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Artigos Originais

THE SINGLE TAX PRINCIPLE AS A LIMIT TO DOUBLE NON-TAXATION? A BROAD PERSPECTIVE

¿EL PRINCIPIO DE IMPOSICIÓN ÚNICA COMO LÍMITE A LA DOBLE NO-IMPOSICIÓN? UNA PERSPECTIVA AMPLIA

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Abstract

In recent years, double non-taxation phenomenon has gained some importance. This phenomenon means that income is not subject to tax anywhere. Based on a purported international tax regime, some academics have defended the existence of a single tax principle which prohibits double taxation as well as double non-taxation.

From a political standpoint, States enjoy fiscal sovereignty in order to design the rules to accomplish their own fiscal policies. In the current economic context of globalization, countries compete with each other in order to attract foreign investment and capital. To achieve these goals, countries use fiscal instruments, such as public expenditure or taxes. Nevertheless, countries are different from each other and may have different goals in consideration of their preferences. There are countries that base their competitiveness on offering good public infrastructures, whereas other countries are focused on low taxation to attract foreign investment, and even there are other countries, due to their economic structure, able to secure good public infrastructures with low taxes. Therefore, a country is free and sovereign to "untax" the income over which it has tax powers.

The question is whether there are limits to the tax sovereignty of countries so that they may prohibit certain forms of double non-taxation. These supranational limits might be identified in the structure of the international tax regime. These attributes of the international tax regime inform largely the tax legislation of the international community. Those principles are the interpersonal equity or ability-to-pay principle, the neutrality principle, and the justice in the allocation of the taxing powers or internation equity principle. Nevertheless, from a positivistic and public international law standpoint, these supranational principles do not bind countries to hold a minimum threshold of taxation.

Keywords: Double non-taxation; International tax competition; Single tax principle;

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Resumen
En los últimos años ha cobrado importancia el concepto de doble no-imposición, fenómeno por el cual el beneficio empresarial no está sometido a tributación en ningún Estado. Sobre la base de un pretendido régimen fiscal internacional, se ha venido defendiendo la existencia de un "principio de imposición única" que prohíbe tanto la doble imposición como la doble no imposición.

Desde un punto de vista político, los Estados gozan de soberanía fiscal para diseñar las normas que den cumplimiento a sus propias políticas fiscales. En el actual contexto económico de globalización, los países compiten entre sí por atraer inversión extranjera y capitales. Para cumplir con estos objetivos, los Estados se valen de instrumentos fiscales, bien a través del gasto público, bien a través de los impuestos. Sin embargo, cada país es diferente del resto y puede tener objetivos diferentes en función de sus características y preferencias. Hay países que basan su competitividad en ofrecer una alta calidad de infraestructura pública a sus potenciales inversores, mientras que otros países centran su política fiscal en un bajo nivel impositivo para atraer capitales, e incluso hay países que, debido a su estructura económica, pueden asegurar un alto nivel de infraestructura pública con un bajo nivel impositivo. De tal manera que un Estado es libre y soberano para no someter a imposición las rentas sobre las que ostenta competencia tributaria.

Cabe hacerse la pregunta de si existen límites a la soberanía fiscal de los Estados que puedan prohibir ciertas formas de doble no imposición. Estos límites supranacionales pueden ser identificados en la estructura del régimen fiscal internacional. Estos atributos del régimen fiscal internacional informan buena parte de la legislación tributaria de la comunidad internacional. Estos principios son los de igualdad interpersonal o capacidad económica, el principio de neutralidad, y el principio de justicia en el reparto de competencias tributarias o *internation equity*. No obstante, desde un punto de vista positivista y de Derecho internacional público, estos principios supranacionales no vinculan a los Estados en el establecimiento de un umbral mínimo de tributación.

Palabras clave: Doble no-imposición; Competencia fiscal internacional; Principio de imposición única;

1 INTRODUCTION

This paper is aimed at evaluating the double non-taxation phenomenon and the single tax principle. Many scholars consider this principle as a limit to double non-taxation in particular and aggressive tax planning in general.

But, what does double non-taxation mean? Is double non-taxation part of a broader concept? Is there a single tax principle prohibiting double non-taxation?

This paper seeks to build a comprehensive theory about the single tax principle from an international perspective. The paper tries to build a dogmatic structure of the single tax principle reconciling the different approaches.

2 TAX COMPETITION AND SOVEREIGNTY AS FRAMEWORK FOR DOUBLE NON-TAXATION

Every phenomenon resulting in base erosion or profit shifting cannot be understood without inserting it within a broader framework. This broader framework is not a legal one, but a political one: the sovereignty; and its economic corollary, the international tax competition.

Current economic reality is dominated by globalization[2]. Communication advances and technologies have made trade to become international and really fast. In particular, e-commerce has meant a revolution in international trade.

McLure has successfully analysed how globalization has changed international taxation and how countries face their tax policy nowadays. Before globalization, international trade was poorly developed. Investment was primarily domestic based. International trade consisted mainly of tangible products and financial products were very simple. The fact that international commerce had such a little importance meant that countries did not need to offer an attractive taxation for foreign investment[3].

However, international trade experienced a fast and intensive rise. Technologies and communications have evolved. Services and intangibles have become very important in international trade. Complex financial products have emerged[4]. In this context, it is extremely easy for multinationals to establish wherever they want. Therefore, capital has become very mobile. Companies have turned into multinationals, and they track all over the world whatever opportunity they may benefit from. These opportunities may consist in a flexible and cheap labour market or in low taxation[5]. In this regard, company location has become extremely sensitive to taxation[6].

Conversely, taxation has become sensitive to capital mobility, resulting in the phenomenon of international tax competition[7]. This growing dependency on international trade has put a lot of pressure on countries to attract and maintain foreign investment. Thus, countries are forced to have a competitive tax system, lowering their tax rates and establishing preferential tax regimes.

The phenomenon of international tax competition has given rise to a controversial debate[8]. The detractors believe that tax competition means an external limitation on national sovereignty[9]. In an environment of high capital mobility, States are obliged to maintain a low taxation to retain investment. This dynamic is leading to the phenomenon called “race to the bottom” whereby countries constantly lower their tax rates in order to maintain their competitiveness. This continuous race to the bottom leads to a “fiscal degeneration”[10]. The sequence is as follows. A country lowers its corporate tax rate because of economic and competition reasons. Because of the risk of

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2 About globalization, see Calderón Carrero (2012); Caamaño Anido and Calderón Carrero (2002); McLure (2001); Lodin (2000); Avi-Yonah (2000b).

3 McLure (2001), pp. 333-34.

4 McLure (2001), p. 33.

5 Lodin (2000), p. 214.

6 See Avi-Yonah (2000b), p. 1591, and Zodrow (2010), p. 890. Slemrod (2010) introduces an analysis about tax mobility disregarded from real mobility. Wilson (1993), p. 196, says that the tax factor is determinant for multinationals in order to locate their managing and distribution centres.

7 About tax competition, see Tiebout (1956); Wilson (1999); Zodrow (2010).

8 Some authors believe that aggressive international tax competition on corporate taxation has a negative impact in the global welfare. These authors support an international cooperation (see Avi-Yonah (2000b), Brauner (2003) and Caamaño Anido and Calderón Carrero (2002)). On the contrary, other authors support international tax competition as the driving force leading to international efficiency (see Roin (2000), Dagan (1998) and Bracewell (2001 and 2003)).

9 McLure (2001), p. 329. Wildasin (1989) analyses this effect in the field of local taxes.

10 Caamaño Anido and Calderón Carrero (2002), p. 198.

weakening the structure of the Welfare State, the State shifts the tax burden to more immobile factors, such as labour and consumption factors. Lastly, when increasing labour and consumption taxation becomes problematic, the State reduces the social safety net[11].

