

TAX TREATIES AND HUMAN/CONSTITUTIONAL RIGHTS: BRIDGING THE GAP? *Tax relief in a cosmopolitan context*

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*“To boost the British economy I’d tax all
foreigners living abroad”
Monty Python, Flying Circus*

*“Κοινή πατρίς ανθρώπων πάντων ο
κόσμος εστίν”¹
Musonius, ap. Stobaeus, Flor. xl. 9.*

1. Introduction

1.1. Why associate tax treaties and human/constitutional rights?

In academia, international tax law is still not “contaminated” by human rights interrogations. International bibliography includes no major studies on the question of the interrelation between international taxation, especially tax treaties and protection of human rights. The first explanation one could give for this “immunity” is simply that there is no relationship between the two legal sub-systems, each one focusing on different fields of human activity.

Indeed, it seems that both the scope and the method of tax treaties justify the lack of interest for them from the human rights standpoint. International tax law is an inter-state matter created by the need of peaceful coexistence of tax jurisdictions. In other words, sovereign States having an equal legal right to tax, treaties permit to settle technical problems generated by the overlapping of tax jurisdictions. In consequence, individuals – and *a fortiori* corporations, not to mention groups – are not directly concerned by these settlements.

Nevertheless, several arguments seem to plead in favor of a closer link between tax treaties and human rights. First of all, tax treaties contain a number of provisions that establish principles commonly found in human rights law. Especially the non-discrimination clause integrated in tax treaties attempts to guarantee an equal tax treatment between national and foreigner taxpayers². The egalitarian logic of these clauses is at least inspired by one the cornerstones of modern human rights theory, which is the principle of non-discrimination. Other common rules of tax treaty law are also

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¹ The world is all people’s common fatherland.

² Art. 24 of the OECD Model Treaty; see K. Van Raad, *Non-discrimination in International Tax Law*, Kluwer Law & Taxation Publishers, Deventer, Netherlands, 1986.

linked to human rights demands –even though the connection is not explicitly established– such as the exchange of information between tax authorities of the contracting States and the respect of confidentiality and privacy.

Moreover, we should not neglect the fact that tax treaties and human rights share some common field of regulation. Human rights intervene in economic activities – either to boost or frame them³ and so do tax treaties. From this point of view, points of crossing or even conflict are not to be excluded in principle.

The parallel of forms in the enforcement of tax treaties and human rights further pleads in favor of their proximity. The conclusion of international treaties is followed by an implementation at the national level, with a distinguished role played by national courts. Besides, international responsibility stands as the ultimate sanction in case of breach of legal norms of both international legal sub-systems.

But there is more to this parallelism. Practice in a comparative perspective shows that tax treaty provisions grant rights to taxpayers, who are entitled to invoke them before national courts. The guarantee of such rights can not be seriously explained as an “accidental” consequence of tax treaty conclusion. On the contrary, it is difficult to deny that the creation of this legal status for taxpayers is within the scope of tax treaties. This means, however that avoidance of double taxation in tax treaty law is closely related – I will try to demonstrate how – to the sphere of rights of individuals/corporations⁴ and duties of taxpayers. Suddenly, the question of human rights does not stand far away from tax treaty law any more, even though at this point we can only acknowledge that a relationship between them may be possible. Indeed, all these arguments however are based on the claim that tax treaties and human rights *can* be connected. My argument goes further than this statement. The link between these two legal subsystems is not only possible. It is also *necessary*.

From the constitutional law standpoint, tax sovereignty does not imply unlimited tax power. Despite the leeway left to State authorities in the design of tax policies, Constitutions fix the framework within the limits of which tax power can be exercised⁵. These constitutional constraints cannot be ignored in the case of tax treaty-making power. Coherence of the national legal order and, above all protection of constitutional rights demand that tax treaty provisions also comply with these requirements. In *Foster v.*

³ See Mark Kelman, *Strategy or Principle? The Choice Between Regulation and Taxation*, The University of Michigan Press, Ann Arbor, 1999.

⁴ At least from a legal standpoint, the question of “human” rights of corporations is resolved; see, Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press, Oxford, 2006.

⁵ G. Brennan, J.M. Buchanan, *The power to tax – Analytical foundations of a fiscal constitution* (Cambridge University Press 1980) 3; E. Willemart, *Les limites constitutionnelles du pouvoir fiscal*, Bruylant, Bruxelles, 1999; Loïc Philip, *Les fondements constitutionnels des finances publiques*, Economica, 1995.

*Neilson*⁶, the U.S. Supreme Court pointed out that a treaty must “be regarded in courts...as equivalent to an act of the legislature”. Thus, a treaty that contravenes the Constitution is not valid. Why would the answer be different in the case of *tax* treaties?

Certainly, tax treaties do not levy any tax. However, their provisions alter the conditions of exercise of tax power. Avoidance of double taxation mechanisms take away a part of tax power, while justifying special tax treatment for categories of taxpayers defined in the tax treaty provisions. Especially in national legal systems recognizing the supremacy of international law even over statutes posterior to the treaty, the enforcement of tax treaties stands as a significant restriction to the power to tax. But even in States with a rather minimalist apprehension of international law supremacy, as is the case of US law, tax treaty override may have serious consequences on the tax status of U.S. residents and citizens in the co-contracting State, due to the reciprocity principle⁷.

For international law, coherence among different rules of its legal order is an issue of capital importance. Hans Kelsen’s claim that no conflict of valid rules can occur in a legal order seems probably exaggerated and illusionary; especially, in the case of international law with its institutionally decentralized character⁸. However, the discontents and the contradictions found within this system should not be ignored or be considered as intractable. Despite the variety of settlements deriving from a wide network of some 2,000 bilateral agreements, tax treaty law repeatedly enforce a number of principles and legal settlements. Their compliance with the basic claim of international human rights protection needs to be assessed.

Finally, it seems possible and up to a certain point necessary to study fundamental rights from both an international law and a constitutional law perspective. Their adjacent if not common ethical foundations, the similar discourse in prescribing human/constitutional rights, the common content for the main corpus of protected rights – especially individual rights – the interchange of methods and metrics to assess breaches and justified restrictions to these rights and finally the parallel – if not common in the case of national courts – mechanisms of enforcement, all these element suggest the continuum in the promotion of (individual) rights as a value to be promoted at different levels of legal regulation (national, regional, global).

⁶ 27 U.S. (1829).

⁷ See Michael S. Kirsch, “The Tax Code as Nationality Code”, 43 (2006) *Harvard Journal on Legislation*, 375, 431.

⁸ Emmanuel Roucouas, “Engagements parallèles et contradictoires“, 206 (1987) *RCADI* 9.

1.2. Anatomy of tax treaties

At this preliminary stage, it would be useful to briefly remind the “anatomy” of tax treaties. Their method has not substantially evolved over the last century⁹.

The basic content of tax treaties concerns distribution of tax rights between the contracting states. This supposes, first, the definition of certain concepts such as “residence” and “permanent establishment” as well as the classification of income items and, second, the assignment of taxing rights to the contracting parties¹⁰. According to these “distributive rules”, tax jurisdictions may be strictly delimited. This means that the tax treaty provisions, on the basis of reciprocity, confer exclusive tax rights to one state whereas the other state is totally deprived from its tax power. In this case, the avoidance of double taxation is directly regulated by the tax treaty, in the sense that its provisions stand as a law of conflict determining the competent tax jurisdiction.

