therefore, at its core, it could be included in the Conventional International (Treaty) Law. These agreements among the member States of the European Union have a content of competence attribution to the former, which puts such treaties on a much higher level than the usual (Model) tax conventions. Furthermore, Secondary Law consists of the normative acts of the EU institutions. European law, after the Treaty of Lisbon, should be more strictly called European Union Law, but the term European Law has been so firmly established in the legal tradition that it has become quite difficult to avoid it in practice.

24. Conventional International Law in the field of taxation is essentially formed by agreements to avoid international double taxation, which are almost completely bilateral. In any case, tax provisions can be found in other types of international conventions, even if they are not primarily devoted to taxation.

25. In the field of European Law, there are different fields related to tax issues. On the one hand, there is the field of community tax harmonization, which tries to bring over the tax legislations of the different EU States in different fields. On the other hand, there are the community resources of a fiscal nature, as a means of EU funding. Finally, there is the contribution to taxation by the member States enforced by the EU institutions. This third field of European Law influence, that is, these duties of cooperation amongst tax Administrations can sometimes affect the community's own taxes and, in some cases, the harmonized state taxes. This means that, in many cases, this role of administrative cooperation could be included within one of the two fields previously mentioned, that is, in that of the fiscal-related own resources or in that concerning tax harmonization. But this EU Legislation, which consists on forcing the member States to collaborate with each other in order to secure taxation can sometimes affect taxes which are neither its own resources, nor are they harmonized taxes regarding Community directives. In accordance with this, we may be dealing with a third field which is different from the others, unless we understand that what is being conducted is tax harmonization at a formal level; in other words, not in terms of material or substantive elements of taxation, but at its effective or formal enforcement level.

26. It follows from its practical importance that the focus of taxation in relation to International Law has focused on the two fields already mentioned: on the one hand, on international agreements in order to avoid double taxation and, on the other hand, on the incidence of EU fiscal Law. However, within the framework of the sources of International Law, we must not lose sight of international custom and the General Principles of Law, both of which shape what could be called the General International Law regarding the rules enforceable on any State, and regardless of their granting (or not granting) direct consent to the former, as rules developed alongside the shaping of the International Community.

27. Obviously, in such a field as taxation, so closely linked to each State's economic policy, the impact of the General International Law is much smaller than that of the Conventional International Law and EU Law. This does not suggest that less attention should be paid to the impact (limited as it is in terms of reach, although not in its relevance) that General International Law may have over the tax sphere.

28. This should be attempted from two different approaches. One would be to find out, even if it is hard to define, whether there is any General International Law rule which affects the area of taxation specifically. Another would be to analyze the way in which some General International Law ideas and principles (albeit not specifically tax-related) could affect the mechanics of taxation, considering the interests of the different States.

29. In any case all the above does not respond to isolated or stovepiped approaches; quite on the contrary, the interrelation between the different groups or types of rules is as permeable and interdependent as in the rest of the fields in the legal System. Let us focus, for example, on the different types of rules that can be distinguished within the EU Law in the scope of taxation, and let us try to implement them in relation to the tax system of the civil servants and other agents of the European Union. In the 12<sup>th</sup> article of the Protocol on Privileges and Immunities of the European Union, 8<sup>th</sup> April, 1965 –modified by the Treaty of Lisbon- the exemption of the income earned by those as a consequence of working for the community institutions is established, just as the need to hold such income to a tax on the wages, salaries and emoluments of the civil servants and other agents of the European Union, which eventually benefits from these. These are simply raised through a withholding of work outputs which depends on the total amount earned by the civil servant and the number of children depending on them. On one side, the aforementioned exemption avoids double taxation that, should this tax benefit not exist, would take place through State taxes and community taxes. The rule that establishes this exemption from State taxes, even though it is a part of European Law, lies closer to the community tax harmonization rules. These ones, however, are usually Secondary Law rules, that is, they stem from the community institutions. On the other hand, the rule that establishes the aforesaid community taxes could be better understood within the set of rules established to account for the community's own resources. This is not an essential element in the EU funding, as its existence is based on other reasons and it is not taken into consideration in the Decisions made upon the community's own resources system. This way, it would be an example of a subject where the previously individualized sets of rules are interrelated.

## VI. Different Origins of International Tax Law Rules

30. According to FEDOZZI, experience proves that the division of International Law according to the same categories already employed for National Law has proved very useful in terms of methodological clarification and scientific advancement. This has been presented by this author as the legitimation of the division he suggests within International Law, which includes International Tax Law amongst its branches.<sup>6</sup>

31. Stemming from the non-existence of fiscal relations as such among States, understood in a strict sense –ie, subjects of International Law exercising their international entity- and also judging from the lack of a true fiscal nature in the States' financial contributions to the international organizations, UDINA came to the conclusion that there was no real “international tax law” proper.

32. However, this author admitted that he could not renounce such denomination and thus, according to him, the concept of International Tax Law could be understood in a broader sense as comprehensive of the international Framework rules. These affect, in one way or another, the wielding of the States' Taxing Power, viewing fiscal relations as developed, not among States, but between each State and the natural or legal persons depending on it and, therefore, just as an indirect and mediate object of

<sup>6</sup> *Corso di Diritto Internazionale*, Volume Primo, I, CEDAM, Padova, 1931, pages 37 and 38.

the international rules. This author highlights that “international tax law” is presented as separate from the former, which consists “internal tax rules concerning foreign affairs”<sup>7</sup>.

**33.** But UDINA, regarding the quandaries of international tax rules issues, did not just single out one International Law branch called International Tax Law. This author also suggested the setting up of an “international tax Court” which function would be to hear officially the controversies between the States regarding the international tax rules –which can be heard by the International Court of Justice– suggesting, moreover, in the ideal delimitation of such international tax court, the possibility to appeal from the individuals<sup>8</sup>.

**34.** Later, UDINA claimed that in such cases, regarding the taxes international organizations demand from the civil servants, “there may be said to exist an international tax law proper, which involves absolute taxing authority, based on the international law, amongst international subjects who are respectively in a position of superiority and of dependence”<sup>9</sup>. In this place, the author discussed the relation amongst “international subjects”, but we have to bear in mind that a civil servant from an international organization does not have an international legal personality.

**35.** G. TESAURO shows a more rigorous approach. He states that only if the fiscal nature of the States’ tax contributions could be acknowledged it would become appropriate to refer to the existence of an International Tax Law, not in any other case. This author also denies the fiscal nature of the member States’ financial contributions to the international organizations<sup>10</sup>.

**36.** Furthermore, CROXATTO states that there is an area of the international legal System that holds the traditional name of International Tax Law and which is characterized by the peculiar aspects of the State activity in this field, which is the aim of its rules<sup>11</sup>. He bases this observation on the fact that international rules affect and condition national law in the field of taxation and given the fact that within International Law there are particular sets of conventional rules, each of which can be accurately distinguished based on the specific features of the correspondent area of the national Law subject. This area integrates internal, or national, rules derived from international ones within the proper group.