Other authors suggest that international tax competition leads to a downgrade of the classical juridical principles for the benefit of economic principles, such as neutrality, efficiency and competitiveness. In effect, tax justice principles such as ability to pay, are relegated[12].

Notwithstanding the previous critics, countries have different preferences and necessities. Every country is different to each other, and it has different structure, such as demographics and economics. In this context, a particular tax policy may be useful for a county, but not for another[13]. Therefore, one can conclude that the "country market" is not perfectly homogeneous, but it is segmented according to the different preferences and necessities of countries and capitals. Thus, every company will seek the country that best serves to its preferences.

Often, the defence of international tax competition comes from a vision of taxes as *benefits taxes*[14]. According to this idea, capital income tax is a payment for the services rendered by the State[15]. The different necessities and preferences of the States and corporations shape an international scenario of diversity where each agent seeks to fulfil its necessities. Thus, corporations do not merely seek to maximize their after-tax profits. Otherwise, international tax harmonization would eliminate the ability for fulfilling these diverse preferences[16].

This point of view contrasts with that one that claims taxes to have a purely redistributive function[17]. Some authors believe that tax competition could erode this distributive function. The most plausible argument is that tax competition may end up harmonizing tax rates at the bottom of the countries competing between each other. Therefore, in the long term, the tax factor is no longer determinant for business location purposes as every country offers the same tax rates. At the end of the day, countries give up revenues in favour of multinationals without any compensation[18].

Leaving aside this tax competition debate, most of the scholars and international organizations share an intermediate position. This stance suggests that international tax competition regarding general tax rates is not so harmful as to require a sovereignty restriction[19]. Absolute tax rate harmonization would force

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[11] Avi-Yonah (2000b), p. 1576.

[12] Calderón Carrero (2012), p. 348.

[13] Avi-Yonah (2000b), pp. 1586 *et seq*.

[14] One of the precursors of this view was Tiebout (1956). This author establishes an efficiency model in the sphere of the local administration. According to this model, tax competition sets an efficiency point that maximizes the preferences of the citizens regarding public services and the resources of the local administration.

[15] Roin (2000), p. 555.

[16] Roin (2000), p. 561.

[17] Fleming, Peroni and Shay, (2001), p. 337.

[18] Zodrow and Mieszkowski (1986), p. 368. Avi-Yonah (2000b), p. 1646, suggests that special tax incentives by several countries cancel each other out.

[19] Brauner (2003) proposes a tax base harmonization, leaving sovereignty regarding general tax rates. Avi-Yonah (2000b), pp. 1643-48, criticises the special tax incentives aimed at foreign investors.

taxpayers to pay the same tax for whatever level of public services they enjoy and wherever they establish. On the other side, tax rate harmonization would force countries to adopt a uniform “productive model”, disregarding their structural characteristics and preferences, leading to an inefficient allocation of resources[20].

Furthermore, each taxpayer may have a different understanding of taxes. Thus, a taxpayer may want to pay a high tax to contribute to hold the Welfare State and the distributive function. Some multinationals have relocated their most mobile activities in in their residence country; who knows whether it is because of popular pressure or genuine altruism[21].

To conclude, we cannot disregard the double function of income taxes: redistributive and benefit-based. Therefore, international organizations have adopted a compromise solution to balance the confronted principles. Sovereignty on the one hand, and on the other hand the traditional tax justice principles[22]. Sovereignty is the political principle that gives legal legitimation to tax competition. International tax competition has been always understood as the policy leading to reduce the tax burden in order to attract investment. This a narrow view. International tax competition also should be understood as the art of States to maximize their resources given particular preferences. Therefore, not only low tax rates, but also high tax rates can express the idea of tax competition. This vision of international tax competition makes difficult to identify a rigorous concept of double non-taxation. Every country decides its appropriate tax rate according to its sovereignty and preferences.

Those authors that deny the existence of a double non-taxation concept because of sovereignty concerns are somewhat right[23]. Therefore, what we can conclude from this section is that neither double non-taxation nor the single tax principle can be defined in a quantitative manner[24].

Nevertheless, even tough we cannot relay on a quantitative dimension of the double non-taxation phenomenon, we can rely on a qualitative one based on international tax law. Therefore, building a single tax principle requires identifying those qualitative elements underlying to every non-taxation phenomenon.

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20 Dagan (1998), p. 377, supports the heterogeneity of an international tax system, where countries could offer different “packs” of services for different prices. Investors could pick those combinations that best suit them.

21 Such is the case of Inditex Company. This company has relocated its e-commerce activity from Ireland to Spain. http://economia.elpais.com/economia/2011/09/15/actualidad/1316071978_850215.html

22 Avi-Yonah (2000b), pp. 1625-1626, calls for a balance between the State sovereignty (that “reflects the divergent preferences of citizens of democracies for particular government sizes”), and the harmful effects of tax competition on equity, neutrality and international welfare.

23 Rosenbloom (2000).

24 Lang (2004), p. 87, expresses that the function of double taxation conventions is to allocate taxation rights between countries “in a manner which ensures that at least one of the two contracting states retains ***the right to tax*** pursuant to the convention”. Lang observes that “some bilateral rules, however, aim at achieving single taxation insofar as they make the waiver of the right to tax provided for in the convention subject to the other contracting state actually exercising the right to tax assigned to it by the convention”.

3 THE SINGLE TAX PRINCIPLE: AN APPROACH FROM INTERNATIONAL LAW

Is there an international tax regime? According to Avi-Yonah, the single tax principle is one of the pillars of the international tax regime[25]. According to this author, "income from cross-border transactions should be subject to tax once (that is, neither more nor less than once)"[26]. Therefore, the single tax principle requires cross-border income not to be subject to double taxation or undertaxation. The level of the single tax principle is determined by the benefits principle. The benefits principle says that source jurisdiction has the primary right to tax active income, whereas residence jurisdiction has the primary right to tax passive income[27].

The main question is to determine whether the international tax regime in general, and the single tax principle in particular, are part of an international tax law.

a) Subjective dimension of the single tax principle

In the previous section I have dealt with international tax competition and sovereignty. Sovereignty gives juridical coverage to double non-taxation and in general, to every phenomenon of aggressive tax planning.

State subjectivity and sovereignty set the line between what is permitted and not. A taxpayer is free to organise its business in whatever way as long as tax law allows its. Countries design their tax law, leaving the taxpayer freedom of act within the limits of the law. According to the classical theory of international law, States (and not the taxpayers) are the subjects of international law. Consequently, international law cannot judge the fraudulent intention of taxpayers when doing aggressive tax planning. The State (and its domestic law) is the competent authority to address the tax abuse[28]. In order to attract investment, a country may want to establish artificial tax base rules, opening the door to tax abuse. Therefore, a taxpayer will not commit tax abuse as its law is formalistic. Consequently, international tax law must disregard the taxpayers' intentionality and focus on whether the effects of a formalistic domestic law violate international law in terms of equity, efficiency or national sovereignty.

Another expression of this subjective dimension is the harmful tax competition. Harmful tax competition can be defined as "a fiscal policy implemented on the initiative of a country that offers a wide range of tax incentives and advantages to attract mobile factors (investment) to that country in the absence of transparency and the effective exchange of information with other countries"[29]. These harmful practices are aimed at attracting foreign capitals at expense of

25 Avi-Yonah (1997), p. 517. Brauner (2003), p. 291, has supported the existence of a single tax principle as a pillar of an international tax regime currently in crystallization.

26 Avi-Yonah (1997), p. 517.

27 Avi-Yonah (1997), p. 517.

28 García Prats (2010), pp. 58-60, and Palao Taboada (2009), pp. 177-184, analyse the different national approaches to tax abuse.