Nevertheless, tax treaties do not always ensure such a clear delimitation of tax jurisdictions. Tax treaties often recognize that States “may” tax certain individuals, corporations, capitals or activities. In this case the question of avoidance of double taxation is not resolved through strict delimitation of tax jurisdictions. Tax treaties offer relief from double taxation by defining which State should renounce from its right to tax. Unless otherwise provided by special provisions, it is the State of residence that undertakes this obligation, according to the general clause of relief from double taxation (article 23 of the OECD Model). Alternatively, the tax treaty may fix a sharing of tax rights between the two States, accompanied also by a burden of tax relief. As for the mechanisms of tax relief, the two systems offered in practice are the tax credit system – offered by one State for the amount of tax paid to the other State – and the exemption system, consisting in reducing the final income tax on the basis of the tax already paid for the same income item to the other State.

Finally, it should be reminded that avoidance of double taxation is only an aspect among others a tax treaty deals with. Tax treaties also provide for a general principle of nondiscrimination of nationals of the co-contracting State in the field of taxation, an exchange of information between tax authorities of the contracting parties and administrative assistance and a mutual agreement procedure aiming to resolve problems of interpretation through discussion between the two parties. Despite the interest they present¹¹, these provisions cannot be thoroughly examined within the short limits of this paper.

⁹ See A. Easson, “Do We Still Need Tax Treaties?”, 54 (2000) *Bulletin for International Fiscal Documentation* 619.

¹⁰ Roy Rohatgi, *Basic International Taxation*, Kluwer Law International, London, The Hague, New York, 2002, p. 45.

¹¹ These provisions are not only valuable complementary elements in the avoidance of double taxation. They also have their distinct, autonomous importance in the regulation of international tax relations with

The paper will proceed in three sections. First, I will examine the question of the ethical foundation of tax treaty law (2), for any relationship between tax treaties and human rights cannot be sufficiently analyzed on a pure basis of crossing norms. The understanding of the underlying ethical and political challenges is necessary. The next section gives an account of the cross-fertilization between human rights protection and international tax law relief (3). Finally, the paper studies the limits of tax relief from the human rights standpoint; limits related to the fragmentary solutions offered by tax treaties (4).

2. The ethical foundation of tax treaty law

2.1. Realism?

Cross-border activities create transnational wealth. Consequently, the question of their taxation arises. Nevertheless international legal system is not ready to respond to this need. As John F. Avery Jones puts it: “Taxpayers have become global; tax authorities have not”¹². In principle, if a State considers itself competent to tax, its tax jurisdiction is founded. At least from a national point of view, only constitutional law constraints could limit this possibility. Nevertheless, Constitutions in general do not determine what should be taxed or not whereas States are eager to find sources in order to meet budgetary demands¹³. And even if “*tax jurisdiction is a consequence of a State’s territorial sovereignty*”¹⁴, there is no general agreement on the legal foundations permitting the limitation of national tax jurisdiction.

From a purely constitutional law point of view, there seems to be no restriction on the State’s right, except any that the Constitution may define. In the *McCulloch v. Maryland*, Justice Marshal stated that the power to tax “is an incident of sovereignty, and is coextensive with that to what it is an incident. All subjects over which the sovereignty of a State extends, are objects of taxation...”¹⁵. This approach is absolutely orthodox in terms of domestic law, it neglects however the fact that the State’s tax jurisdiction has to coexist in the international environment with other tax jurisdictions that are equally – at least at the legal level – legitimate to exercise their power.

Later, the Supreme Court understood tax sovereignty in a less state-centered way. In *Burnet v. Brooks*¹⁶, the Court recognized that “we determine national (tax) power in

considerable impact on human rights questions. For instance, the Case *United States vs. Stuart*, 489 U.S. 353 (1989), reminds how the implementation of the exchange of information clause of a tax treaty can raise serious questions of privacy and self-incrimination.

¹² John F. Avery Jones, “Are Tax Treaties Necessary?”, 53 (1999-2000) *Tax L. Rev.* 1.

¹³ K.W. Dam, “The American Fiscal Constitution”, 22 (1977) *University of Chicago Law Review* 271, 275.

¹⁴ A. Knechtle, *Basic Problems in International Fiscal Law* (1979).

¹⁵ 4 Wheat. 316, 42.

¹⁶ 288 US 378.

relation to other countries and their subjects by applying the principles of jurisdiction recognized in international relations”. Thus, the overlapping of tax jurisdictions stands for an expression of competing sovereignties struggling in the economic field for survival. This approach which stands in fact as an application of the *Lotus* case-law¹⁷ in the field of international taxation has the merit of taking into account the juxtaposition of tax sovereignties and of granting or at least recognizing their existence¹⁸.

At the same time, this approach offers legitimizing ground to the network of treaties related to double taxation matters on the basis of political realist ideas. Political realism is based on the juxtaposition of national sovereignties and proposes strategies for national survival in the international context¹⁹. The conclusion of tax treaties relies upon the sudden understanding of States that their tax jurisdiction is not only parallel to that of other States, but that tax jurisdictions may cross each other in the field of cross-border economic activities. All States involved in the generation of cross-border wealth are allowed to levy tax on it²⁰.

In other words, according to the political realist approach, the delimitation of tax jurisdictions through treaties answers primarily to political and economic constraints, rather than an ethical need for human rights protection. It is apparent that this idea is based on a cost-benefits analysis: the limitation of a State’s tax jurisdiction and the loss of taxes due to the application of tax treaties are counterbalanced by the attenuation of tax jurisdiction conflicts and the sharing of tax benefits on the basis of reciprocity²¹. International tax law stands as a “peacemaker” among tax jurisdictions permitting the development of economic relations between countries²².

Furthermore, this conciliatory function of tax treaties responds to a need of coherence within the international legal order. International law does not simply intervene among distinct sovereignties in order to offer means of peaceful coexistence. It also ensures a legitimizing function for States. In other words, the delimitation – in terms of geography but also *ratione personae* and *ratione materiae* – of national sovereignties is founded on international law rules. Thus, it is normal for the international legal order to seek for ways to avoid or at least blunt conflicts generated by the conflict of (tax) sovereignties. Tax treaty law responds to this need.

¹⁷ Permanent Court of International Justice, Decision of September 7, 1927, *Collection of the Court’s Case-Law*, series A, n° 10.

¹⁸ R. Rohatgi, *Basic International Taxation* (Kluwer Law International, 2002) 12.

¹⁹ Terry Nardin, *Realism, Cosmopolitanism and the Rule of Law*, 81 (1987) *Am. Soc’y Int’l L. Proc.* 416.

²⁰ Concerning the different criteria permitting to justify a link to a State’s tax jurisdiction, see Rutsel Silvestre J. Martha, *The Jurisdiction to Tax in International Law, Theory and Practice of Legislative Fiscal Jurisdiction*, Kluwer Law and Taxation Publishers, Deventer, Boston, 1989, p. 43 seq.

²¹ In fact equality among states promised in this way is inaccurate. A global balanced distribution of tax profits supposes national economies of equal or at least similar capacities, which of course is not always the case between contracting States.

²² Martha, p. 9.

Nevertheless, without denying the importance of political realism's suggestions, it seems that they cannot offer a complete, persuasive philosophical justification for the development of tax treaty law.

First, the discourse bears a strong tautological character by emphasizing on the need to avoid tax jurisdictions conflicts without explaining the underlying reasons justifying this conciliation. Besides, the apprehension of tax treaty conclusion as a purely inter-state matter seems difficult to reconcile from both a philosophical and a political standpoint with the fact that tax treaty provisions are self-executing and directly invoked before national courts by individuals and corporations against national tax power. Of course, from a purely legal point the foundation of subjective rights on the basis of international treaties has nothing original by itself. The concept of direct effect and/or integration of international norms in the national legal order sufficiently explain this phenomenon. However, here we are seeking to explain from a *philosophical standpoint* the function of tax treaties as a human rights protection mechanism –the key features of which will be illustrated later. The legal process to ensure this function is irrelevant at this stage. For the time being we should keep in mind that the ethical foundation claim refers to values not to a legal basis.