**37.** On the other hand, SAMPAY discussed International Fiscal Law, including both national and international tax rules within it<sup>12</sup>. The distinction between Fiscal International Law, subjected to international rules, and International Tax Law, subjected to national rules, has been used by tax law doctrine<sup>13</sup>. Thus, Fiscal International Law conditions International Tax Law. In the Spanish legal system, for the rules of an international treaty to become national Law only one administrative activity from the already ratified treaty needs to be published in *BOE* -the Government Gazette of the Government of Spain-. Thus, article 96.1 of the Constitution of Spain states that “Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order.” Once the treaty is part of the Spanish legal system, it becomes normatively above the law, as it is stated in that same article 96.1 so

<sup>7</sup> *Il diritto internazionale tributario*, CEDAM, Padova, 1949, pages 16 to 31.

<sup>8</sup> «Sulla creazione d'una Corte internazionale per le controversie in materia tributaria», in the *Rivista di Diritto Finanziario e Scienza delle Finanze*, Parte I, 1949, pages 54 and ss.

<sup>9</sup> «Il Trattamento Tributario dei Funzionari Internazionali», in *Gegenwartsprobleme des internationalen Rechtes und der Rechtsphilosophie (Festschrift für Rudolf Laun zu seinem siebzigsten Geburtstag)*, Girardet & Co., Hamburg, 1953, page. 284.

<sup>10</sup> *Il finanziamento delle organizzazioni internazionali*, Jovene, Napoli, 1969, page. 8, note 6.

<sup>11</sup> «Le norme di Diritto internazionale tributario», in *Studi in onore di Enrico Allorio*, II, Giuffrè, Milano, 1989, pages 2223 and 2224; and, by the same author, «Diritto internazionale tributario», in *Digesto delle Discipline Privatistiche*, IV, UTET, Torino, 1989, page 642.

<sup>12</sup> *El Derecho Fiscal Internacional*, Editions Biblioteca Laboremus, La Plata-Buenos Aires, 1951, page. 91.

<sup>13</sup> See C.C. CARLI; «Cooperazione internazionale tributaria», in the *Enciclopedia Giuridica Treccani*, pages 1 and 4-5; J.J. FERREIRO LAPATZA: *Curso de Derecho Financiero Español*, 10th edition, Marcial Pons, Madrid, 1988, pages 112 and 113; and F.SAINZ DE BUJANDA: «La interpretación de los Tratados internacionales para evitar la doble imposición », *cit.*, pages 92 and 93. This last author, in another one of his Works, mentions the «International Fiscal Law», including references to the national and international rules and to the international tax rules (*Hacienda y Derecho*, I, Instituto de Estudios Políticos, Madrid, 1975, pages 465 and ss.).

that the legal provisions of the international treaties “may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law.”

**38.** Therefore, if the international treaties’ tax rules become national Law, we should wonder whether it still makes sense to distinguish between Fiscal International Law and International Tax Law. The first “international” qualifier responds to the origin of the rule. Even if the international treaties’ rules become national Law, they still have an international origin, whilst International Tax Law rules have a national origin. Here “international” is explained on account of the nature of the field wherein they are applied. This field consists on the taxation of transnational wealth which stems from the international circulation of goods, capital and subjects.

**39.** But international treaties’ and the European Community’s rules are not the only ones constituting International Law. General International Law, which is built of, as previously stated, customs and General Principles must always be born in mind. The General International Law rules are not part of national Law in the same manner that other international treaties’ rules do, as the former are simply national Law conditioning factors. And although General International Law is not as relevant in terms of taxation as international treaties, there is no denying it has some effect on taxation. Furthermore, its principles are the essential basis of territoriality in a formal sense, or of the spatial effectiveness of this tax.

**40.** Conversely, European Community Law bears great importance in the field of taxation, and it has an unquestionably international origin. The original EU Law stems from international agreements or treaties, whilst secondary EU Law stems from the actions of the EU institutions, which are international bodies, or international organizations’ bodies. But European Community Law also becomes national Law. The sole publication of legislative acts in the Official Journal of the European Union is enough for these to become national Law, and then they need to be directly enforced by the state bodies. Given the primacy of European Community Law over national Law, the former also sets limits to the legislator.

**41.** EU Law is not like the traditional International Law. The latter is only binding for States and international organizations, which appear as the only real holders of the rights and obligations of the traditional international legal System. EU Law arises from international instruments, but then it directly affects EU citizens, generating rights directly linked to these, with no need, originally, for a regulatory state intervention. These are EU citizen’s rights in relation to their State, the other member States and the European Union itself<sup>14</sup>.

**42.** The directives are the fundamental legislative instrument to harmonize national legislations and, obviously, national taxation systems of the member States. Even though directives are normally in need of regulation that allows them to conform to national Law in order to be totally effective, it does not have to be always this way. It could happen that, in the case of a harmonization directive affecting national taxation, a member State might not have created specific conditions for the adjustment of its tax system to the directive and that, nevertheless, this directive may be enforced. The reason may be that it is in agreement with a rule parallel to another one belonging to a primary Law treaty, thus fulfilling the aim pursued by the directive, ie, applying the content corresponding to the Treaty. It may also happen that, given the absence of such national law and without the aforementioned circumstance, the directive might have direct effectiveness. This may happen if it exists a national disposition that enters into conflict with the directive, resulting in the ineffectiveness of that national law contradicting the EU law and as long as the directive is appropriate to take into account rights which taxpayers can plead against the State<sup>15</sup>.

<sup>14</sup> Cfr. E.GARCÍA DE ENTERRÍA, «Las competencias y el funcionamiento del Tribunal de Justicia de las Comunidades Europeas. Estudio analítico de los recursos», in *Tratado de Derecho Comunitario Europeo*, Volume I, Civitas, Madrid, 1986, page 700.

<sup>15</sup> It has been thus seen by the Court of Justice of the European Union, for example in the Sentence made in 1982 on the 19 of January, C-8/81, which has been well advocated on taxation. On the possible direct effectiveness of the directives of tax harmonization, see A.CAYÓN GALIARDO/R. FALCÓN Y TELLA F. DE LA /HUCHA CELADOR,; *La armonización fiscal en la Comunidad Económica Europea y el Sistema tributario español: Incidencia y convergencia*, Instituto de Estudios Fiscales, Madrid, 1990, pages 668 to 672.

**43.** Then, could we consider EU Tax Law as Fiscal International Law, or is it International Tax Law? Because of its international origin we are inclined to think that it is Fiscal International Law.

**44.** Frequently we use the term ‘national Law’ in order to refer to Law of national origin, as opposed to EU Law. In our view it would be better, as argued earlier, to employ the term ‘domestic Law’ when referring to the former. In any case, in usual practice and as stated the expression ‘national Law’ is very often used to refer in an effective way to the national origin of the rules mentioned.