29 Lampreave (2011).

eroding the tax collection ability of other countries[30]. These practices may give rise to international liability as tax havens hinder other countries' collection.

b) Objective dimension of the single tax principle

This dimension refers to the material effects that double non-taxation gives rise to. As I stated before, this material dimension cannot be quantitative, but qualitative. These effects may be economic, when they relate to efficiency and neutrality. But these effects may be juridical as well, when they relate to equity. The existence of a single tax principle requires to identify a set of qualitative patterns and elements common to every phenomenon of base erosion and profit shifting.

Once identified those patterns, it is necessary to decide if they are contrary to international law. This dimension requires setting a line distinguishing those cases of illegal double non-taxation from those ones that are expression of the legitimate exercise of the sovereignty by States[31].

3.1 Existence of an international tax law: methodology and approaches

It is obvious that an international tax treaty law exists. According to some scholars, tax treaties are the only formal source of international tax law[32]. Nevertheless, other authors support the existence of a general international tax law, embodied in the customary law and the general principles of law that forbid both double taxation and double non-taxation[33].

International law requires a polyhedral approach because it has multiple faces. Therefore, it is important to analyse the single tax principle from different approaches in order to establish the implications on double non-taxation. For this purpose, Pastor Ridruejo identified three basic approaches on international law[34]. One approach is the axiological or meta-juridical. This approach links international law with the world of universal values. The second approach adopts a perspective from positive law. This perspective is more technic and assesses international law from a strict juridical point of view. The last approach is the historical and sociological one. This approach evaluates international law as a dynamic discipline changing over the time and over the changing values.

This distinction is important because sometimes the debate about double non-taxation could be misled adopting a monolithic approach[35].

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30 In the report *Harmful Tax Competition: An Emerging Global Issue*, the OECD (1998) designates these practices as "*'poaching' as the tax base 'rightly' belongs to the other country*". (p. 16).

31 Double non-taxation resulting from deliberate State action does not violate double tax conventions. According to Lang (2004), p. 86, "it seems that there is not a single case in which double non-taxation triggered by a unilateral waiver of the right to tax by both sides is in violation of the DTC". Similarly, Scapa and Henie (2005), p. 267.

32 Rosenbloom (2000), p. 140.

33 For Avi-Yonah (2007), pp. 4-8, the international tax regime, which incorporates the single tax principle, is part of an international customary law. Other authors, as Thomas (1996), believe the arm's length standard is a norm of customary law.

34 Pastor Ridruejo (2009), pp. 23 *et seq.*

35 The famous discussion about tax arbitrage between Avi-Yonah (2000a) and Rosenbloom (2000) is a paradigm of the adoption of different approaches. Rosenbloom denies the existence of the single tax

3.1.1 The meta-juridical approach

3.1.1.1 "Aggressive tax planning" as a unifying term?

Firstly it is necessary to seek for a coherent concept of "undertaxation" in order to analyse the existence of the single tax principle.

Undertaxation is an ambiguous term that may cover every phenomenon of base erosion, profit shifting, double non-taxation, or even harmful tax competition. Therefore, several questions arise: where to set double non-taxation in this ambiguous context? Does the single tax principle embody the goal of avoiding the common undesirable effects of all those undertaxation techniques?

The current Base Erosion and Profit Shifting project (BEPS) by the OECD has been able to cover in a coherent and systematized manner all the previous concerns relating to undertaxation[36]. The BEPS project is aimed at effectively preventing "double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it"[37].

> "*BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than* ***single taxation****. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place.* ***No or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it****. In other words, what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed*"[38].

We can see how the OECD supports what I advanced previously: that the quantitative element is not an issue or harmful. Besides, the OECD identifies one of the qualitative elements I talked about before: the misalignment between the tax base and the real activity.

Following the terminology of the OECD and the EU, some authors have used the term "aggressive tax planning" to label all practices covering tax avoidance and "the existence of legal gaps or mismatches exploited in transnational situations"[39].

However, I believe that the term "aggressive tax planning" is not the most appropriate term. Firstly, "planning" implies taxpayer's intentionality. As I stated before, the single tax principle cannot be defined by the taxpayer's subjective behaviour, but by

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principle adopting a positivistic approach. On the contrary, Avi-Yonah supports the single tax principle from a historical perspective.

36 Serrano Antón (2015), p. 92, suggests that BEPS project embodies the international regime about anti-abuse measures.

37 *Action Plan on Base Erosion and Profit Shifting*, issued by OECD (2013), p. 13.

38 *Action Plan on Base Erosion and Profit Shifting*, issued by OECD (2013), p. 10.

39 Dourado (2015), p. 48. Similarly, Pistone, Julien and Cannas (2016), pp. 211-12.

the objective and material consequences violating some universal principles. In this line, the Partnership Report issued by the OECD (1999) aims at eliminating double taxation and non-taxation resulting from hybrid qualifications, disregarding the taxpayer's intentionality[40]. Secondly, the existence of "legal gaps or mismatches" does not explain by itself the differentiation between tax avoidance and international tax arbitrage. Legal gaps and mismatches are inherent to every tax avoidance practice. The existence of legal gaps makes easier the manipulation of the tax base in order to shift the profit to other jurisdiction. In other words, the imperfect and formalistic international tax regime leaves multiple legal gaps that are exploited by taxpayers. Besides, mismatches are also inherent to every tax avoidance practice insofar as tax rates are different[41].

Kleinbard has coined the term "stateless income". In my opinion this term is very appropriate in order to construct the single tax principle. This term disregards the fraudulent behaviour of taxpayer. According to Kleinbard, "stateless income" is "income derived by a multinational group from business activities in a country other than the domicile (however defined) of the group's ultimate parent company, but which is subject to tax only in a jurisdiction that is not the location of the customers or the factors of production through which the income was derived, and is not the domicile of the group's parent company"[42]. Therefore, this term is able to encompass tax avoidance practices as well as international tax arbitrage[43]. The goal pursued by the anti-avoidance measures is to realign the tax base location with the real substance of the activity.

3.1.1.2 The tax justice principles: equity and ability to pay

Some scholars have set out that base erosion and profit shifting may violate some of the traditional tax justice principles, such as equity, ability-to-pay or non-discrimination[44].

The maintenance of the public expenditure through taxes has two pillars: the equity principle and the solidarity principle. The ability-to-pay principle operates as a measure for the equity principle, whereas at the same time it is the tax corollary of the solidarity principle[45]. Therefore, every taxpayer must contribute to the Treasury according to its ability to pay.

The equity principle requires a comparability element[46]. According to this principle, similar situations must be treated equally, whereas different situations must

40 Scapa and Henie (2005), p. 266, distinguish between double non-taxation from treaty abuse and double non-taxation from properly use of treaty.

41 Rosenbloom (2000) puts both tax avoidance and international tax arbitrage in the same boat, because both result from differences between domestic laws.

42 Kleinbard (2011), p. 702.

43 According to Kleinbard (2011), p. 703, "stateless income" is not the same as capital mobility. Whereas capital mobility involves real location of the investments, "stateless income" involves the movement of taxable income without shifting the real factors of the activity.

44 Van de Vijver (2015), pp. 248 *et seq.*; Happé (2007), p. 545; Avi-Yonah (2000b), pp. 1616 *et seq.*; Vega Borrego (2003), p. 91.

45 Herrera Molina (1998), pp. 65-66. The solidarity principle is the criterion underlying the allocation of the tax burden between taxpayers.

46 Van de Vijver (2015), p. 243.

be treated differently. This idea divides the equity principle in two dimensions: horizontal and vertical equity[47]. The ability-to-pay principle operates as a measure of comparability between two situations in the tax field.

First of all, it is important set that the non-discrimination principle does not work for the single tax principle. Even though the foundation of this principle is the equity principle, the non-discrimination principle operates in a negative manner and only with respect to the horizontal equity.