Even the economic and fiscal scope of tax treaty law seems hard to explain in terms of pure political realism. If the overlap of tax jurisdictions creates the need for protection of the State interest, tax treaties lead to the opposite result from a fiscal point of view. At least for the State of residence, which is normally obliged under tax treaty law to reduce or completely exempt individuals and corporations, the originally unlimited power of the State to tax is replaced by a share of tax jurisdictions and a decrease of tax revenue. Of course, economic arguments regarding the need to boost foreign investments plead in favor of international tax arrangements. Besides, in the case of a tax treaty concluded between a rich State seeking to extend the opportunities of investment abroad and an economically weaker State eager to receive investment capitals, the game of economic reciprocity is roughly played. The strategic element is the investor, for whom the State of residence tries to open international markets, whereas the State of source seeks to be attractive. This situation is easier to explain in political realist terms, in other words as a pure game of power.

However, these statements already push the analysis further than the rigid framework of political realism. The market player enters into the scene as the “vehicle” or (in a more liberal way) the final addressee of the avoidance of double taxation. Whether paternalistic or liberal towards the market player, the sharing of tax jurisdictions is somehow more complicated than a matter of State survival in the international context. Even the Public Choice movement that argues that State is “*a giant rent-seeking machine*

*that provides wealth transfers to the highest bidder*²³, cannot by itself offer an absolutely convincing explanation for the interest of the State to grant tax relief for market-players engaged in wealth produced (and often even spent) abroad²⁴.

Finally, even if one accepts that the ratio of tax treaty law is the satisfaction of the State's *stricto sensu* economic needs, it would be quite difficult to fit in this approach the fact that several income items and legal situations described in tax treaties have a primarily "social" character. Double taxation of dividends, of associated enterprises and even income from personal services creates negative conditions for cross-border investments. But in the case of pensions or child's support allowances (Article 18 of the OECD Treaty Model) there are distinct social considerations, related to the mobility of non-active individuals. The same goes for the taxation of students (Article 20 of the OECD Model) or the tax exemption of charities which are residents of the co-contracting country²⁵. Of course, it can be argued that these legal situations are also economically measurable and, thus, respond to the same need for national economy development. However, here lies exactly the contradiction with the realist understanding of tax treaty law. If economy is perceived as a network of social relations rather than mere financial values, the question of double taxation cannot be severed from its social dimension. In the cases described here, the intervention of the State at the international level through tax relief stands as the exercise of social and welfare policy. Tax relief becomes a social, educational, cultural, etc. policy instrument. Besides, this statement applies to all political systems – even totalitarian – with a very emphatic application of course in the case of liberal democracy, where the individual is not annihilated under structures such as the "State", the "Nation", the "Party", etc.

One thing should be made clear. I do not deny the need of reconciling concurring tax jurisdictions as an objective to be pursued through tax treaty conclusion. We do not put it aside as an instrument to understand tax treaty law either. It seems, however, that there is more to the sharing of tax jurisdictions than the juxtaposition of sovereignties, trying to maximize their position in the international environment through tax treaty choices. The only case where tax treaty law can be philosophically and politically interpreted on the sole basis of political realism regards the taxation of governmental individuals, organizations and agencies abroad²⁶. In these cases, tax treaty law works as an extension of international law on diplomatic immunities, facilitating state representation abroad and, consequently, relationships between States. Beyond this case,

²³ Gary M. Anderson, "Referendum, Redistribution, and Tax Exemption: A Rent-Seeking Theory of Direct Democracy", in Donald P. Raftery, Richard E. Wagner (eds.), *Politics, Taxation, and the Rule of Law – The Power to Tax in Constitutional Perspective*, Kluwer Academic Publishers (Boston, Dordrecht, London), 2002, 81, 82.

²⁴ Ibid.

²⁵ See *infra* 4.2.

²⁶ See Article 28 of the OECD Model Treaty.

the justification of double taxation relief leads inevitably to a more anthropocentric apprehension of tax treaty law²⁷.

To summarize, either as an underlying ethical foundation or as a means to understand tax treaty law, political realism's ideas do not offer satisfactory answers, when the analysis does not seek answers to the technical questions "who should pay how much to which country?" but rather to the more curious question "why ensure relief of double taxation?".

2.2. Cosmopolitanism

Cosmopolitanism describes a wide variety of views in moral and political philosophy. Recently, emphasis has been placed on the altruistic tendency of cosmopolitanism, understood as the concern for human beings we have never met (and probably nor will we ever meet)²⁸. This altruism is nevertheless an expression of cosmopolitan attitude, not its *raison d'être*. Without entering further into the debate on the definition of cosmopolitanism, for the needs of this paper, let's consider that in more general terms cosmopolitanism consists in loosening the traditional link between the State (or the *Polis*) and the individual and confirming "a certain positive attitude towards association with others leading to an extension of our sense of community"²⁹. Seneca's vision was pertinent when arguing that we are not confined within the limits of our own walls, but we make the world itself our fatherland, where we may find wider ground to develop our virtues³⁰. In other words, cosmopolitanism can also be motivated by an "egoistic" or better individualistic inclination to consider that personal interest is better served in a larger than the purely national scale³¹. Thus, the fact that in the case of economic transactions or immigration movements the motivations are directly related to the pursuit of wealth is not incompatible with this idea. The dissociation between the State and the individual should not be apprehended as a purely psychological inclination. It can be manifested in cross-border cultural and economic exchanges³².

²⁷ Already under the League of Nations System, A.N. Sack, "La double imposition et l'allègement de sa charge dans les travaux de la Société des Nations", *Revue générale de droit international public*, 1930, 97, 100 remarked: « *abstraction faite de ses intérêts économiques, d'ordre général, l'Etat du domicile ne saurait, bien entendu, rester indifférent si la double imposition constitue une charge par trop écrasante pour ses résidents et nationaux* ».

²⁸ Noah Feldman, "Cosmopolitan Law?", *Yale Law Journal* (forthcoming); see also Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers*, Norton, New York, London, 2006, 155 seq.

²⁹ Sharon Anderson-Gold, *Cosmopolitanism and Human Rights*, University of Wales Press, Cardiff, 2001, 20.

³⁰ Seneca, *De Tranquillitate Animi*, 4 ; see W.H. Hadow, *Citizenship*, 1923, Clarendon Press, Oxford, 168-169.

³¹ Cf. Aristide R. Zolberg, "The Dawn of Cosmopolitan Denizenship", 7 *Ind. J. Global Legal Stud.* (1999-2000), 511, 517-518.

³² Sharon Anderson-Gold, *ibid.*

Any cosmopolitan approach to tax treaty law raises, nevertheless, a serious problem. If cosmopolitanism stands as a dissociation between the State and its citizens, and if tax treaties contribute to this dissociation, why should the former encourage or serve the cosmopolitan? The answer is related to the consequences of a scattered landscape of juxtaposed sovereignties. Political realism is right in emphasizing the roots of the problem. Its weakness consists in neglecting the justification of the solution.

However, the simple disconnection between the sovereign State and the individual as a constitutive element of cosmopolitanism does not offer by itself an ethical foundation to tax treaty law. In order to answer the question of the moral justification –if any– of human rights protection in the field of tax treaties, this disconnection should respond to an ethical claim, for if we consider this disconnection as a moral capital by itself, the argument becomes tautological.

