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ABSTRACT

The basic objective of my PhD dissertation is to identify to what extent Public International Law comprises allocation rules of taxing powers that ensure an at least partial elimination of (juridical and economical) double taxation within multinational corporations.

Analyzing both Customary and Treaty Law from a strictly positivist (kelsenian) point of view, I come to the conclusion that — although Customary Law prohibits the exercise of taxing powers if no (personal or territorial) fiscal attachment can be found as well as some forms of “harmful” exercise of taxing powers and Tax Treaty Law has been overdeveloped these last decades on the bilateral level — international double taxation is always a frequent phenomenon, as the allocation rules provided by Public International Law are not sufficient to ensure its integral elimination.

This critical, negative conclusion can yet generate a positive one: the necessity to conceive allocation rules of taxing powers in more advanced forms of international cooperation, as EU.

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A HERETICAL QUESTION :
Are There Any Allocation Rules of Taxing Powers in Public International Law?
Specifying in the Problem of the Allocation of Taxing Powers within Multinational Corporations



TWO MAIN HYPOTHESES:

HYPOTHESE N° 1: In Customary International Law



The question of the existence of allocation rules of taxing powers in Customary International Law is certainly not a new question. Nonetheless, no answer has yet been unanimously accepted by Tax Law scholars. In order to examine this question we distinguish two different categories of rules: allocation rules strictly speaking (*direct allocation rules*) and rules that prohibit some forms of harmful exercise of taxing power and thus have an indirect incidence on the allocation of taxing powers (*indirect allocation rules*).

As regards *direct allocation rules*, we come to the conclusion that there are two exclusive criteria of fiscal attachment (personal and territorial) and a false criterion (the control). However, this does not mean that a real allocation of taxing powers exists since no allocation rules of tax bases can be found in Customary International Law. It is thus very easy to circumvent the absence of fiscal attachment (this is the case of the Californian Unitary Taxation).

As regards the *indirect allocation rules*, there is certainly no Customary Rule prohibiting double taxation in general. On the other hand, the principle of non discrimination can prohibit some forms of international double taxation but is not sufficient to guarantee an exhaustive allocation of taxing powers between States.

- Partial Conclusions n° 1:**
Two Exclusive Criteria of Fiscal Attachment BUT
 - **No Allocation Rules of Tax Bases**
 - **No General Prohibition of Harmful Exercise of Taxing Powers**

HYPOTHESE N° 2: In Tax Treaty Law



International Tax Treaty Law seems, on the contrary, rather over developed, since no less than 3000 Bilateral Tax Treaties are currently into force. These Treaties present sometimes outstanding similarities since they are mainly based on the OECD and UN Model Tax Conventions. This practically means that the allocation rules of the Model Conventions are generally also introduced in bilateral tax treaties. It results an apparent uniformity of allocation rules in bilateral tax treaties, even though the Model Tax Conventions have no binding force.

However, this uniformity is only apparent. In fact, Bilateral Tax Treaties are applied in a divergent way by the States since the allocation rules of the Model Tax Conventions have a “weak normative structure”: they can have different interpretations. At the same time, the interpretation proposed by the OECD and UN Commentaries is not always followed by the States, even when they accept the wording of the allocation rules of the Models.

This problem cannot be resolved using the means of resolution of conflicts proposed by the Model Tax Conventions: the Mutual Agreements Procedure is not obligatory for the States, and the new procedure of obligatory international arbitration cannot compensate for the absence of “strong” general and abstract allocation rules.

- Partial Conclusions n° 2:**
There is an Outstanding Uniformity of Allocation Rules in Tax Treaty Law BUT
 - **This Uniformity is only Apparent**
 - **There is so far no Satisfactory Mode of Conflicts Resolution**

A FATAL ANSWER: NOT REALLY...