- The non-discrimination principle involves a negative obligation that requires not doing anything that might violate horizontal equity[48]. On the contrary, equity requires an active intervention by the State[49]. Public authorities must design a fair tax system in order to achieve an effective equity.
- The non-discrimination principle operates only in the context of horizontal equity because discrimination means a violation of the horizontal equity[50]. However this principle does not incorporate any criteria of differentiation for incomparable situations. In other words, it does not contain any criteria about how vertical equity should operate[51]. Therefore, the non-discrimination principle does not oblige to respect the ability-to-pay principle.

Nevertheless, the equity and ability-to-pay principles do work to build the single tax principle. Both principles cannot work in isolation. The equity principle needs an appropriate pattern of differentiation, a measure to distinguish equals from unequals[52]. This criterion is the ability-to-pay principle. The ability-to-pay principle justifies that two taxpayers are taxed differently[53].

Real mobility does not appear to constitute a violation of equity. Let´s imagine two taxpayers residing in a country with a territorial system (exemption method). Taxpayer A has income of €100 from a foreign source (the foreign source is a low-tax jurisdiction) and taxpayer B earns income of €100 from domestic sources. Even though both taxpayers support different tax burden, this different taxation is justified by *internation equity* considerations[54]. According to the benefits principle, the source country assumes the primary taxing right on active income and the residence country renounces to tax foreign income because considers that active income has more economic allegiance with the source country[55]. The territorial system just taxes the ability-to-pay arising within its territory. Moreover, a capital import neutrality policy (CIN) may justify this different treatment because of the necessity for resident

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47 About horizontal and vertical equity, see Musgrave (1959 and 1990), Kaplow (1989), Repetti and McDaniel (1993) and Repetti and Ring (2012).

48 Santa-Bárbara Rupérez (2001), p. 43, defines non-discrimination as a rule that prohibits violating the equity, but without obliging to promote that equity.

49 Santa-Bárbara Rupérez (2001), p. 46.

50 Bammens (2012), pp. 22 and 989.

51 According to Kaplow (1989), p. 140, and Musgrave (1990), p. 113, vertical equity requires an appropriate pattern of differentiation between the persons that are not equals.

52 See note 45 and 51.

53 Herrera Molina (1998), p. 159, suggests that ability-to-pay is this “reasonable criterion” that justifies an unequal treatment.

54 About *internation equity*, see Avi-Yonah (2000b), pp. 1648 *et seq.*, and Kaufman (1998), pp. 188 *et seq.* The *internation equity* was first developed by Peggy Musgrave. This principle seeks to identify guidelines to allocate the taxing rights among countries according to fairness.

55 See note 27.

companies to maintain competitiveness abroad. The bottom line is that the generating-income activities are carried out in different countries, and then both taxpayers are in different situations so that a different treatment might be justified. In the same manner, *internation equity* might justify a deviation from ability-to-pay in those situations in which the residence country abstains from taxing (through a *tax-sparing* clause) because the generating-income activities are located in developing countries.

Now let´s modify the previous example and let´s assume that both taxpayers carry out their activities in their residence country. However, A has exploited some legal gaps to shift its tax base to a foreign low-tax country. In this situation it appears to be no justification for a different treatment as both taxpayers carry out their activity in the same country. Therefore, internation equity justification appears to vanish. It is a "stateless income" situation whereby tax location is not aligned with real location. In other words, a same taxable event has two different tax consequences (both taxpayers should be treated equally, according to their ability to pay). Besides, according to the benefits principle it does not seem legitimate that a taxpayer whose activity benefits from public services and infrastructure does not contribute to support public expenditure.

In the previous avoidance situation, two questions arise. The first one is whether this different tax treatment may be justified by investment attracting and competitiveness purposes. In other words, may tax competitiveness justify the granting of certain privileges? If we take a look at the so-called *production tax havens*[56], there is no legitimacy concern because they are deliberately aimed at raising investment and welfare. Therefore, equity deviations are justified. Nevertheless, when legal gaps are responsible for facilitating tax privileges there are two potential conclusions. The first conclusion suggests that to the extent that those privileges are not deliberate by the legislator, no justification can be invoked to justify an equity deviation. The second conclusion relates to the hypothetical situation in which legal gaps are deliberate[57]. In this situation, the lack of transparency about the State's intentions provokes a violation of the principle of legality, which requires transparent laws[58]. Some authors have supported the legitimacy of formal avoidance with economic arguments such as international competitiveness[59]. Nevertheless, I do not believe that economic motivations may be predominant to the democratic principles of legality and transparency. Between the citizens' "right to mistake" and "obligation to be right", it

56 The "*production tax haven*" expression was coined by Avi-Yonah (2000b), pp. 1588 *et seq*. The production tax havens are special regimes aimed at attracting foreign investment with real and physical presence. On the contrary, *harmful preferential tax regimes* are special regimes aimed at attracting very mobile activities. Both harmful preferential tax regimes and production tax havens are ring-fenced.

57 Ireland did not implement effective transfer pricing regulations until 2010. Ault (2013), p. 1198, suggests that "some countries like the U.S. have been complicit in structuring their own CFC rules to keep the domestic tax base but in effect encouraging base erosion by U.S. companies operating in other jurisdictions, thus lowering the U.S. companies' overall effective tax rate and strengthening their competitive position in foreign markets". Similarly Ting (2014), p. 48, about the cost sharing agreements in transfer pricing. Rosenbloom (2000), p. 153, has suggested an ambiguous and soft attitude by the US authorities towards the check-the-box regime and the arbitrage possibilities. Webb (2004), p. 80, evidences that multinationals and business associations have lobbied in favour of maintaining legal loopholes.

58 Van de Vijver (2015), p. 253, states that the principle of legality should guide the States in analysing double non-taxation.

59 Bracewell-Milnes (2003), p. 96, distinguishes between *substantive avoidance* and *formal avoidance*. The former results from the real mobility. The latter results from the profit shifting techniques. The author says that formal avoidance is more beneficial because it does not cause flight of capital.

should prevail the former. The principle of legality is the last resort and guarantee in hands of the democratic societies.

The second question about tax avoidance is about to what extent every taxpayer has right to access to aggressive tax planning. If every taxpayer could do aggressive tax planning, we might infer that there are no deviations from the equity principle. Nevertheless, the labour factor is much more immobile than capital. Besides, capital income tax bases have more legal resources to artificially shift to other countries. Lastly, aggressive tax planning requires the taxpayer to spend a lot of resources in tax advisors[60]. Therefore, we can conclude that not every taxpayer can access to aggressive tax planning.

3.1.1.3 Internation equity

The previous analysis about equity and ability-to-pay departs from a presumption: that a single State can legitimately claim the taxing right on an income over other countries. Who is that country? According to which criteria taxing rights are allocated among countries? Without a clear response to these questions, the single tax principle is a vacuous principle. If the single tax principle obliges countries to allocate taxing rights in order to avoid double taxation, then the allocation of taxing rights will determine indirectly the level of the single tax principle[61].

Consequently, without a coherent and fair distribution of taxing rights, the equity principle does not tell us anything. **Coherent** because it is necessary that the taxing rights allocation does not provoke any hybrid outcome. In the hybrid situations, either both countries claim taxing rights on the same income or no country claims taxing right on the same income. The allocation should be **fair** as well. Allocation criteria should comply with fairness standards in order to avoid artificial distribution of the tax base, giving rise to tax avoidance opportunities. It might happen that developed countries want an allocation that prevents taxpayer from base erosion and profit shifting. On the contrary, developing countries might want an allocation that encourages capital mobility in order to attract investment. Setting a dividing line between what is considered real capital mobility and what is considered artificial tax base mobility is one of the most important dilemmas in international taxation. Depending on the different interests of the countries, the response to this dilemma may vary[62]. At this point, it is important to question which system is fairer, the arm’s length or the formulary apportionment approach?