The first idea that comes in mind is property. Clauses on avoidance of double taxation aim to diminish tax burdens stemming from the overlapping of tax jurisdictions. In consequence, tax treaties offer guarantees for the enjoyment of wealth against excessive taxation. The protection of property rights against tax power is a classical theoretical issue³³. John Locke contended that personal property is a necessary condition for persons to enjoy life and liberty³⁴. From this liberal approach property appears to be a basic human right to be protected by legal means³⁵. Given the importance that property acquires in liberal democracies, it could be argued that behind the negotiation of a tax treaty stands the will of the contracting parties to reflect their moral visions on the question of property in international conventional rules, by offering a substantial protection of property in this sense. This deontological statement could stand as an honorable ethical foundation for the avoidance of double taxation.

This suggestion is not very convincing. At this point, it should be reminded that ex-communist States, including the USSR³⁶, have concluded tax treaties with liberal democracies. The skepticism on the apprehension of private property as a right was not sufficient to prevent the conclusion of tax treaties containing the common provisions to be found in practice. Besides, even among liberal democracies, the perception on ownership is not uniform³⁷, whereas the international protection of property as a human right is highly disputed, with the emblematic exception of the regional protection offered by the European Convention of Human Rights.

³³ Liam Murphy, Thomas Nagel, *The Myth of Ownership, Taxes and Justice*, Oxford University Press, 2002.

³⁴ Gary Wolfram, "Taxpayers Rights and the Fiscal Constitution", in Racheter, Wagner, 49, 50-51.

³⁵ Leonard W. Levy, "Property as a Human Right", in James W. Ely, Jr. (ed), *Main Themes in the Debate Over Property Rights*, Garland Publishing, New York & London, 1997, 25, 31.

³⁶ Convention between the United States of America and the Union of Soviet Socialist Republics on Matters of Taxation, with related letters, signed at Washington on June 20, 1973.

³⁷ Gregory S. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*, University of Chicago Press, 2006.

Furthermore, property is not the only human right / constitutional liberty to benefit from tax treaty law in double taxation. As we will see further, other rights equally protected at the international and the national level are implicated in double taxation matters. Freedom of business, which technically should be distinguished from property rights, freedom of association, freedom of religion and family protection are the rights most directly to be affected, even though the impact of double taxation on other legally protected freedoms is not to be *a priori* excluded. In consequence, if we consider property rights as the foundation of tax treaty protection, should we suggest implicitly that the protection of property stands as a matrix for other liberties equally concerned? Arguably, this can be said about the freedom to conduct a business – apprehended in a rather clumsy way in my opinion³⁸ as the legal possibility to intervene in the market and acquire wealth – what about freedom of association or freedom of religion, which may have only circumstantial links, if any, to the concept of property?

As a matter of fact, cosmopolitanism is not simply a method, a path to achieve certain political goals. The affirmation that the individual cannot be identified simply as a citizen of his national or local community but that he should be enabled to seek grounds for his accomplishment beyond national boundaries contains, though implicitly, a very important ethical claim³⁹. Human seeking for perfection implies the maximization of opportunities. This maximization cannot always be ensured within the strict boundaries of a State. However, the importance of the State is not denied. The recognition of these limitations on behalf of state authorities obliges them to try to find ways to overcome it⁴⁰. According to Kant, the State stands as a rational form of social organization whose objective is to guarantee the maximum of freedom and to facilitate the development of skills for each individual⁴¹. Given that mutual antagonism between States puts in jeopardy the conditions for the realization of this goal, it is necessary to find ways to ensure peaceful coexistence between them⁴². This statement does not apply only to the

³⁸ As a matter of fact, comparative constitutional case-law shows that freedom of business is more related to the development of one's personal and economic capacities and talents. For the French *liberté d'entreprendre* see the Conseil constitutionnel decision of January 16, 1982, 1982 Collection of Decisions 18; concerning the *Berufsfreiheit* in Germany and its relationship with taxation see Klaus Tipke, Joachim Lang, *Steuerrecht*, Otto Schmidt, Köln, 1998¹⁶, 128; as for the laconic provision of Art. II-76 of the Treaty establishing a Constitution for Europe, it stipulates simply that “the freedom to conduct a business in accordance with Union law and national laws and practices is recognized”.

³⁹ For the transcription of this ethical claim as political objective of the EU integration process see Joseph H.H. Weiler, *The Constitution of Europe – “Do the new clothes have an emperor ?” and other essays on European Integration*, Cambridge University Press, 1999, 342.

⁴⁰ Modern theories, such as the concept of “market-state”, confirm this role entrusted to public authority; David B. Oliver, “Tax Treaties and the Market-State”, 56 *Tax L. Rev.* (2002-2003) 587, based on the ideas of Philip Bobbitt's (*The Shield of Achilles: War, Peace and the Course of History*, 2002), notes that “this emerging order of the market-state might be described as promising to maximize the opportunity of its people, tending to privatize many state activities, and making representative government more responsive to the market”.

⁴¹ Sharon Anderson-Gold, *ibid.*

⁴² *Ibid.*

ultimate form of inter-state dispute, which is military conflict. Struggle for political influence and ultimately for economic development are also forms of inter-State competition. “Tax war”⁴³ among sovereignties obeys the same logic. By trying to expand tax power in order to increase collected taxes juxtaposed tax jurisdictions are potentially at permanent war. The impact of such conflicts on taxpayers is far from being trivial. Heavy tax burden is placed upon taxpayers’ shoulders because of the overlapping of tax sovereignties. Thus, the need to ensure peaceful coexistence of tax jurisdictions leads to settlements at the international level through the classical legal instrument of treaty conclusion.

This general position is applicable in the case of tax treaty law. One of the means to maximize opportunities for individuals, corporations or the State itself (as a market player or simply as the emblematic figure of common interest) is by delimitating national tax jurisdiction in common with other States. Despite the abstraction of this suggestion, its applications can be found in all cross-border activities that are potentially double taxed. In this sense, Public Choice Theory is not incompatible with the approach described above. What seems unsatisfactory, on the contrary, is pushing the Theory to its limits, by arguing that both the objectives and their underlying motivation are exclusively based on the idea of public decision-makers’ “self-interested wealth maximization”. The public interest model cannot be totally excluded⁴⁴.

Another argument in favor this approach is given by American tax law. Tax scholars have questioned the possibility to impose a tax on unrealized gains inhering at the time of renunciation of American citizenship in property held by the taxpayer⁴⁵. The major question concerns the internationally protected right to emigrate⁴⁶. Even though it seems difficult to establish a violation of this right by the imposition of an expatriation tax⁴⁷, the discussion reveals the underlying interest for mobility (of individuals and/or capitals) that taxation can potentially undermine. Double taxation relief stands as a means of facilitating this transnational mobility.

Certainly, it is not necessary to conclude tax treaties in order to attain peaceful coexistence of tax jurisdictions and ensure mobility. On the basis of a self-restraint tendency, municipal law can take this fact into account on a purely unilateral way by granting a tax credit, as is the case in US tax law, or by restricting the national tax jurisdiction to the territorial criterion. The State, each State, should stand as the protector

⁴³ Martin Norr, “Jurisdiction to Tax and International Income”, 17 *Tax L. Rev.* (1961-1962) 431.

⁴⁴ Gary M. Anderson, *ibid.*

⁴⁵ Detlev F. Vagts, “The Proposed Expatriation Tax – A Human Rights Violation?”, 89 *American Journal of International Law* (1995) 578.