**45.** Moreover, we may note that those international limits to the Power of the State over its territory may in some cases be, eventually, instances of the self-limitation of the Power of the State itself. International treaties are examples of this, as they require the States’ consent. Secondary Community Law is founded on primary Law, which is itself composed of international treaties and agreements. We must link to this the legislative instruments of secondary Law which are submitted to its unanimous approval in the Council. Out of these, the core of the EU tax harmonization must be highlighted. Thus, International Tax Law, for the most part, represents a form of self-limitation of State Power, leaving aside certain instances such as the ones related to the limits proceeding from General International Law.

**46.** Fiscal International Law could be considered a branch within Financial International Law.<sup>16</sup> Similarly, within the state Tax Law is a branch of Financial Law. Within Fiscal International Law, the legal issues derived from the financial contributions from the States to the international organizations could be included. These cannot be inserted within International Tax Law since they are not related to taxation, but in terms of the finance of the international organizations their regulation would be a part of International Financial Law.

**47.** From a different perspective, Tax Law is mostly taken into consideration by the legislation, pursuant with the principle of legality in terms of taxation and legal reservation. In the light of this, it has been asserted the reduced practical effectiveness of General Principles of Law in themselves as source of Tax Law. In other words, as principles which can be inferred from the different regulations without being expressly gathered in law or enshrined in the Constitution. In such cases, they become expressly written law and their worth is not any more related to those principles, but to the status of the legislative text in which they are expressly gathered. Also regarding what is written down, custom is deprived of legal weight within the sources of Tax Law. Then again, in the field of Fiscal International Law a certain relevance of custom and the General Principles of Law as sources of Law can be found<sup>17</sup>. It can be seen as a very limited incidence, as compared to the width, spread and development of other types of sources of International Law. This, obviously, does not justify the neglect of such customs and General Principles of Law.

**48.** Regarding Fiscal International Law, those branches most thoroughly studied are International Treaty Law, that is, that branch made up of international agreements, and EU Law. This seems logical, bearing in mind that these are the two international normative fields with a greatest practical impact, limiting or conditioning the States’ Taxing Power. However, along with these two branches of International Law, General International Law also has an effect on taxation, if only in a more limited way in practice than International Treaty Law and EU Law. This may be the reason why this discipline has not been so widely examined as the other two. But the incidence of General International Law on taxation is the most obvious and essential, being the basis of the shaping of international tax. This incidence is mostly found regarding the effectiveness of tax law in the area, and it could also be affected by Law. Because of this -we are persuaded- the study of the incidence of General International Law on taxation should not be neglected, contrary to what the doctrine has been doing, encouraging the development of its analysis within International Tax Law.

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<sup>16</sup> This can be found in F.SAINZ DE BUJANDA, *Un esquema de Derecho Internacional Financiero*; Published by the University of Granada, 1983.

<sup>17</sup> Let us think, for example, about the tax system in foreign diplomatic missions and the staff assigned to those.

## VII. The Consideration of the Idea of Sovereignty as the Essential Element of the State and its Impact in International Tax Law

49. Authors have defined and analyzed “tax sovereignty” from the perspective of international taxation. That is, they have studied this concept in sight of the confluence of Taxing Powers of diverse States on the wealth tax declarations which surpass its territorial limits. Thus, these declarations would be related to the Taxing Powers of various States. On the other hand, they would consider the fact that the States are looking for cooperation from other States in order to make their tax claims effective, given the mobility of their taxpayers and the taxpayers’ heritage.

50. Within this field, GARBARINO<sup>18</sup> has carried out a thoroughly detailed systematic delimitation of the issue of sovereignty. He argues that wherever a State sovereignty on taxation is considered in an international level -that is, a coexistence of more States with a primary sovereignty and, therefore, with unlimited taxing Power- it is necessary to distinguish two general concepts, from which tax remarks can be made. On the one hand, sovereignty understood as taxing Power preeminent above any other Power, within the territorial scope of the State. On the other hand, sovereignty as the independence of the State, meant to act within the scope of the international Community, made up of more sovereign States, each of them with their own original taxing Power. This author notes that, whilst from a national viewpoint taxing Power implies the supremacy of the active subject entitled to hold that Power (the State) as opposed to the passive subjects, from an international, or external, viewpoint, on the contrary, sovereign taxing Powers of the State exist within a parity law system, just like the international legal system. GARBARINO states that in the specifically domestic and state context, tax rules, through which Taxing Power stems, directly obtain their validity from the state’s legal system, which is sovereign. On the contrary, in the international legal system scope no acknowledgement is made of any taxing Power above the States or its citizens.

51. GARBARINO also points out that, by adopting this double perspective of research, which comes from the bases of a State’s sovereignty in order to get to the various ways in which the sovereignties of more States interact among themselves, two interconnected dimensions of the issue arise: the exclusively internal, and the external dimension of sovereignty. The author therefore highlights that the internal side of State sovereignty –considered in its dimension as sovereign Taxing Power- is the way in which the authority of the State’s national legal system is manifested in relation to its submitted subjects, whilst in the international or external scope sovereignty is seen within the State’s International Tax Law with regard to the other States.

52. GARBARINO’s key point is the thought that tax sovereignty is a *species* within the wide *genus*, made up of the powers articulating the State’s sovereignty. He particularly states that sovereignty is manifested in the State Power in order to pursue a national tax policy, expressed through a set of rules intended for international budgets. He adds that sovereignty is the basis on which the State will develop fiscal relations with the other States.

53. SAINZ DE BUJANDA has argued that no European State can play a major role in History because they lack the power to do so, and they lack political, economic and military power. Thus “neither its ends nor its own means allow it to live with a minimum of autonomy”<sup>19</sup>.

54. European States have felt the need to undertake an economic integration that leads to a deeper political integration. The process of European integration was boosted by the European Union Treaty. Then, efforts were made to enhance this integration through a failed draft Treaty which tried to create a European Constitution, and later through the Treaty of Lisbon. The creation of the European Communities gave birth to a system of powers, whose relations with the States are different from that

<sup>18</sup> Cfr. C.GARBARINO,: *La tassazione del reddito transnazionale*, CEDAM, Padova, 1990, pages 96 to 99.

<sup>19</sup> This is SAINZ DE BUJANDA’s statement in D. MARTÍNEZ MARTÍNEZ’s work *El Sistema financiero de las Comunidades Europeas*’s prologue, Instituto de Estudios Fiscales, Madrid, 1974, page XII.

of the international organizations of cooperation. The European Union is presented as an integration organization, and this type of integration alters the power international organizations had been exercising over the States in such a way that even the doctrine has seen the influence of this phenomenon over the traditional concept and conception of sovereignty<sup>20</sup>.