Whereas interindividual equity and ability-to-pay have to do with equity between taxpayers, internation equity has to do with equity between countries[63]. We have seen that interindividual equity needs an appropriate pattern of measure: the ability-to-pay. In the same manner, internation equity needs specific criteria to concrete a fair distribution

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60 The *Action Plan on Base Erosion and Profit Shifting* by OECDE (2013), p. 8, mentions that domestic companies have more difficulties than multinationals to do aggressive tax planning.

61 *Supra* note 27. The benefits principle, which allocates the taxing rights among countries, determines the level of the single tax principle.

62 Eden and Kudrle (2005), p. 108.

63 Kaufman (1998), p. 188. This author says that interindividual equity is a domestic issue, whereas internation equity is an international issue.

of taxing rights. In this regard, beyond the theory developed by Peggy Musgrave and the benefits principle developed by the four economists[64], there is no rigorous theory.

The benefits principle[65] rests on too weak, ethereal and arbitrary assumptions and criteria, such as the "source" concept[66]. The "residence" concept does not have a uniform definition. Some countries locate the residence jurisdiction where company is incorporated, whereas other countries locate it where company is managed. Moreover, residence is becoming expanded through the CFC rules to embrace a less formalistic approach[67]. On the other side the source principle rests on a set of specific rules based on practicability and arbitrariness considerations. Therefore, even though source is a necessary concept, it is somewhat vacuous[68]. For instance, the allocation of the active income rests on the permanent establishment notion and the arm's length standard. Both the arm's length standard and the permanent establishment threshold are easy to manipulate by taxpayers and give rise to an artificial allocation of the tax base[69].

To conclude, there is no general and coherent theory about the "source" concept so that it permits its specification and extrapolation to new situations still not covered. Solving double taxation and double non-taxation from hybrid situations requires reassessing and reallocating the current allocation criteria.

3.1.1.4 Neutrality

Some scholars have assessed the single tax principle from an economic perspective[70]. According to these scholars, tax neutrality pursues taxation to be neutral regarding cross-border investment, in order to maximize the economic resources, increase global welfare and achieve international efficiency. Therefore, neutrality should be a guiding principle in international tax policy. International double taxation discourages cross-border investment, and undertaxation discourages domestic investment, and therefore both phenomena violate tax neutrality[71].

Nevertheless there is to be cautious regarding tax neutrality. First of all, I consider that the fact that taxes are not neutral should not be a bad thing. As I explained previously, taxes are a sort of benefits taxes that represent an equilibrium between taxpayers' preferences and States' necessities[72]. The variable taxes/public services should be a valid element for countries and taxpayers in order to fulfil their heterogeneous necessities. Eliminating the States' ability to compete in the international

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64 See *Report on Double Taxation submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp,* League of nations (1923). In this report, the four economists developed the *economic allegiance* doctrine that underlies the current benefits principle evidenced by Avi-Yonah. This allocation theory underlies the current international tax treaty net.

65 *Supra* note 27.

66 Vogel (1988), pp. 223 *et seq.*

67 Avi-Yonah (2007), p. 24.

68 About the vacuity of the source principle, see Vogel (1988), p. 223, Avi-Yonah (2000b), p. 1648, Avi-Yonah (2007), p. 27, and Lokken (2012), p. 140.

69 According to Kleinbard (2001), pp. 752-53, aggressive tax planning feeds on the artificiality of the source rules. Green (1993), p.70, suggests that source-based taxation is eroding the ability-to-pay principle due to profit shifting,

70 See Avi-Yonah (2007), pp. 8-10; Brauner (2003), p. 291; Ring (2002), pp. 109 *et seq.*

71 Avi-Yonah (2007), p. 9.

72 *Supra* note 15 and 16 and accompanying text. About benefits taxes, see Roin (2000), pp. 555 et seq. This author believes that "definition of neutrality is expanded to include governmental benefits" (p. 589).

arena through taxes would put at risk their ability to attract investment and grow in the long term.

Moreover, the traditional distinction between capital export neutrality (CEN) and capital import neutrality (CIN) is blurring little by little because international tax competition is exacerbating. In effect, the confusion of the traditional roles of exporting and importing countries is making useless this distinction[73].

Lastly, there is no unanimity regarding which policy is better, CEN or CIN. Some authors suggest that all is about a game with winners and losers, where each country adopts the policy that suits it best. In effect, CEN and CIN have been used by countries as tools to achieve national interests over international efficiency considerations[74].

3.1.1.5 Conclusion

The infringement of the equity and ability-to-pay principles does not involve a conflict with the taxpayers' right to do tax planning up to the extent law permits it. The core of this section lies on analysing the legitimacy of laws that, deliberately or not, allow taxpayers to avoid their tax obligations.

Consequently, the interindividual equity and ability-to-pay principles must inform not only the legislating activity, but also the activity of judges in the law interpretation[75]. Designing a fair tax system that favours the alignment between the tax base and the real activity must be a mandate for the public authorities.

In the same way, internation equity must guide the international community in allocating taxing rights according to fairness criteria. The main dilemma is to establish what is fair and what is not.

3.1.2 Limitations from the positivistic approach

The purpose of this paper is to analyse the background, potential existence and effectiveness of the single tax principle from a universal basis. Therefore, tax treaty law is out of the scope of this paper.

3.1.2.1 The existence of a general international law

If we depart from a classical approach of international law (i.e., as a law that governs the relations between countries and delimits the scope of the taxing rights in order them to be able to peacefully coexist), international double taxation is a phenomenon susceptible to be covered by international law[76]. I do not mean that general

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[73] See Gratez (2001), p. 264. The four economists already predicted this reality in 1923: "as semi-developed countries become more industrialised, with the resulting attenuation of the distinctions between debtor and creditor countries, the principle of personal faculty at the place of residence will become more widely understood and appreciated and the disparity between the two principles will become less obvious" (*Report on Double Taxation submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp*, League of nations (1923), p. 51).

[74] Graetz (2001), p. 293.

[75] Van de Vijver (2015), p. 252.

[76] See the Vienna Conventions on Diplomatic Relations and Consular Relations, in force as from April 24, 1964 and March 19, 1967, respectively. The international codification of diplomatic relations has a consuetudinary origin and has its roots in the classical international law. Those conventions recognize some exemptions on the diplomatic personnel.

international law (covering customary law and the general principles of law) prohibits international double taxation, but that international law might potentially cover double taxation since classical international law is intended to govern conflicts between countries exercising overlapping rights over a same object.

In order international law to be able to cover double taxation, it is not enough the existence of an international conflict involving overlapping taxing rights. Besides, it is necessary international law to identify specific distribution criteria in order to allocate the taxing rights. In other words, the single tax principle is an inoperative principle insofar as international law does not concrete specific criteria for allocating taxing rights. Under which premise can international law prohibit double taxation and non-taxation resulting from hybrid qualifications if it does not provide specific criteria to allocate taxing rights? If the benefits principle determines the level of the single tax principle (as Avi-Yonah says)[77], how could we know what this level is without any allocation criteria? In this regard, the allocation provided by the benefits principle cannot give us coherent guidelines since "source" and "residence" lies on changing and not universal criteria, such as the arm's length standard and the permanent establishment threshold[78].

Nevertheless, the previous reasoning does not apply to double non-taxation[79]. We have to take into account that countries are free to abstain from making use of their resources and exercising their sovereign rights. Besides, it not likely that any country might feel offended and takes legal actions against other State just because it had not exercised its taxing rights. This reasoning corroborates the idea that double non-taxation cannot be defined by its quantitative aspect. The mere existence of low tax rates cannot give rise to any violation of international law. Therefore, the main question lies on determining whether customary law may prohibit the qualitative elements that underlie double non-taxation, such as the lack of transparency, violation of equity, or the lack of alignment between the tax base and the real activity.