⁴⁶ See Article 13 §2 of the Universal Declaration of Human Rights ; Article 12 § 2 of the International Convention on Civil and Political Rights; in the case of EC Law this right finds an enhanced expression under the form (and the specificities) of the free movement of persons.

⁴⁷ Detlev F. Vagts, 580.

against the harmful effects of overlapping tax jurisdictions. One should not overlook however that the municipal tax law “altruism” in question is granted as a political choice of the State. By applying its proper criteria, there is little limitation, if any, to the State’s tax power. Besides, tax relief is rarely granted as a general rule. Many exceptions, justified by fiscal concerns or political objectives of each State as well as the different systems of relief suggest that unilateralism does not ensure uniformity, or at least, reciprocity among states. The contractual character of tax treaty law offers the ground for harmonized tax relief solutions for cross-border activities. The need to ensure a certain order in a world of concurring and overlapping tax powers and on the basis of rational and common criteria is in the center of the clauses on the avoidance of double taxation.

Moreover, this contribution of tax treaties stands as a complement to the multidimensional environment legitimized by international law. From a legal standpoint, it seems that international law does not merely settle (pacific) relationships among sovereign States. It recognizes and legitimizes the coexistence of equally respected sovereign entities (the legal conception of state frontier is a good example, though not the only one in this sense). Faced with this multi-polarization, international law needs to offer tools in order to “correct”, or at least blunt, the confusion and the disorder due to the juxtaposition of equal sovereignties. Certainly, it is unlikely that we can derive such requirement from International Human Rights Law – as we will see, avoidance of double taxation is not a human right. Nevertheless, coherence of international law as well as the theories on its ethical foundation that break through the inter-state veil and speak about international community or *jus gentium* suggest that, beyond the fragmentary landscape of States stand common values or at least common concerns, putting the individual at the center. Thus, there is nothing surprising about the claim that international law should furnish adequate tools in order to establish rationality and encourage cosmopolitanism.

It should be made clear, however, that this cosmopolitan approach does not reject the relationship between the State and the taxpayer. As a matter of fact, tax citizenship⁴⁸ is reconstructed on new grounds. First, the negotiation of international treaties with third countries in order to obtain relief of tax burdens stands as an important illustration of the State’s concern for its (tax) citizens. This welfare function of the State towards its population renews the link between public authority and the taxpayers. Instead of levying taxes, the State ensures tax relief and maximizes opportunities for its residents abroad⁴⁹. Second, the logic of tax treaty provisions corroborates the protective mission of the State. The distributive rules of tax treaties are accompanied by a general obligation of the State to relieve its residents from having their income taxed twice. This privilege allocated to

⁴⁸ On this concept, see Emmanuel de Crouy Chanel, « La citoyenneté fiscale », 46 *Archives de philosophie du droit* (2002) 39 *seq.*

⁴⁹ In this sense, the ideas of Michel Foucault about the role of the State and “governmentality” can be useful: Michel Foucault, « La gouvernementalité », *Dits et écrits 1954-1988*, vol; III, Gallimard, Paris, 1994, 635 *seq.*

resident taxpayers to the detriment of national tax revenue is not only a technical choice. It is a major political act. It demonstrates the will of the State to keep tax burdens on its residents to a reasonable level and, thus, ensure substantive opportunities for economic, social and personal progress. In summary, tax citizenship is questioned and reconstructed before being affirmed⁵⁰.

3. The cross-fertilization of human rights protection and international law tax relief

Avoidance of double taxation as a statement or legal concept implies a broad understanding of the taxation phenomenon. It supposes that taxation is apprehended in a multiple dimension, in a legal environment where more than one tax jurisdictions coexist. This is an element of capital importance in order to understand the contribution of tax treaties to human rights protection. Indeed, in comparative positive constitutional law, it seems extremely difficult to claim a violation of a constitutional right because of excessive taxation, whenever the tax power simply exercises its prerogatives in parallel with the tax power of another State.

Of course, constitutional principles such as equality, substantive due process and non-retroactivity of tax law provisions can offer certain guarantees to taxpayers. Nevertheless, these provisions cannot ensure any protection against double taxation, whenever the national tax legislation decides not to grant such relief. Property rights, for instance, can be protected against excessive or confiscatory taxation. However, which constitutional legal order would be so audacious as to grant protection of property rights against excessive taxation, based on the fact that taxes have been already paid to another country? Or to reconstruct the constitutional principle of tax equality on the basis of taxpayers' tax burdens worldwide? This perspective of "extraterritorial" protection of the taxpayer's global property fits roughly with modern constitutional law reality.

In this sense, it appears that international tax regulations in the field of double taxation relief is not another mechanism of property rights protection at the international

⁵⁰ Besides, tax treaty law may raise the question of tax citizenship in terms of tax federalism. The confirmation of the link between the (federal) State and the taxpayer through tax treaty conclusion does not answer the question of the relation of the latter with the infra-state entity especially when it also exercises tax power. The matter is not irrelevant to the human rights question. The need for democratic legitimacy of tax treaty law cannot be ignored, on the mere argument that tax treaties do not levy taxes, given the limitation of tax power envisaged by tax treaty settlements. This democratic demand acquires a specific significance from the standpoint of (internal) self-determination and participatory rights. Infra-state entities with tax autonomy have an interest in participating, at least indirectly, in the tax treaty conclusion process, for the tax treaty obligations will have an impact on the exercise of their tax policy. The case of the 1975 Tax Treaty between Quebec and France is an astonishing example of a tax treaty between a sovereign State and an infra-state entity, explained by specific legal and, of course, political circumstances. Even though it does not allow any general conclusions, it reveals the underlying challenges for collective rights and democracy in the field of international taxation.

level. The cosmopolitanism that we have already proposed as ethical foundation for international tax treaty law permits to transcend the one-dimensional national logic and put cross-border taxation at the far more complicated international environment⁵¹. This achievement has not a mere descriptive importance but also a normative value, for it gives legal substance to a situation that otherwise escapes (national) legal orders while establishing specific constraints in favor of taxpayers and protected before courts of law.

The case of the European Convention of Human Rights is revealing. In the *National & Provincial Building Society v. United Kingdom*⁵², the Court seems to have admitted that double taxation due to the change of a tax regime can constitute a breach of the right to property⁵³. The case concerned, however, double taxation imposed by the same State. On the contrary, double taxation occurring as the result of overlapping tax jurisdictions does not constitute as such a breach of any human rights. International human rights stands as a source of obligations dictated to the State. Little attention has been paid to the need to ensure human rights protection in cross-border activities. Even the European Convention of Human Rights system (although considered as an exceptional model of regional protection system of human rights) is designed to ensure the protection of human rights at the national level⁵⁴. The letter of its provisions pleads in favor of this claim. In other words, human rights law has not developed so highly as to consider that double taxation is a breach of the corresponding freedom suffering from the overlapping of tax sovereignties. Thus, it seems extremely difficult to allege a breach of

⁵¹ In order to better understand the methodological step undertaken by tax treaty law, it appears interesting to link it to EC Law. Article 293 of the EC Treaty refers to the avoidance of double taxation through (multilateral) tax treaties among the Member States as a means to achieve the construction of the common market. In the *Gilly* Case (Case C-336/96, *Gilly*, [1998] ECR I-2793), the ECJ even recognized avoidance of double taxation within the European Community as one of the objectives of the Treaty. In this sense, it is not surprising that ECJ case-law often refers, in a rather pedagogic style towards the Member States, to tax treaty law in order to convince them to apprehend their tax jurisdiction as a variant in a larger context of cross-border activities (see for instance Case C-400/02, *Gérard Merida* [2004] ECR I-8471; Case C-319/02, *Manninen* [2004] ECR I-7477). In fact, this apprehension of tax sovereignty in the larger EU legal galaxy seems to be the underlying logic of the *Schumacker*-doctrine (Case C-279/93, *Schumacker*, [1995] ECR I-225), by which the ECJ states explicitly that “[a]lthough, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law”. In other words, the transcendence of States is an inherent element of the European integration program (“*Integrationsprogram*”) for the realization of which EC fundamental freedoms stand as cornerstones, exactly because they refer to cross-border situations. This consubstantiality between tax treaty law and EC law in the cross-border apprehension of human activities stands as a common methodological ground for the two legal subsystems. Even though, the instrument of bilateral tax treaties is far from being satisfactory for EC law demands – as we will see later – this fact explains the references of ECJ to tax treaties.

