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The State taxing competence

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ABSTRACT

The aim of this PhD thesis is to identify the grounds and the limits of state taxing competence.
It is generally observed that a personal or territorial attachment is necessary to justify a state's tax jurisdiction.
Efforts to define harmful exercise of state taxing competence have not resulted in a consensus over the reasonable limits of linkage for the aforementioned fiscal attachment, and no sufficient remedies under international law exist for the violation of those principles.

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Recognition of the competence

• The taxing competence is an element originally intrinsic to a political community. Thus, state taxing competence cannot be considered as *delegated* from international law. Even if tax law is a domain highly internationalized, there is no international tax order, or, if there is any, it is not sufficiently centralized to organize tax competences by itself. Therefore, states are using international law as an instrument to manage already established powers and not as a source of legitimacy of their taxing competence.

• In unitary states, such as France, taxing competence belongs, according to the Constitution, to the legislator, but tax Administration has also considerable powers. Tax bills voted by the Parliament are prepared by the tax legislation bureau of the Ministry of Finance and tax Administration has a large regulatory competence, often eroding the Parliament's competence through extensive legislative interpretation.

• Recognition of a taxing competence to *subnational* levels of government, in a federal or, in a more limited extent, in a decentralized state context, means that competence is shared by different levels of authority with a possible result of overlapping tax regimes. Allocation of taxing competence and mechanisms that guarantee this allocation between the different levels of government show that it is possible to use instruments of international law in a purely domestic situation.

• Two exclusive criteria (*personal, territorial*) for the establishment of tax jurisdiction can be identified. However, each jurisdiction has its own perception of the extent of the personal and the territorial principle, and there is no common understanding of what *reasonable attachment* is. Moreover, no rule seems to exist in customary international law related to the allocation of tax bases. Rules and standards promoted through the OECD doctrine have certainly resulted in a harmonization of the used terms. The establishment of an international tax language is valuable, but consensus regarding the chosen terms to use does not necessarily mean that a common definition of the used concepts exists.

Exercise of the competence

• States can exercise their taxing competence unilaterally, bilaterally and multilaterally. In order to tackle tax loopholes or overlapping tax regimes resulting in double taxation or double non taxation schemes, it is possible to coordinate unilateral tax measures, or to cooperate through bilateral treaties and harmonize through multilateral treaties. It seems that normative taxing competence is unlimited under international law. However, in practice, countries self-restrain their tax jurisdiction, in order to readjust *normative* competence to the factual limits of the *executive* tax competence.

• One could argue that a *duty to cooperate* on tax matters is inherent in the quality of sovereign state. The OECD work on harmful tax competition seems to rely on this kind of consideration. The so-called soft law instruments, including not only the harmful tax competition OECD reports but also the "authentic" interpretation proposed for the OECD and UN models, tend to establish principles and standards regarding the exercise of the state taxing power.

• It is does not seem like an *international tax regime* can be deduced from the network of double tax conventions. The existence of guiding principles throughout this network doesn't imply that they are part of customary international law. The remarkable uniformity of double tax conventions, connected to the success of the OECD and UN models, is only apparent, and, in fact, states can give different interpretations to the models' allocation rules. Therefore, state competence is under international treaty-based tax law minimums restricted by the respect of principles of non discrimination and most favored nation treatment.

• Functional federalist models, such as the EU, have less room for free action. Apart from the indirect tax harmonization accompanying the common market launch, state competence has substantially been restricted in direct tax matters as well. Negative integration through the ECJ case law has proven to have a function equivalent to the one of a *framework-legislator*. The ECJ case law focuses on eliminating tax discrimination, however it would be more coherent with the common market aim to remove any restriction in the exercise of EU rights, even non discriminatory. The construction by the Court of the concept of balanced allocation of taxing rights between EU member states highlights the fact that there are no general criteria for the allocation of the tax bases in EU law and that competence on direct taxation still belongs to the Member-States.