The existence of a general international law in the tax field takes us to the potential existence of universal principles. The debate has been focused on identification an international customary law[80]. But the mere existence of a customary law does not mean that it is effective. Customary law just can repeal a State's conduct as long as it is an imperative or *ius cogens* norm[81]. This distinction is

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77 *Supra* note 27.

78 In the recent OECD projects, such as BEPS, the arm's length standard appears to be evolving towards a formulary approach. See Singh and Mathur (2013), p. 1332, and Arora, Sheppard and Madara (2013), p. 532.

79 Even though tax avoidance and base erosion do not appear to be covered by classical international law, under the coexistence principle, current international law trends are cooperation-based. Friedmann (1964) states that customary law is an inappropriate means for the international law of cooperation, This latter requires positive regulations of economic, cultural and social issues.

80 According to Rosenbloom (2000), p. 166, the international tax regime "appears to be imaginary". This author denies the existence of a general international tax law and the single tax principle. Kane (2004), pp. 113-16, and Rosenzweig (2007), p. 588, have criticized the existence of the single tax principle. On the contrary Avi-Yonah has supported the existence of an international tax regime qualifying as customary law (Avi-Yonah (2000a), pp. 168-71, Avi-Yonah (2007), pp. 2-10, and Avi-Yonah (2015)). Also in favour of the single tax principle, Ring (2002), p. 105. In an intermediate position Calderón Carrero (2010), pp. 197-98, believes that the current international tax regime lacks of coherence and is not binding. Brauner (2003), p. 291, supports the existence of the single tax principle as a pillar of an international regime in "crystallization".

81 *Ius cogens* gives rise to *erga omnes* obligations, as the International Court of Justice states in the case *Barcelona Traction, Light and Power Company, Limited*, I.C.J. Reports 1970, p. 32, paragraph 33.

important because a first approach to an eventually binding single tax principle requires to know whether it is an imperative norm or it can be repealed by the mere State's will. Is the single tax principle a *ius cogens* norm?

The first problem is that the normative *corpus* of the *ius cogens* does not have a conventional source. Even, the voluntarism doctrine has denied the existence of *ius cogens*[82]. Therefore, the responsibility for concreting the *ius cogens* norms has fallen on the International Court of Justice[83]. In this regard it is widely accepted that Human Rights and the general principles of law are *ius cogens* norms.

Qualifying the single tax principle as an *ius cogens* norm is a hard task because of the uncertainty of its content. In order to achieve legal certainty, the international community has codified, to the extent possible, the *corpus* of the *ius cogens* norms through multilateral treaties. Furthermore, the own existence of the *ius cogens* has been captured by article 53 of the Vienna Convention of the Law of Treaties. Consequently, I believe that the only chance for the single tax principle to qualify as an *ius cogens* norm is linking it with the Human Rights. Specifically with the social and economic Human Rights (the second generation), from which tax justice principles derive[84].

Out of the Human Rights scope, it is really hard to talk about an *ius cogens* in international taxation that might bind States beyond their will. Every country is free to design its tax policy as it suits it best and to pursue its own national interest, permitting either double taxation or non-taxation[85]. Even considering the single tax principle as a customary law norm, countries can sign bilateral treaties with *inter partes* effects or act unilaterally under the "persistent objector" rule[86].

Analysing the elements of the customary law, I do not believe that the international tax regime (and its underlying pillars) could qualify as customary law. The customary law requires two concurrent elements: a State practice and an *opinio iuris*[87].

Prima facie, it is possible to assert a State practice regarding the avoiding of international double taxation. As Tsilly Dagan evidences, there is no need to look at tax treaties to corroborate that almost every country has implemented any measure to avoid international double taxation, thus turning tax treaties into a superfluous instrument[88].

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82 Pastor Ridruejo (2009), p. 44. Article 53 of the Vienna Convention of the Law of Treaties just mentions the existence of the *ius cogens.*

83 Pastor Ridruejo (2009), p. 44.

84 Van de Vijver (2015) seeks to link the prohibition of double non-taxation with the European Convention on Human Rights, specifically with the principles of non-discrimination and legality. The report *Tax Abuses, Poverty and Human Rights,* issued by the International Bar Association's Human Rights Institute (2013), concludes that poverty is cause and consequence of many Human Rights violations (p. 102). The report states that countries have the obligation to establish a fair tax system that mitigates the poverty (pp. 132-33). Lastly, the report calls for a corporate social responsibility with regard to aggressive tax planning (p. 133).

85 About the limits to the taxing power, López Espadafor (2006), pp. 14-19, suggests that the extension of tax law has no limit other that the effectiveness of that one. In other words, taxing rights are born from the State's ability to enforce them. It is this circumstance, and not international law, what limits the extension of taxing powers. In the scope of the European Union, Member States have retained tax sovereignty as an expression of their individuality.

86 About the "persistent objector" rule, see Green (2016). According to Thomas (1996), p. 135, the arm's length standard is a customary norm, but the U.S. might qualify as persistent objector.

87 About the customary law in general, see Lepard (2010). With regard to the customary law in international taxation, see Thomas (1996) and Lepard (1999).

88 Dagan (2000), p. 995.

Vogel considers that there is no customary law prohibiting international double taxation[89]. According to this author, international double taxation can only be prevented by allocating taxing powers between countries, and so far, this allocation is just carried out by bilateral treaties. Nevertheless, I consider that the international tax treaty net is vast enough to evidence the State practice element. Besides, not only tax treaties have implemented a distribution of taxing rights. But also the arm's length standard, worldwide accepted, implements a method for allocation. Moreover, the arm's length has a dual function: anti-avoidance measure and allocation method to relieve international double taxation[90].

However, I do not believe that there is an *opinio iuris* with regard to the elimination of double taxation. The spiritual element or *opinio iuris* requires that the customary norm be "accepted as law"[91]. The own ICJ has required the conviction that the State practice has become binding because of the existence of a legal norm. Nevertheless, the Dagan's work evidences that double taxation relief is not motivated by a legal conviction, but by economic reasons such as competitiveness in the international arena[92]. According to Lepard, the fact that the international community has been reluctant to sign multilateral treaties implementing the arm's length evidences that countries want to protect their freedom to decide if they want to distribute the taxing rights and how to do it[93]. This is evidence that there is no *opinio iuris*[94].

The benefits principle governs the allocation of taxing rights between the residence and the source country. Here it is not possible to support the existence of an *opinio iuris* either. Out of the tax treaty scope, countries unilaterally tax their taxpayers to the extent possible and according to economic factors. It is not infrequent that source countries tax with high tax rates passive income arising in their jurisdictions, breaking thus the benefits principle (which grants the taxing right on passive income to the residence jurisdiction). Secondly, the continuous "patch-up" of the international tax system through measures to avoid double non-taxation and base erosion is leading to erode the benefits principle[95]. International equity considerations also may alter the benefits principle allocation, for instance through the tax-sparing and matching-credit clauses[96]. Lastly, the benefits principle lies on arbitrary and artificial notions, such as source and residence[97]. Furthermore, the criteria that conforms the source principle, such as the arm's length and the permanent establishment threshold, are permanently changing in order to fight against aggressive tax planning. It is very hard to conclude that the "source" principle is a customary law norm because it is not universal (neither in

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89 Vogel (1986), p. 8.

90 Kaufman (1998), p.147.

91 Article 38 of the Statute of the International Court of Justice.

92 Dagan (2000), p. 940, uses the game theory to demonstrate that States behave motivated by competitiveness considerations.

93 According to Lepard (1999), p. 172, States prefer to govern those issues through bilateral treaties, and thus protect their autonomy.