**55.** Regarding European Union Tax Law, CONSTANTINESCO argued that tax harmonization within the European Communities inevitably led to a limitation, no matter how subtle, of the “tax sovereignty” of the member States, thus interfering with their political freedom<sup>21</sup>. But the general perspective of the community phenomenon must never be neglected, and from this viewpoint, ADONNINO highlighted the fact that by adhering to the Communities –or, more accurately nowadays, to the European Union- the States’ sovereignty is eventually limited in some areas, although it is so through a process of self-limitation which is constitutionally legitimate<sup>22</sup>.

**56.** Although the validity of the concept of sovereignty regarding taxing power at a national level has been heavily contested, it keeps a specific quality in relation to international taxation. Admittedly, sovereignty cannot be presented as the direct basis of Taxing Power. The people, in whom popular sovereignty is vested, approves the Constitution and through it decides on what conditions and to what extent the State power can operate on taxation. Therefore, the legal direct basis of Taxing Power lies within the Constitution.

**57.** However, in the shaping of the State as subject to International Law, sovereignty is seen as one of its essential components. This is important in order to define the State power on the territory, excluding international interventions which could affect the independence of the State, and, thus, excluding those actions that could have a fiscal nature. But sovereignty, considered as a State component in terms of being the subject of International Law, has also changed. Today it cannot be seen as something illimitable and indivisible, and there actually is a wide range of competences within it. Once these are individualized, the State itself can decide upon the attribution of some of their practices to a supranational body. This explains why the States have been able to yield to the European Union the exercise of competences derived from their Constitutions, more specifically competences in fiscal areas. All this breaks away with the notion of State sovereignty as something indivisible.

**58.** One of the most essential elements to the State is its sovereignty, also known as independence. Sovereignty means that the State takes part in international relations by means of its own power, and not by means of other subject of International Law. This is why it can take direct and immediate action upon all the elements that belong to the State<sup>23</sup>.

**59.** MONACO claims that “State sovereignty involves the situation of superiority of the States themselves in relation to the human societies they control and direct. It is not about the superiority of the States concerning other States of the international community”<sup>24</sup>. GARELLI, on his part, stresses that “the exercise of sovereignty involves the exclusiveness of the territory upon which it is displayed”. To this author “the territoriality of sovereignty” is presented as “undeniable canon law, in order to ensure the effectiveness of the actions taken by the particular States”<sup>25</sup>.

<sup>20</sup> See C.M. GIULIANI FONROUGE, *Derecho Financiero*, Volume I, 2<sup>a</sup> edition, Depalma Editions, Buenos Aires, 1970, page 282.

<sup>21</sup> «La problemática tributaria de la Comunidad Económica Europea », in *Hacienda Pública Española*, number 57, 1979, page 164.

<sup>22</sup> «Il principio di non discriminazione nei rapporti tributari fra Paesi membri secondo le norme della CEE e la giurisprudenza della Corte di Giustizia delle Comunità», in the *Rivista di Diritto Finanziario e Scienza delle Finanze*, number 1, 1993, page 65.

<sup>23</sup> Cfr. M. Díez DE VELASCO VALLEJO, *Instituciones de Derecho Internacional Público*, Volume I, eighth edition, Tecnos, Madrid, 1988, page 196.

<sup>24</sup> «Limiti della sovranità dello Stato e organizzazione internazionale», in *Studi di Diritto Costituzionale in memoria di Luigi Rossi*, Giuffrè, Milano, 1952, page 370.

<sup>25</sup> *Il Diritto Internazionale Tributario. Parte Generale. La Scienza della Finanza Internazionale Tributaria*, Roux Frassati e C°, Torino, 1899, page 14.

**60.** DÍEZ DE VELASCO has asserted that sovereignty cannot be seen today as an indivisible whole. Sovereignty is now seen as a set of attributions and competences. Amongst the State's competences, there are territorial competences, which relate to every item which can be found in its territory and whatever happens within it. And there are personal competences, which refer to the people inhabiting the state territory, be they nationals or foreigners, or to particular people, regardless of whether they are within the State territory or not<sup>26</sup>.

### VIII. The Territorial Dimension of Tax Sovereignty.

**61.** Linked to the idea of sovereignty and regarding the implications of the State's territory power,<sup>27</sup> it must be said that such power is not defined in terms of rights over the territory. Rather, it is expressed as an aspect or behavior of the State's general sovereign power, which involves some rights over or related to a territory; it does not focus on the territory itself, though, since the general sovereign power of the State is structured in relation to all the subjects and things within a territory. The territory is, thus, the direct or indirect object of the State Law concerning it, but at the same time, it is presented as the field over which territory power exerts its reach, that is, the space within which it is steadily exercised. The territory power of the State behaves in a varying way, depending on whether it is considered internally or from an international perspective.

**62.** According to the first approach, we must bear in mind the fact that within the State and based on its sovereignty the State can have complete authority over every person and commodity that can be found within its realm, aiming at goals responding to the general interest. The consequence of this is that rules belonging to foreign legislation can only be made effective as long as one State rule redirects them; in this case, these are enforced by national bodies.

**63.** Considering the distinction between power over people and power over things, and regarding the first ones, the territorial sovereign power of the State finds its clear manifestation in the subjection of the foreigner within the realm to State rules. On the other hand, the State can give shelter to a foreigner in its territory in certain cases determined by the legal system, removing them from the authority that any other State power may have over that person. Finally, the State, exercising its own territorial power, can also expel from its own territory the foreign or stateless individuals it is not willing to accept, and it can also prevent them from entering its territory.

**64.** Furthermore, regarding the State's territorial power over things, such power allows to establish their legal system and that of their relations, and also to use them in the circumstances and ways determined by the legal System. To this effect, such dispositions as, for instance, expropriation may be resorted to, without prejudice to the indemnities laid down by the law. Also, the State can prevent incoming goods, publications and other types of foreign genres, from entering its territory too, based on diverse motivations, which can range from sanitary to security and public order reasons.

**65.** Concerning the territorial power of the State at an international level, it is seen as a natural power to the State: it does not stem from International Law, but must be considered as an actual power, upon which every State can claim that any other States refrain from entering and acting upon its territory. This brings about the consequence that the State itself is legally responsible for what occurs within its territory.

**66.** Every State is the holder of a specific right to territorial sovereignty in relation to the other International Law subjects. This is reflected in the right to not be prevented from the exercise of its powers

<sup>26</sup> Cfr. M.DÍEZ DE VELASCO VALLEJO, *op. cit.*, page 299.

<sup>27</sup> The focus is on the description by BICARETTI DI RUFFIA («Territorio dello Stato»), in the *Enciclopedia del Diritto*, Vol. XLIV, 1992, pages 336 and 337).

within its own territory and to not have that exercise diminished, which involves the right to the territorial integrity and inviolability of the State, with the impossibility of interference of the foreign States. Along with this right, there is the State's right to repel, by means of the auto-protection methods recognized by the International Law, every act of violation of the State and the territorial sovereignty, the so-called "*ius excludendi alios*". From this stems an International Law responsibility to those States violating foreign territory. The penalty, when incurring such responsibility, consists of those acts of auto-protection to which the State can resort when its territory is being violated or gravely threatened by violation, and of those other means of guaranteeing the territorial sovereignty appointed by international treaties.