⁵² *National & Provincial Building Society v. United Kingdom* (1998) 25 EHRR 127.

⁵³ See Philippe Malherbe, « Vers un droit fiscal à visage humain ? », in *Mélanges en hommage à Michel Waelbroeck*, II, Bruylant, Brussels, 1999, 1192, 1200.

⁵⁴ Of course, the *Bosphorus Airways v. Ireland* Case (June 30, 2005) confirms the possibility to control a supranational authority, such as the European Union. However, the case of cross-border activities and the double taxation matter is different, for there is no supranational authority (to blame), but dispersion of the responsibility

property rights (or any other right) before the European Court of Human Rights on the mere fact that a State has taxed an income that has already been taxed by another State. Besides, any control based on a temporal criterion –which State has taxed first– would be extremely hazardous for interstate relations, for each State would be incited to exercise immediately its tax power. As for the taxpayers, they would also suffer from this phenomenon, as States would try to levy taxes even before the realization of the taxable income⁵⁵. Relief from double taxation through international treaties stands as a mechanism of regulation where the mechanisms of sanction appear ineffective.

Avoidance of double taxation is however not the only possible way for tax treaties to serve property rights. Treaties may also contribute to the reduction of potential excessive taxation by reducing withholding taxes imposed at source. For both fiscal and administrative reasons (increasing income revenue, reducing administrative cost and fighting against tax avoidance), withholding taxes are usually calculated in a rather inelegant way. By not taking into account expenses incurred in generating the taxable income, the taxpayer is exposed to an effective rate of tax that is significantly higher than the tax rate applicable to net income in either the source or residence country⁵⁶. Tax treaties reduce withholding taxes imposed as source, mainly by fixing a reduced tax rate. Certainly, it is not self-evident to prove that excessive taxation turns out to be confiscatory due to this effective rate of withholding tax, for in practice the limits of taxation against enjoyment of property are hard to define and leave an important margin of appreciation to the tax power⁵⁷. This fact stresses precisely the importance of tax treaty law which manages to lower withholding taxes on the basis of reciprocity. If for investor importing countries this stands as an incentive for investment, for capital exporting countries this solution offers tax relief to their residents⁵⁸.

It should also be stressed that property rights are not the only ones to benefit from tax treaty law. The previous analysis on the ethical foundation of tax treaty law allows thinking that other aspects of human activity may be at stake. Tax treaty practice confirms this idea. Religious associations, humanitarian organizations, scientific and educational establishments obtain relief from double taxation in their cross-border

⁵⁵ This perspective would be very problematic from the standpoint of human rights. In a relatively similar problem, the ECJ (Case C-9/02, *De Lasteyrie du Saillant*, ECR [2004] I-2409), seems to admit that property may stand as a limit to the taxation of still unrealized increases in value in case of a taxpayer transferring his residence in another Member State (in order to prevent a risk of tax avoidance). According to the Court this demand “deprive[s] the taxpayer of the enjoyment of the assets given as a guarantee”.

⁵⁶ Hearing before the Committee on Foreign Relations, United States Senate, 109th Congress, 2nd Session, February 2, 2006, p. 8.

⁵⁷ On the question of confiscatory taxation from the constitutional law standpoint, see Eric Kades, “Drawing the Line between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application”, 97 *Nw. U. L. Rev.* (2002-2003) 189; Allan R. Brewer-Carías, “Les protections constitutionnelles et legales contre les impositions confiscatoires”, in *Etudes de droit public comparé*, Bruylant, Brussels, 2001, 371.

⁵⁸ John P. Steines, *International Aspects of U.S. Income Taxation*, 2005², New York, p. 94.

activities. The doctrine of “regulation through taxation” apprehends tax levying as well as tax relief/exemption as economic policy instruments of dissuasion or encouragement of the related activities⁵⁹. In this perspective, transboundary exercise of the freedoms of religion and/or association is facilitated. Tax treaty law offers the possibility to erase impediments that undermine the effective exercise of human rights in a transnational context. Protection of family life (regarding taxation of family allowances and children support, or even the simple question of taxation of spouses who are residents of different countries) or freedom of expression (with regard to cross-border activities in the field of media or art) are facilitated through relief from double taxation as guaranteed by tax treaties. This social function of tax treaty law reaches its highest point in the case of double tax exemption for religious and charity organizations⁶⁰.

Nevertheless, tax treaty law does not merely contribute indirectly to the enjoyment of freedoms by facilitating their cross-border exercise. From their entry into force, tax treaty provisions grant specific rights to taxpayers. These subjective rights are not of course “human rights”. They constitute, however, legally protected rights on the basis of international and/or constitutional law. In this way, the relationship between tax treaties and human rights is here inversed. Here tax treaties do not stand as a mechanism of facilitating human rights enjoyment; it is the human rights protection that ensures the effective enforcement of tax treaty law.

This contribution of human rights is particularly important from the standpoint of property rights. More precisely, by the moment of their entry into force in the national legal order, tax treaty benefits are covered, in principle, by constitutional and international law standards of the protection of property. Of course, the constitutional protection of property rights depends on the specific content and the intensity of property protection granted by each constitutional legal order. In the case of international human rights protection however, and especially in the case of the European Convention of Human Rights the role of property rights in the protection of tax treaty relief benefits is beyond dispute. On the one hand, the European Court’s case-law extends the Convention’s protection to rights granted by international norms integrated in the national legal order⁶¹. On the other hand, “property” in the meaning of Article 1 of the

⁵⁹ Erik M. Jensen, *The Taxing Power – A Reference Guide to the United States Constitution*, Praeger, Westport, 2005, 180 ; Gilbert Orsoni, *L'interventionnisme fiscal*, Presses universitaires de France, Paris, 1995.

⁶⁰ See however infra § 4.2.

⁶¹ This situation does not seem to have been seriously examined until now in the ECHR case-law. The *Hornsby v. Greece* case (March 19, 1997), 24 EHRR 250 is an example of protection of subjective rights granted by supranational law (in this case EC Law) through the ECHR provisions. In this case, the EC fundamental freedom of establishment was watered down by the denial of the Greek administration to comply with the decisions of both the ECJ and the Greek Council of State. The breach of Article 6 of the ECHR and the control exercised by the Strasbourg court demonstrates the possible contribution of human

First Additional protocol is an autonomous concept, apprehended by the Court in a very large manner, including a large range of propriety interests that can not be considered technically as “rights”⁶². In these conditions, international law tax relief acquires sufficient legal (including judicial) protection.

4. Tax relief limits: fragmentary cosmopolitanism

4.1. Narrow Cosmopolitanism

The contribution of tax treaty law should not be overestimated, for it suffers of an astonishing oxymoron. Whereas it suggests a conception of taxation that transcends national apprehensions, it is bound by the most rigorous international law classicism: bilateralization, strict reciprocity and a very static content of tax treaty provisions, based on the OECD Treaty Model.