94 Lepard (1999), p. 168.

95 Picciotto (2016), p. 234.

96 According to Kaufman (1998), p. 203, these clauses indicate "an acceptance of a certain degree of redistribution within the international tax system".

97 *Supra* note 66 and accompanying text.

time nor in space) and thus, we cannot extrapolate universal solutions to specific situations.

When talking about double non-taxation, it is harder to support the compliance of the two elements of customary law. The material element or State practice is not uniform or universal. It is true that the international community has raised great concerns about base erosion and developed a large set of anti-avoidance measures. This trend is more stressed in the developed countries and the OECD context because these countries are more interested in protecting their tax bases. However, this trend is sometimes incoherent because many countries tacitly consent to maintain legal loopholes[98]. On the contrary, out of the OECD context, developing countries support an allocation of taxing rights that favours the tax base mobility. As I said before, setting a dividing line between what constitutes real capital mobility and what constitutes artificial tax base mobility depends on the perspective adopted[99].

At first sight, it may seem that there is an *opinio iuris* against double non-taxation. The recent OECD and EU projects against harmful tax competition and base erosion have evidenced the necessity of building a fairer tax system[100]. Therefore the national selfish and competitiveness give in to a fair and cooperation-based tax system. Nevertheless, I find this attitude contradictory since the current international tax law does not prohibits the special tax incentives or preferential tax regimes[101]. Consequently, I do not believe in an *opinio iuris* that compels countries to adopt anti-avoidance measures against base erosion. This idea is reinforced, following to Lepard[102], by the fact that the OECD has decided to issue non-binding recommendations instead of binding decisions.

Lastly, it is in the context of the harmful tax competition where it is easier to support the existence of a binding general international law. Departing from the classical theory of international law as a law of coexistence, it is possible to question whether it is lawful that a country hinders, through opacity practices, the other States' ability to collect the income that legitimately belongs them[103]. Is there a violation of other States' tax sovereignty?

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98 *Supra* note 57.

99 *Supra* p. 12.

100 According to Hillgenberg (1999), p. 514, and Serrano Antón (2015), p. 94, a recommendation may contribute to shape an *opinio iuris*. According to Lepard (2010), p. 113, the *opinio iuris* involves the States' wish for a norm to have legal authority "now or in the near future".

101 The OECD considers harmful those preferential tax regimes aimed at attracting mobile activities. Only the European Union, through the State Aid rules, has prohibited what Avi-Yonah calls "production tax havens" (*supra* note 56). Nevertheless, this limitation is due to EU economic concerns, such as neutrality and competitiveness. This sovereignty limitation is understandable because the EU has a subsidiary function that permits it to grant subsidies to regions and sectors in crisis. However, in the international context there is no international organization with such subsidiary powers to mitigate poverty of countries, thereby it does not make any sense deprive sovereign countries of their tax policy instruments.

102 *Supra* notes 93 and 94.

103 The fact that a country has formalistic tax rules to attract capitals is not illegal itself, since every country has formalistic rules to some extent and it is not a sovereignty violation. What might constitute a violation of international law are the opacity practices.

3.1.2.2 The effectiveness of the general international law in the domestic law

Analysing the single tax principle in the light of the general international law requires assessing not only its existence but also its effectiveness. Nevertheless it is convenient to repeat that analysing the effectiveness of international law is somewhat useless because it is unlikely that any country might feel offended by other States' tax policy up to the point that it takes legal actions.

Therefore, this section will analyse the practical difficulties that citizens find to enforce international tax law when is violated by domestic law, particularly focusing on the Spanish case.

We find the first obstacle in the internal reception of the general international law (customary law and the general principles of law). In some countries such as the Netherlands, the international customary law is not part of the domestic law, and therefore citizens cannot invoke such norms in domestic courts[104]. The Spanish Constitution does not mention the automatic reception of the general international law. Thus we can understand that in Spain, the international customary law does not attribute any subjective rights to its citizens, notwithstanding the potential international liabilities incurred by Spain when not observing such norms. This conclusion is aligned with the necessity of preserving the principle of legality and the rule of law in taxation[105].

On the other hand we cannot forget that Human Rights must inform the tax policy of States. Progressively more voices claim more prominence of Human Rights in the taxation field[106]. Human Rights have been fully captured in the Spanish domestic law by international conventions and the Constitution, and therefore they enjoy an efficient protection at domestic level (writ of protection or *recurso de amparo*) and at international level (European Court of Human Rights). However, in the taxation field, the Human Rights lose all their effectiveness:

- The first reason is the lack of "juridification" of a close link between Human Rights and tax justice principles. Tax justice principles such as equity or ability-to pay are captured in article 31 of Spanish Constitution. Such principles have a programmatic nature and they are intended to guide the lawmaker in making tax law. Consequently these principles are not subjective rights for the citizens and taxpayers. Citizens do not have effective mechanisms to raise in court the adaptation of domestic tax law to those principles.
- Some authors have suggested that tax law is susceptible to be guided by the second-generation Human Rights[107]. These rights are fundamentally economic, social and cultural in nature. The problem is the lack of effective

104 Such is the case of the Netherlands (Smit (2012), p. 538) and France (Dubut (2012), p. 315).

105 González Martínez (2010), p. 580.

106 Following a humanistic orientation, movements like Tax Justice Network have claimed the establishment of fair tax systems. See also International Bar Association (2013).

107 Gutmann (2011), pp. 107 and 108. This author states that first-generation Human Rights have a clear link with formal tax law. However, the second-generation Human Rights could be a usefull instrument to inspire the substantive tax law.

mechanisms to protect these rights[108]. The more plausible reason is that the ownership of the second-generation Human Rights is collective. Besides, the compliance with these rights involves an active intervention by the State, through the legislative development and the mobilization of large financial resources.

The last problem to enforce a potential single tax principle is the principle of legality and the rule of law, so important in taxation. These principles protect taxpayers when doing aggressive tax planning. Furthermore, they are widely captured in domestic laws, and they are regarded as general principles of international law, and therefore countries cannot violate them.

3.1.2.3 The States' unilateral conduct as source of international liabilities: the *estoppel*

Beyond the general international law, the unilateral conduct of States may be a source of international liabilities[109]. Serrano Antón has suggested applying the *estoppel* doctrine out of the tax treaties scope[110]. The *estoppel* is an institution whereby one State carries out a primary conduct that provokes that a second State, under good faith considerations, carries out a secondary conduct. Thus, the first State is bound by its own primary conduct, not being able to undo it to the detriment of the second State[111].

In the strictest theory it is possible to support that those countries voting for the BEPS recommendations have created a legitimate expectation on the rest of the international community about their intention to follow the BEPS. If eventually they do not implement the BEPS measures, either in their tax treaties or in their domestic law, those countries having followed the BEPS would be in a worse competitive position to attract foreign investment. Nevertheless, as Serrano Antón has expressed, it is unlikely that the mere vote for a non-binding recommendation could create a legitimate expectation[112].

A second manifestation of the *estoppel* could arise when a State adopts a specific criterion for allocating taxing rights (for instance the arm's length) under the legitimate expectation created by other countries. In this context two damaging situations may arise. If such a State exercises its taxing right, there is a risk that other State exercises its taxing right on the same income because it applies a different allocation criterion. Therefore double taxation arises. The second situation would happen when such a State, applying the allocation criterion, refrains from taxing and other State, applying a different criterion, also refrains from taxing the same income.

Lastly, It is possible to give some legal value to the matching principle if we apply the *estoppel* doctrine. The matching principle is a principle whereby a country refuses to exercise its taxing right in favour of the other contracting State under the

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108 The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 1966 does not provide expressly any right to an effective judicial protection.