**67.** The legislative power is one among the various State powers. Therefore, we must examine the relation that may exist between the legislative power and the sovereign power of the State over the territory.

**68.** The territorial principle of Law was conceptually conceived when –in a process ranging from the 12<sup>th</sup> century to the Peace of Westphalia in 1648- the State understood as an association of individuals became the institutional State based on territory, which signals the beginning of the modern era. This transition becomes practically factual when State territory acquires its own relevance as an independent area, pointing out the reach of the effectiveness of the State system; together with this, also when State scholarship holds as self-evident the existence of the State as necessarily dependent on a particular territory. Through this process, the power that was firstly held by the Papacy and the Empire, and later by the lordships and feudal estates, is later concentrated within the territorial and autonomous entities which will become today's States. Their autonomy becomes so important within the theory of the State, that their territorial sovereignty will be considered an essential element for the State. The territoriality of the Law is perceived as an immediate consequence of the strength with which the idea of territorial sovereignty<sup>28</sup> has become central in legal scholarship about European Law.

**69.** But the territorial principle will begin its transformation, as well as its decline, with the change in the concept of the State. A new concept of the State as nation-State, which appeared with the French Revolution, was developed in private international Law. This becomes evident in the exaltation of popular sovereignty as opposed to the previous absolute monarchy. Thus, the laws will not only find a link with the State in the factual premises within the territory, but the inclusion and belonging of the subjects to the state will be increasingly distinguished, so that State laws can relate to their nationals based on what they have done abroad. With all this, the territory continues as the basis and essential element of the State. Through the evolution of the territorial principle, the two main objections made to the principle are, on the one hand, that the territorial limit to the State's legislative power is not imperative, since the legal discipline of the verified actions abroad does not necessarily involve a violation to the foreign territory; on the other hand, the concept of "territoriality" is so indeterminate that it is impossible to derive from it specific legal consequences<sup>29</sup>.

**70.** But, can the legislative power be considered a manifestation of the State power over the territory? The factual premises of the legal rules do not always consist of situations generated within the territory of the State which creates the rule. The State laws can be enforced, as it happens through the conflict rules of the private international Law, to events that took place abroad but which are linked to the State through a link of nationality of the intervening subjects in the corresponding situation. Thus, there are events that took place in a State which are related to nationals from another State and are regulated by the State law of the latter. Then, would these events suggest that the power to create legal rules is not a manifestation of the territorial power?

**71.** Regarding legal rules, within the State we find law-making powers and law-enforcement powers. Law-enforcement is presented as a manifestation of the State sovereign power over its territory.

<sup>28</sup> Cfr. C.SACCHETTO, «Territorialità (diritto tributario)», in the *Enciclopedia del Diritto*, Vol. XLIV, 1992, pages. 307 to 309.

<sup>29</sup> Cfr. C.SACCHETTO, *op. cit.*, pages 309 and 310.

If a State tries to enforce its laws in a foreign territory, it would be violating International Law. The enforcement of decisions of power in a foreign territory can only take place in the context of international cooperation between States. The State in which territory a measure of power is enforced has either enforced it itself, or else given its consent to its enforcement by another State.

72. Concerning the law-making power, and regarding the controversial situations mentioned above, we must consider the fact that, if a State decides, through its conflict rules, that its laws must be enforced upon its nationals on account of foreign events, it is making that decision through rules –conflict rules– which must be enforced upon its own territory (*lex fori*), upon the premises that there exists a legal conflict which was presented to its bodies. Also, when based upon a State’s conflict rules, nationals from another State must be subjected to their own State’s law, on account of events which did not happen within its territory, then the basis of this law-enforcement is to be found in the State power upon which it is enforced.

73. Besides, when a State takes as factual premises not conflict rules but material laws –events which did not happen within its territory and were related to its nationals– it is in any event establishing through these laws some legal consequences to enforce upon the territory itself. These are rules in which the factual premises take into consideration the foreign element and which are made by the State with the aim of enforcing them on its territory.

74. The law-making power cannot be conceived without a legal System. A legal System cannot be conceived without a State, because those entities integrated within the State are included in the State legal system. In their turn, the legal systems of supranational organizations are enforced in the States because they have previously agreed to it. A State cannot exist without a territory, as the latter is an essential element. And a legal System cannot exist without law-enforcement, simply devising the laws, because it would prove to be useless as a consequence of its ineffectiveness. Consequently, the State’s law-making power cannot ever be separated from the power of the State over its territory.

75. SAINZ DE BUJANDA has argued that whenever a State loses sovereignty over a part of its territory –as a consequence of an international agreement or simply through occupation– then the occupying State can declare the uselessness or ineffectiveness of the previous State’s laws<sup>30</sup>. This clearly shows the extent to which law-making is necessarily bonded to the State sovereign power over the territory.

## IX. Essential Elements of Fiscal International Law

76. Retaking the previous thought and given the evolution of the fiscal international phenomenon stemming from the development of transnational trade and circulation, there is a need to reconsider the validity of the idea of sovereignty in the field of taxation. The legitimacy of the concept of sovereignty regarding Taxing Power at a national level has long been a topic of discussion –but today the concept has been played down. Obviously, sovereignty cannot be presented nowadays as the direct basis of Taxing Power. The people, with whom sovereignty resides, approve the Constitution, and there it states the conditions and limits to the State taxing power. Therefore, the legal basis of Taxing Power lies in the Constitution. But, at an international level, considering the State an International Legal subject, sovereignty is presented as one of its essential elements. This is useful to determine the State powers over the territory and over the subjects linked to it, excluding foreign interventions which could affect the independence of the State and, consequently, acts of a fiscal nature.

77. Sovereignty considered as a State element, subject to International Law, has also changed. It is no longer conceived as something illimitable and indivisible, but as including a diversity of com-

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<sup>30</sup> Cfr. F.SAINZ DE BUJANDA, *Lecciones de Derecho Financiero*, eighth edition, Complutense University, Faculty of Law, Publications Section, Madrid, 1990, page 53.

petences. Once these are singled out, the State can decide upon their ascription to a supranational entity. This explains why the States have been able to bestow upon the European Union the exercise of the competences of their Constitutions and thus, amongst them, the exercise of competences in the fiscal field. This breaks with the notion of State sovereignty as something indivisible.

**78.** Within the State, we can distinguish between the law-making and the law-enforcement powers. Law-enforcement is presented as a manifestation of the State sovereign power over its territory. If a State tries to enforce its laws in a foreign territory, it would be violating International Law. The enforcement of decisions of power in a foreign territory can only take place in the context of international cooperation between States. The State in which territory a measure of power is enforced has either enforced it itself, or else given its consent to its enforcement by another State.