More precisely, tax treaty benefits do not constitute autonomous legal rights that can be invoked outside the framework of a tax treaty. In other words, positive international law does not establish any “right to a tax treaty”: if the treaty creates a right to the avoidance of double taxation, this right derives exclusively from the treaty provisions. Thus, a taxpayer cannot invoke the absence of a tax treaty as a breach through omission of the taxing State to conclude such a tax treaty.

Even in a regional entity of economic integration such as the European Union, where, as we saw, a cross-border apprehension of subjective rights is intelligible, no right to the avoidance of double taxation through tax treaty conclusion can be founded⁶³. The lack of a European competence in the field, reflected on article 293 of the EC Treaty, confines the protection of subjective rights based on the EC freedoms to the evaluation of the legality of one’s State attitude on the basis of the nondiscrimination principle or the potential or real obstacles imposed on the exercise of the freedom⁶⁴.

The close relationship between the enjoyment of tax relief benefits and the conventional framework is also demonstrated through the application of the reciprocity principle. A contracting State can deny tax relief benefits to tax residents of the other

rights protection to the enjoyment of rights (such as tax benefits) granted on the basis of international provisions.

⁶² ECHR, *Wiggins v. United Kingdom*, n° 7456/76, 13 DR, 40 at 46, (1978); see D.J. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, Dublin, Edinburgh, 1995, p. 517.

⁶³ The regrets expressed by the ECJ in the *Manninen Case*, *ibid.*, on the absence of a multilateral tax treaty framework for EU Member States clearly show this weakness of European competencies in the field of double taxation.

⁶⁴ Théodore Georgopoulos, « Le rôle créatif du juge communautaire en matière de fiscalité directe – De l’affaire sur l’avoir fiscal français à celle sur l’avoir fiscal finlandais », 41 (2005) *Revue trimestrielle de droit européen* 61.

country because of the failure of the other party to honor its own tax relief obligations. However, from the human rights perspective, reciprocity offers no valid justification for a State to put aside its own obligations⁶⁵. In the case of tax treaty law, the protection of double taxation relief passes through the bilateral conventional framework. Any doctrinal proximity to human rights law does not reach the point of emancipation from this classical configuration.

Nevertheless, the narrowness of tax treaty law is even more obvious, from an external to the treaty relationship point of view. Indeed, double taxation relief is a privilege that acquires a double apprehension. As a benefit granted to taxpayers, it contributes to an equitable tax treatment. In the meantime, however, the static character of tax treaty's bilateral framework seriously questions the conformity of the relief granted to a limited circle of taxpayers. In particular, one may legitimately wonder whether the special tax regime established by tax treaty provisions reserved to certain taxpayers (those *ratione personae* concerned by the tax treaty) complies with constitutional or international law demands on equal treatment.

This question is further complicated by the practice of Limitation of Benefits Clauses (LOB) contained in tax treaties. These clauses aim to prevent abusive application of tax treaties by third country residents that would try to build up a corporate construction in order to fall within the ambit of the tax treaty and benefit from its provisions, including double taxation relief⁶⁶. The need to fight against abuse of rights granted by tax treaties offers sufficient justification for LOB clauses –which often acquire a highly technical character⁶⁷– on grounds that are not unknown to the human/constitutional rights doctrine. Nevertheless, this strict bilateral character of tax treaties raises serious questions from both constitutional and international law standpoints.

At first sight, it seems that the constitutional principle of equality is at stake, especially in countries applying the exemption system. Relief from double taxation granted from the country of residence means that for taxpayers covered by the tax treaty provisions, the equivalent domestic tax law provisions will not apply. Now let's consider that the tax to be paid at the source country is significantly lower than that paid according to national tax legislation. By getting tax relief in his country of residence, the taxpayer is in an advantageous position compared to tax residents, to whom the tax treaty does not apply. Under these circumstances, one may plausibly ask if *a taxpayer could allege a breach of the constitutional principle of equal tax treatment because of the existence of a tax treaty that creates a favorable situation for other resident taxpayers.*

⁶⁵ See Article 60 § 5 of the 1969 of the Vienna Convention on the Law of Treaties.

⁶⁶ Which is a very interesting possibility in case the country of residence has not concluded a tax treaty with the country the taxpayer intends to make business in.

⁶⁷ See Article 26 of the U.S.-Netherlands Tax Treaty, as rewritten by the March 8, 2004 Protocol.

Even though the different treatment due to tax treaty provisions is obvious, it is extremely difficult, if not impossible, to establish a breach of the tax equality principle. A large margin of appreciation being left to the tax power, the derogations based on tax treaty can arguably escape any equality principle test. Besides, it should be pointed out that in the case of implementation of a tax treaty, there is a serious legal reason permitting the differential treatment of the taxpayer, for he is already taxed by another country. The demands of tax treaty law justify this different treatment.

The answer is roughly different on the basis of international law. Reciprocity that strictly applies in tax treaty law is not watered down by the human rights principles. Double taxation relief is by no means an international human right to be granted for all taxpayers. The bilateral treaty instrument that commonly applies in practice stands as an approval of this State-to-State method by the international legal system.

Nevertheless, three exceptions nuance this general statement. *First*, in the hypothetical case in which a tax treaty would explicitly exclude a specific category of taxpayers from its benefits, on criteria other than tax residency or nationality, such as race, sex, ethnicity etc... In this case, tax power is bound by the general exigencies of non-discrimination, as founded in constitutional or/and international law.

Second, and more realistically, whenever a discriminative intent is not explicitly reflected in the letter of the tax treaty provisions but rather derives from interpretation. This may concern unilateral interpretation, mainly at the stage of enforcement of the tax treaty provisions by national tax services or courts, as well as bilateral (“authentic”) interpretation through the mutual agreement procedure⁶⁸. Apart from the constitutional law restraints, it should not be neglected that despite its autonomy, a tax treaty is placed in the international legal system, whose imperative norms (*jus cogens*) it should comply with. The principle of non-discrimination, at least in terms of racial discrimination seems to enter in this hardcore of international prescriptions.

Third, in the case of EC Law, where the equality principle is put in the very specific terms of the common market objectives. In the *Saint-Gobain Case*⁶⁹, the ECJ pointed out that if a tax treaty between Germany and the U.S. obliges the German State to grant tax relief to German subsidiaries doing business in the U.S., the same relief should benefit subsidiaries of another Member State engaged in business with the third country. In other words, in these so-called triangular situations, the EC general principle of equality, as expressed through EC fundamental freedoms, breaks the veil of the bilateral framework. Even though more recent case-law nuanced the application of the *Saint-Gobain case-law*⁷⁰, it is clear that under the pressure of EC demands the exclusive

⁶⁸ See article 25 of the OECD Model Convention.

⁶⁹ Case C-307/97, *Saint-Gobain ZN*, ECR [1999] I-6161.

⁷⁰ Case C-376/03, *D.*, ECR [2005] I-5821.

character of tax relief based on tax treaty provisions is seriously undermined. In the same manner, the non-discrimination clause found in tax treaties and providing for equal tax treatment of resident taxpayers and residents of the co-contracting State has little importance for tax treaties between EU Member States. Equal tax treatment of all EU citizens and EU corporations (including EU stable establishments of third country corporations) is a requirement imposed on Member States that goes much further than this bilateral tax treaty clause⁷¹. In the same way, LOB clauses are seriously questioned in the light of EC Law, because of the exclusion effect they produce in a legal environment where transnational enjoyment of economic freedoms is a primary objective⁷².