109 About States' unilateral conduct as source of international liabilities, see Pastor Ridruejo (2009), pp. 140-148. Engelen (2008) has developed the *estoppel* theory in the scope tax treaties and the legal force of the Commentaries to OECD Model Tax Convention.

110 Serrano Antón (2015), pp. 95-96.

111 Pastor Ridruejo (2009), p. 146.

112 Serrano Antón (2015), p. 96.

legitimate expectation that this other State will tax the income at a minimum tax rate or *single tax*[113]. However, when this legitimate expectation is broken and this other State does not tax the income, the matching principle is violated. According to Avi-Yonah, tax treaties are signed under the expectation that the other contracting State will tax the income at a minimum rate. Therefore, tax havens are not "proper treaty partners"[114]. Hence, the unilateral implementation through domestic law of special tax incentives affecting to income covered by the tax treaty, might violate the legitimate expectation created on the other contracting State[115].

Nevertheless, the *estoppel* is ineffective in those situations where there is no legitimate expectation. For instance, in hybrid situations whereby no country claims taxing right on the same income. These situations are created by the inherent flaws of the international tax regime. Under which legal title can a country feel damaged since it never renounced to a taxing right over which it never had any right?

3.1.3 Historical-sociological approach: international cooperation and soft law in the modern international tax law

This approach analyses international tax law from a dynamic perspective. If international society changes, international tax law changes too, according to the new interests and values[116].

Despite the great difficulties to apply a binding international tax law to avoid double non-taxation, we should not forget that international tax law has evolved upon the time. While the classical international law was based on relations of conflict and coexistence, the modern international law moves towards international cooperation in order to better achieve national goals. Friedman described this transformation as the step from an international law of coexistence towards an international law of cooperation[117].

As a result of this new dynamic of cooperation, global law has developed. Global law is the consequence of a gradual process of "verticalization" of law[118]. International organizations have turned into trustees of national interests to encourage the cooperative way. As a result, domestic laws are harmonizing gradually, shaping a true global law. This new global law is not only limited to govern the international relations and to allocate taxing powers, but also it is incorporating common national principles, such as justice tax principles, and making them universal. This globalization of law is consequence of the "sympathy effect", whereby States tend to copy other States' solutions, and the recommendations and guidelines issued by international organizations[119].

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113 Avi-Yonah (2000a), p. 173; Tomazela Santos (2015), pp. 184-85.

114 Avi-Yonah (2000a), p. 173.

115 The purpose of this section is not whether the contracting State can exercise residual taxation. This issue correspond to tax treaty law (see Lang (2004) and Scapa and Henie (2005)). On the contrary, the analysis of *estoppel* is aimed at determining whether the affected State has legal action against the country bound by the *estoppel*.

116 Pastor Ridruejo (2009), p. 47.

117 Friedmann (1964); McDougal and Reisman (1965), p. 811.

118 Rosembuj (2011), p. 174.

119 Serrano Antón (2014), p. 47.

This evolution is appreciable if we look back the historical concerns of international taxation. Until the late 20th century, international double taxation was the main concern of international taxation. This concern fits perfectly in the classical concept of international law since it requires solving the overlap of taxing powers by allocating them. On the contrary, double non-taxation does not involve an international conflict. Double non-taxation has raised the necessity to cooperate in order to achieve common national goals and to enforce the national tax justice principles. Therefore, tax justice principles are becoming global. The main feature of the modern international taxation is the existence of supranational goals that require international cooperation.

Another of the main features of the modern tax law is the polycentry in the sources[120]. The centres producing tax law have been displaced to international organizations. Currently, the OECD and the European Union have become the most important agents producing international tax law; their recommendations, without having binding force, have influence *de facto* in law-making by countries.

The soft law is currently the key source in international taxation. Even though it is not binding, it has a lot of influence. The soft law appears to be the most effective tool for the international cooperation. The main virtue of soft law is the flexibility. It offers a "third way between the potentially uncomfortable position of describing the OECD guidance as 'law' (…) and the potentially unrealistic position of describing it as not law at all"[121]. As a result of this flexibility, the soft law allows to involve new actors in the tax debate, such as private actors, in order to reinforce the legitimacy and compliance of the hard law[122]. We can observe that some processes to adopt soft law norms incorporate public consultation procedures. For instance, the BEPS project has incorporated public consultations during its adoption[123].

Once asserted the existence of a global tax law, it is important to analyse its legitimacy. At first sight, international organizations work on purportedly universal principles. But sometimes these law-making processes lack of universal representation. The principle "no taxation without representation" and the rule of law require every tax norm to have democratic legitimacy. That is, every tax rule must be legitimised by the parliament, where citizens are represented. Therefore, we can question if the BEPS project enjoys legitimacy as in the adoption process only 44 countries have participated, which ones mainly represents to developed countries[124]. The same question has been set out with regard to the harmful tax competition project carried out by the OECD in 1998[125].

Furthermore, the international community is not uniform at all. The economic and demographic structures are different among countries. Besides countries and taxpayers might have heterogeneous preferences with regard to the tax level and public services associated therein.

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[120] Serrano Antón (2014), p. 47; Calderón Carrero (2012), p. 362.

[121] Christians (2007), p. 331.

[122] Gribnau (2008), p. 113.

[123] The European Commission opened a public consultation period during the process to adopt the Communication from the Commission about Double Taxation in the Single Market, COM(2011) 712 final. Similarly, the European Commission opened on February 2012 another public consultation period about double non-taxation.

[124] Serrano Antón (2014), p. 70.

[125] Webb (2004) analyses the legitimacy of the OECD harmful tax competition project.

On the other side, every tax policy suffers to a certain extent from politicization and ideology. And this politicization is present in the soft law production as well[126]. The OECD and the EU support opinions close to liberalism regarding both double taxation and base erosion. In fact, economic principles have prevailed over tax justice principles. In the EU, tax neutrality is the principle governing the fundamental freedoms. This same liberal and anti-protectionist feeling has led the OECD to fight against double taxation in order to create a global market as efficient as possible. Similarly, the OECD and EU efforts to fight against harmful tax competition and base erosion seek to create a level playing field for everybody in order to promote fair competition[127]. Both OECD and UE do not agree with protectionist stances as they have proscribed preferential tax regimes. Nevertheless, it is hard to discern whether these economic principles are genuinely aimed at achieving a global welfare, or by the contrary they are aimed at achieving national goals. As Graetz states, U.S. tax policy has always served to its national interests over neutrality concerns.

Therefore, neither every country is represented in the soft law law-making, nor represented countries may claim representation on the remaining countries. Keeping in mind this circumstance, we can question whether global tax law is truly universal or it is an imposition from the relevant actors in the international community.

4 CONCLUSION

As we have seen throughout this paper, it is difficult to support that the international tax law, relying on an alleged single tax principle, might prohibit double non-taxation and base erosion.

It is difficult as well to reconcile this alleged prohibition of double non-taxation with the tax sovereignty. Furthermore, the international tax regime is not coherent enough and the single tax principle appears to be vacuous without a coherent theory of internation equity.

From a positivistic approach, the international tax law is not coherent and uniform enough so that a binding general international tax law might be regarded. Moreover, the traditional tax justice principles are difficult to enforce at the international and domestic level.

Nevertheless, we cannot forget that the modern international law, based on international cooperation and the soft law, is helping to reinforce these tax justice principles and to mitigate the harmful effects of tax competition and base erosion. Therefore, there is margin to be optimistic.

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[126] Webb (2004), p. 819, suggests that every tax policy departs from ideological premises. Besides, Web (2004), p. 792, states that the private sector, such as business associations, is part of the "relevant community" that has influence over the tax law.

[127] During the 60s and 70s of the 20th century, the utilization of special tax incentives to attract foreign investment was widely accepted because of the social democrat ideology (Webb (2004), pp. 800-801).

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