**79.** Regarding the question of whether the law-making power does or does not represent a manifestation of the territorial power and bearing in mind that there are certain controversial cases that could imply a negative answer, we must consider that if a State decides through its conflict rules that its laws must be enforced upon its nationals on account of situations that took place abroad, it is making that decision through rules –the aforementioned conflict rules- which must be enforced upon its own territory. These rules are based on the existence of a Legal conflict presented to its bodies. Also, when as a consequence of the conflict rules of one State, this State’s law must be enforced on other State’s nationals –even if it is due to events which did not happen within its territory- the basis of this law-enforcement regulation stems from the power of the State on which it is enforced. Nevertheless, the scope of conflict rules does not include Tax Law, but we still consider them from a perspective characterized by a general approach to the functioning of the legal System. Also, when the factual premises –not conflict rules but material ones- of a State are events which have not taken place within its territory and concerning its nationals, it is at any rate, establishing legal consequences from these laws to be applied on the territory itself. These are laws the factual premises of which take into consideration the foreign element and which are devised by the State, with the purpose of enforcing them on their own territory and by its own bodies.

**80.** The law-making power cannot be conceived without a legal System. A legal System cannot be conceived without a State, because those territorial entities of an inferior nature integrated within the State are included in the State legal system. In their turn, the legal systems of supranational organizations are enforced in the States because they have previously agreed to it in previously-agreed terms. A State cannot exist without a territory, as the latter is an essential element. And a legal System cannot exist without law-enforcement, simply devising the laws, because it would prove to be useless as a consequence of its ineffectiveness. Consequently, the State’s law-making power cannot ever be separated from the power of the State over its territory.

**81.** Taxes must be enforced by an entity entitled to do so. But once created, in order to be effective, specific administrative units are required with the power to manage and raise them. It is this double dimension of taxation –its law-making process and its enforcement which helps us delimit fiscal capacity.

**82.** Nowadays, wealth located outside the State boundaries is taxed. This wealth corresponds to subjects residing within the territory of the taxing State, in which case there is a link between the subject and the territory based on the place of residence. More uncommonly, it may correspond to nationals even if they are not residing in their homeland. In the latter case, the link between the subject and the territory is not comparable to that of the resident. Indubitably, nationals have a personal relation with the State, but they are also potentially linked to its territory, since they may return to it whenever they wish. Likewise, they also have a potential relation with the public services offered by the territory, or there existing. They also have an interest in the State’s existence and, therefore, in the territory. It is therefore reasonable that nationals are compelled to economically contribute to the financing of the public

services of the State territory. It is true that in this case, of small relevance in the contemporary taxing systems, nationals have a predominantly personal relation with the State, but they cannot be considered completely alien to the State territory. Therefore, this case of practical ineffectiveness cannot make us think that law-making taxing power is totally unrelated to the State power over its territory. This link always exists to a larger or lesser extent, and we need to bear in mind the considerations made above on the subject of Law at large. Let us consider that a State creates a tax with the aim of making it effective, and this effectiveness is originally confined to its territory; this goes to show that the power to make tax laws effective is rooted in the State power over the territory.

**83.** Therefore, the legislative taxing power of the State is linked to its territory based upon several reasons: firstly, because the links with the State taxing power are generally presented as –objective or subjective, as the case may be– links to its territory, usually with a territorial, not purely personal, nature. Secondly, because the public expenditures, which are financed with these taxes –to which the taxpayers must contribute in solidarity– are intended to cover public services provided within the State territory; to these services the nationals, although residing abroad, have a potential relation, as potential and free as their relation with their own State territory. Finally, because the rationale of the tax-law system requires coherence between the fiscal power and the power to render fiscal goals effective, being the latter limited by the national territory.

**84.** Tax rules are devised to be effective. The State, on its own, can make them so in a coercive manner only in relation to its own territory. A law-making power with no corresponding coercive-power would become useless. Thus, law-making normative power can never be severed from the State territory.

**85.** Regarding theoretical approaches to the use of the concept of territoriality in Tax Law, we suggest a double sense: a material sense and a formal one. In the first sense, territoriality involves describing the links with the territory of the State taxing the wealth under taxation, that is, the territorial link which tax law anticipates in the taxable base. Under this sense of territoriality we confront the issue involving the diversity of links with the territory, its legal limitations and the meta-legal considerations which may influence legal choice. These are all the considerations regarding law-making. On the other hand, there is a formal territoriality, which concerns the issues derived from the fact that one particular territory is only ruled by its own State's law –and not any other State's law, unless there is some form of consent by the State entitled to the territory. All things considered, here lie all the problems stemming from the limitations derived from the fact that a State can only enforce its laws in fiscal matters over its own territory, and not upon another State's territory unless there mediates that State's consent. These issues may all be included within territoriality in a formal sense, as they all collectively affect the law's effectiveness on the territory, whilst so-called taxing law extension would operate within the bounds of the territory in the material sense of the tax.

**86.** Regarding the discussion on whether, within taxation, territoriality should be related to tax, to tax law or to Taxing Power, it is important to bear in mind that, in the dichotomy tax vs. tax law, a tax is a legal institution, as far as it is created by an act of law and its existence is arranged by fiscal law. This is why there is no major problem in considering territoriality as an attribute of the tax or of the tax law. And regarding Taxing Power, the two dimensions pointed out by the doctrine must be brought to mind. On one side, legislative taxing Power would be fully included within the field of territoriality in a material sense, and it would be limited regarding tax law on territoriality, thus conditioning the links to the territory, which exist within the Law. Once the law-making process is over, regarding the existing links it is obvious that, concerning current positive Law, when questioning what exists within law, the limits to the legislator's work must always be taken into account. Territoriality will be dealt with in order to touch upon one aspect or the other, depending on what our main focus is, but those will be intimately linked aspects, also concerning their territoriality. On the other side, the evolution of the concept of Tax Law has shown to us one aspect of Power to make the State's taxing claims effective. Also, in the development of this Power by the State bodies, territorial limitations to their power are based on the field of

territoriality in the formal sense. All this reveals how territoriality may be discussed, regarding taxation, in order to allude to the tax, to Tax Law and to Taxing Power.

**87.** The answer to the question of whether the issue of residence should be included in the concept of territoriality or not has, in the first place, the need to determine if territoriality can be discussed regarding the passive subject or any other subjective element. From a broad perspective of territoriality, there would be no objections to such a view. But we must bear in mind that we may move, not only within the field of the passive subject, but also within that of the subjective element to be taxed. And if nowadays nationality were relevant as a linking point in Tax Law, then the territorial aspect of residence would stand out in a more emphatic manner by opposition to it. Even though residence can be considered a quality or a condition pertaining to the particular person, there is no doubt that it is defined in relation to the territory. This is why the concept of residence cannot be severed from that of territoriality according to Tax Law. From a different perspective, we may argue those criteria of attachment to the territory considered by Tax Law are various and different. Thus, in the first place, there must be a distinction between objective and subjective; similarly, various and different are the fiscal and legal consequences in each case.

**88.** Furthermore, residence is presented, within contemporary taxing systems as a link with a central relevance in terms of the taxation on the passive subject's worldwide income, and on their estate across the world, within those systems which have a general tax on estate. Residence is not only relevant regarding direct taxation, but also in connection with indirect taxation.

**89.** The territorial -in a material sense- dimension of the tax itself is determined by the link between the taxable event and the passive subject, on one hand, with the territory. This link may also influence those elements pertaining to the quantification of tax liability.

**90.** Together with the influence that territorial factors may have on the taxable event, on the passive subject and on those elements required to quantify tax liability, such factors may also influence on the legal regulation of concerning tax enforcement.

**91.** If the territorial factors surrounding the tax as such have an influence upon its essential elements, it is reasonable that the characteristics of the tax are also affected by these territorial factors, especially given the fact that such characteristics are a consequence of what those elements are like.

**92.** Theoretically, the State's legislative Power can come across, regarding tax law on space, a series of limitations which could consist of the obligation to adopt the criterion of territoriality concerning the taxation of wealth in certain cases or in the obligation to follow this criterion in a certain way, or to a certain extent, conditioning thus the delimitation of the linking points of taxation. Among these limits, we must single out those of General International Law, Conventional International Law, EU Law and Constitutional Law.

**93.** In international conventions and agreements intending to avoid double taxation we may find express evidence of the absence of General International Law rules which define, in a general sense, territorial duties in the materiality of the tax. Whenever these conventions explicitly allude to the rules of General International Law regarding the taxation of diplomats they then acknowledge the existence of those types of rules related to these subjects' taxation, but not regarding international taxation at large. In this way it is shown how the States do not accept the existence of a General International Law rule prohibiting international double taxation.

**94.** The fact that, in article 31 of the Spanish Constitution of Spain simply states "all", without further clarification, suggests that both, nationals and foreigners, may be the duty bearers in this article. Nationals are linked to the State by political solidarity, but also by economic and by social solidarity.

Foreigners, on the contrary, can only be linked to the State by economic and social solidarity. Given this, article 31 should be interpreted in the sense that, according to the foreigners' taxation, there should be an economic link to the Spanish territory which may be assessed in terms of taxable capacity. However, although there is a duty of political solidarity regarding nationals with the State, this does not prevent the tax legislator from choosing to give up the nationality link, for reasons of equity and effectiveness.

**95.** The States cannot proceed without permission in a foreign territory. A State, by itself and through its own civil servants, cannot enforce its Law outside its national borders, because these delimit the reach of its territorial sovereignty. This is a principle of General International Law. Non-compliance with this rule involves violating another State's sovereignty and committing thus an illicit international act.

**96.** In principle, a State's bodies cannot enforce their taxing power on another State's territory. Therefore, such bodies cannot make their State Taxing Power effective outside its territorial borders, with the exception of those cases in which there is an express consent, by the other State, to the intervention of foreign bodies upon its own territory. The inability of tax-enforcement by States on foreign territory, with the resulting State's impossibility to enforce, on its own, its tax rules upon a foreign territory and thus make its tax claims effective there, has called for the need to implement international mechanisms of cooperation between States, especially in the field of information exchange and revenue matters.

**97.** Although a particular State cannot enforce its power upon another State's territory without its consent, international organizations may enforce their power upon the territory of the member States based on the principle of conferring of competences, undertaken by the member States over the organization. This is what happens in the European Union.

**98.** When a State proceeds to levy another State's tax credit, there is not an actual enforcement of foreign Tax Law. When the tax authorities of a State proceed to levy foreign tax credit, they are not stating a foreign Law declaration. Rather, they just analyze if the foreign State's cooperation request complies with the previous requirements in the corresponding treaty or international legislative text, which will be formal and competence requirements. Foreign tax credit has, concerning the cooperating State, the nature of a legal act, because there is a rule which provides it with legal effects in the system. This rule is the one included in the corresponding international agreement and which, as previously stated, becomes national Law, or the one included in the corresponding secondary Community Law's legislative text. Community Law, it must be emphasized, has in principle direct effect over the national systems. We must also note that the State's tax authorities do not arrange for the assessment of the foreign tax credit claim. The aforementioned action by the legal tax agent is different from what legal bodies do when faced with Private International Law enforcement. Bilateral conflict rules call for foreign legal rules. Foreign tax credit levy is, as previously stated, completely different. At any rate, with such levy, the State holding the tax claim witnesses that it becomes effective in foreign territory. However, this does not mean that foreign Tax Law has been truly enforced.

**99.** The boundaries analyzed regarding territoriality in the formal fiscal sense have forced the States to establish, among themselves, cooperation mechanisms in tax enforcement. These forms of cooperation do not actually represent exceptions to those limits of tax territoriality in the formal sense, but instead they are mechanisms intended to overcome these limits. The reason is that within these cooperation acts, although these activities are promoted in order to encourage the foreign State's tax claims, the Taxing Power which is enforced is that of the very State in which the act is taking place. It is this State's bodies who enforce their powers, not those of the foreign State's. This will help make the foreign State's tax claims effective, and it will help fulfill what was determined by the tax laws devised according to that foreign State's Taxing Power. Here, a State, based on its Taxing Power, orders its bodies the enforcement of their own powers in the development of the cooperation acts, but this does not mean that a State may enforce its Taxing Power in foreign territory. In short, a State takes action upon its own territory to help another one, that is, it is not the foreign State that takes action, but the State of the territory where acts

of cooperation are implemented. When there are mechanisms of international cooperation concerning territoriality in a formal sense, this does not imply that the State's taxing power may be enforced beyond the limits of the territory itself and violate another State's territory. Instead, it just means that there is a mechanism of international cooperation whose aim is to overcome the problems derived from the general limitation concerning territoriality in a formal sense. Therefore, when the mechanisms of international cooperation concerning territoriality in a formal sense are implemented, the action taken upon the State Taxing Power is that of the State whose bodies take the action, that is, that of the State who is asked to cooperate, and not the State who requests the cooperation; this latter State is the holder of the tax claim. All this may find an exception in those cases in which a civil servant from a foreign State's revenue service is allowed to act upon national territory, even though it might be just to make a public notification or to carry out inspections. But, at any rate, there must be -even in these cases- an intervention of the State on the territory of which the action is taken, as long as the State has consented to these actions or agrees to be obliged by the corresponding rules devised.

**100.** There is no General International Law rule or principle preventing a State from cooperating with another one in the latter State's tax enforcement, and which acts upon its territory with that very aim. This can be seen in the existing examples of cooperation between States in this field. Such examples prove that the States are not bound by that uncertain General International Law rule, a rule which does not exist. Moreover, it would be contrary to International Law and to the International Society's current state of development to consider the links of international cooperation between States closed by International Law itself.

**101.** Furthermore, we are persuaded that there is no General International Law principle or international custom which forces the States to cooperate in the enforcement and levy of foreign tax. If there was such a rule, then there would be no need for the existence of international agreements and other international texts -think for instance of Secondary Law's legislative texts -establishing mechanisms of cooperation in this field. But you could also think that such international conventions are there to grant legal certainty in this field, codifying an international custom which already existed in it. Yet in comparing these two different statements and given the strong territorial nature of Tax Law we have encountered in the present work, there is no guarantee at all that the States feel compelled by that hypothetical international custom. Furthermore, a State cannot always admit the tax acts of another State without questioning certain aspects concerning those. This is to say, a State should be free to judge and decide upon its own constitutional principles and based on the socio-economic political perspectives prevailing when the foreign tax ought to be enforced, given it is the State's duty to determine the limits of enforcement -especially when the amount has to be delivered to a foreign State. We are persuaded, then, that the States should be considered free-which is to say, not bound by General International Law- to either develop or not develop such cooperation, unless there exists a norm from International Law agreements or an EU Law rule enforcing such duty. Nevertheless, it must be admitted that this kind of cooperation would be very convenient, desirable and suitable to the cooperation spirit expected to occur within the International Community. As a matter of fact, that the States are under no obligation to cooperate in this field does not, obviously, imply that they cannot do it and that it is not convenient that they do: hence the need to strengthen and increase the mechanisms of international cooperation on taxation. The fight against international tax evasion through tax havens has not quite reached the expectations that the measures implemented by the European Union and the OECD had created. Actually, not even the multilateral Agreement of administrative assistance on taxation can sort out this problem in any significant way, despite the expectations it had also created. That said, the fact that a General International Law principle which forces the States to cooperate in the tax sphere -when there is no international convention for it- cannot be legally maintained does not necessarily mean that, at a global or world level, there cannot exist some United Nations-based lines of action which compelling them in this sense. This would be mostly addressed to those states which are tax havens and the actions of which could be considered contrary to the spirit of the aforementioned international organization, with all the consequences this could carry.

**102.** Given the validity of the principle of legality on taxation and the principle of legal reservation, as a depiction of that principle, Tax Law is considered mostly in the Law. Keeping this in mind, the fact that the General Principles of Law as sources of Tax Law have not proven to be very effective at all has traditionally been noted. This is regarding the former as principles from which the different legislations stem, without being expressly included in Law or enshrined in the Constitution, since, in these cases, they become expressly written law and their effectiveness does not depend on their nature *qua* principles, but according to the status of the legislative text which expressly includes them. In this same line, the validity of custom as a source of Tax Law is often denied. Yet, in the sphere of International Tax Law, custom and the General Principles of Law do have certain validity as sources of Law. However, this validity is quite reduced if compared to the width, proliferation and development of other types of sources of International Law. Obviously, this does not justify the neglect of such customs and General Principles of Law.

**103.** Concerning International Tax Law, the most studied branches are those pertaining to International Treaty Law, that is, a field made up of international conventions and EU Law. This only seems logical if we keep in mind that these are both the two legislative international scopes with the biggest practical influence in limiting or conditioning the taxing Power of the States. Yet, together with these two International Law branches General International Law also affects taxation, if only in a much more limited way, in practice, than International Treaty Law and EU Law. This may be the reason why this field has been understudied by scholars, when compared to the attention paid to the other two. However, the effect of General International Law on taxation is the most obvious and essential, and constitutes the foundations of international taxation. This effect is mostly found regarding the effectiveness of tax law in the territory, although it may also have some importance concerning the scope of Law. It is because of this that we believe that the study of the effect of General International Law on taxation should not be overlooked, which is what academics have been doing. Instead, the development of its analysis, within International Tax Law, should be fostered. In short, General International Law rules seem to represent the essential legal parameters that legal globalization should meet. Also, it is important to determine to what extent the idea of tax justice should be taken into consideration, from the perspective of international tax relations, and stemming from European practice.

## X. Conclusion

**104.** When international conventions were not so developed, the need to use General International Law to find a solution to the international tax issues was clearer. The subsequent technical development of international agreements and conventions in order to avoid double taxation, especially in light of the OECD Model and the increase in the amount of conventions signed in that sense, albeit providing international taxation with a greater relevance, also neglected the general principles of International Tax Law, turning them into General International Law principles.

**105.** With time, it has become self-evident that there are States consistently refusing to sign any international convention which involves collaboration with other States within the scope of taxation. The reason is that these States want to profit from the lack of cooperation which allows them to remain as tax havens, guaranteeing lack of fiscal transparency towards their national fiscal administrations to those who transfer their funds to these territories.

**106.** Only the attempt to find a general principle underlying international collaboration in the fight against tax dodging, which would even link those States which have not signed an international cooperation agreement on taxation, could help effectively fight tax havens. This way, the solution to these problems can only come from the recovery of General International Law concerning taxation, and adapting it to current reality.

**107.** That States respect other States' essential elements means respecting their population, their territory and their sovereignty. Sovereign decisions are required for a State to be said to be operational,

and these decisions are interpreted as policies for action that need to be financed. The moment a State does not collaborate with another State to make its own taxes -which it legally owns- effective, it is in a certain way disregarding the latter State's sovereignty; consequently, the non-cooperating State would not be acting in accordance with the general rules of International Law. Therefore, even in those fields which are not regulated by fiscal International Treaty Law, some compulsory lines of action could be drawn, and they should be considered prior to any international convention trying to provide them with international legal certainty.

**108.** The organization of current International Tax Law cannot be achieved simply by means of some technical improvement of the rules aiming to avoid international double taxation, or through those concerning the mechanisms of exchange of tax-relevant information. The increase and structuring of the international dimension of the tax must stem from the preliminary premise of determining the legal parameters which could define the possibilities of the development of the International Tax phenomenon. This should be attempted addressing both its limitations and its possibilities of expansion. This will not require a review of which the general rules and principles of International Law are. These will serve as the foundation of taxation, and how they affect tax relations between States will also have to be examined.

**109.** Not too long ago, international tax law seemed to be a part of Tax Law which only had to be examined in a casual or secondary way; furthermore, it did not require any special attention. Yet, the growth of this field of Tax Law was increasingly noticed, even though not all scholarship predicted that it would become as central in the field. Nowadays, International Tax Law represents the most developed field within Tax Law.

**110.** The development pursued by contemporary International Taxation cannot be restrained. However, this growth cannot ignore the essential parameters upon which International Tax phenomenon has to be built and which have been, and must be, the basis of International Tax Law.