More generally, a legal claim on the basis of the principle of equality (in terms of constitutional, international or EU Law) is made possible, because of the presence of a value (non-discrimination, in its different forms) the protection of which transcends the bilateral framework. Otherwise, the apprehension of the taxpayer's legal status occurs on a narrow one-to-one State basis. Tax treaty law does not pursue a general reconstruction of the tax power environment in a cosmopolitan way. Regarding the constitutional principle of equality, the weakness of the cosmopolitanism proposed by tax treaties is reflected on the fact that cross-border income cannot be assimilated to purely domestic income, so that the two cases could be treated similarly. The answer is the same for the international law principle of equality. The bilateral framework freely negotiated by sovereign States stands as an opening to a world that remains divided by frontiers, at least from the standpoint of international taxation. Insofar as no presumption of tax cosmopolitanism is established in positive international law, it is impossible to extend double taxation relief outside the bilateral relationship by simply adopting an egalitarian discourse at a multilateral international scale.

4.2. Bounded Cosmopolitanism

The previous analysis leads us to another equally interesting question. Can a question of conflict between tax treaty benefits and human rights standards arise not because of tax treaty provisions, but rather the taxpayer's own disrespectful attitude towards human/constitutional rights?

American tax law seems to offer serious arguments in favor of this suggestion. Federal income tax legislation grants tax exemptions for charitable organizations⁷³. In

⁷¹ M. De Wolf, *Souveraineté fiscale et principe de non discrimination dans la jurisprudence de la Cour de Justice des Communautés européennes et de la Cour suprême des Etats-Unis*, Bruylant, Brussels, 2005.

⁷² Dietmar Andfers, "The Limitation on Benefit Clause of the U.S.-German Tax Treaty and its Compatibility with European Union Law", 18 *Nw. J. Int'l L. & Bus.* (1997-1998) 165, 182; see however Klaus Vogel, Daniel Gutmann, Ana Paula Dourado, "Tax Treaties between Member States and Third States: "reciprocity" in bilateral Tax Treaties and non-discrimination in EC Law", *EC Tax Review*, 2006, 83, 92, for a more nuanced position.

⁷³ §§501(a), (c)(3) of the Internal Revenue Code.

*Bob Jones University v. United States*⁷⁴, the U.S. Supreme Court confirmed and further developed a 1970 case-law of the U.S. District Court for the District of Columbia (*Green v. Kennedy*)⁷⁵ and upheld the Internal Revenue Service's revocation of the tax-exempt status of a private school discriminating against black people. The Court considered that the charity organization's violated an "established public policy" against racial discrimination, whereas it confirmed the IRS's power to fight against such private policies while deciding on public policy grounds⁷⁶. The reasoning is less audacious than the one offered in the *McGlotten v. Connally* judgment⁷⁷, by which the federal court tried to establish that tax exemptions were state "subsidies", the granting of which to discriminating organizations was to be considered as a state encouragement of private discrimination⁷⁸. The difference between the two approaches is anything but trivial, for in the second case the IRS obligations to water down any tax exempt status is far more imperative. Whatever the path to follow, the question of tax relief benefits granted by tax treaty provisions is worth being asked in case of human/constitutional rights breach on the part of the taxpayer. Tax treaty-making power as well as tax treaty enforcement are forms of tax power.

Even though the question does not seem to have been answered in the American case-law, it appears that tax treaty relief ought to or at least may be denied in the case of mutual tax exemptions for charity organizations. For instance, article 27 of the U.S.-German Treaty on Income Taxation provides, in its 1st paragraph, that "a German company or organization operated exclusively for religious, charitable, scientific, educational or public purposes, shall be exempt from tax by the United States in respect of items of income, if and to extent that a) such company organization is exempt from tax in the Federal Republic of Germany, and, b) such company or organization would be exempt from tax in the United States in respect of such items of income if it were organized, and carried on all its activities, in the United States". Thus, the provision assimilates the tax status of German charities operating in the U.S. to the tax-exempt status of U.S. charities. In case of a German charity operating in the U.S. and practicing discrimination in its U.S. activities, can the application of the *Bob Jones University* case-law be denied?

⁷⁴ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

⁷⁵ *Green v. Conally*, 330 F. Supp. 1150 (D.D.C. 1971).

⁷⁶ David A. Brennan, "Charities and the Constitution : Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities", 5 (2001-2002) *Fla. Tax Rev.* 779, 788; Bruce R. Hopkins, *The law of Tax-Exempt Organizations*, 2003⁸, John Wiley and Sons, Hoboken (NJ), 2003, 111 *seq.*

⁷⁷ 338 F. Supp. 448 (D.D.C. 1972); see I. Bittker, Kenneth M. Kaufman, "Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code", in *Collected Legal Essays* (F.B. Rothman & Co. 1989), 166.

⁷⁸ I. Bittker, Kenneth M. Kaufman, 176 *seq.*

Of course, it should not be neglected that tax exemption is not granted on the basis of public policy in the field of charities but results from a settlement of tax jurisdictions between two sovereign States. In this sense, it seems irrelevant to enforce a rule originating in the charities public policy in order to curb an international tax law settlement. This argument is particularly interesting for the double taxation relief settlements. As a matter of fact, it should be inconsistent to deny a relief from double taxation, granted by a tax treaty, on the grounds that the taxpayer does not comply with certain constitutional principles. Denial of tax relief cannot be used as a general coercive measure to protect values whatsoever. The arsenal of government has a great variety of efficient weapons for this purpose. In the case of double taxation relief on the basis of tax treaty law, the tax benefit is granted because the income will be taxed somewhere else.

On the contrary, in the case of tax exemptions for non-resident charities, the tax benefit is granted by international tax law on the basis of the charitable character of the organization. This is corroborated by the letter of the tax treaty provisions. According to Article 27 of the U.S.-German Treaty, the German charity would be exempt from tax in the United States “if and to the extent that ... such company or organization would be exempt from tax in the United States”. But precisely, the charity would not be exempted because of its discriminatory policy. Besides, the same principle will apply, inversely, in the case of a U.S. charity exercising discriminatory policy in the U.S. and operating also in Germany. The tax exemption should also be denied in Germany, for the charity cannot benefit from the tax-exempt status in the country of residence⁷⁹. We should also add that despite the letter of the provision, which enables these assumptions, the perspective of banning discriminatory charities is far from being rooted in international taxation practice.

It seems, nevertheless, that relieving international mobility from tax burdens is accompanied by the obligation to respect fundamental values of each jurisdiction, in so far as this obligation is linked to tax treatment. In this way, by an effect of accumulation, the taxpayer is subject to (tax related) obligations of both tax jurisdictions. The fragmentary character of cosmopolitanism is shaped here on the basis of the different perceptions on the role of taxation in public policy. Even though the fundamental values to protect may be common in the two states (prohibition of racial discrimination), the interference of tax law is not self-evident. Certainly, the denial of tax exempt status in the example of the U.S.-German tax treaty by both states appears as an element of convergence rather than fragmentation. Nonetheless, one should not neglect the bilateral character of the framework. Apprehended in a larger context, the solutions will probably be substantially different.

⁷⁹ Art. 27 par. 2 of the U.S.-German Treaty imposes the same as in par. 1 mutual tax-exempt status for U.S. charities.

In any case, the hypothesis presented here suggests that tax relief provided by tax treaties can also be apprehended as an instrument for human/constitutional rights enforcement. At the inter-state level, an interesting illustration of this use is found in the case of the tax treaty between the United States and South Africa⁸⁰. In the fight against the apartheid regime, the U.S. proceeded to the termination of the 1946 Income Tax Treaty, while in the meantime denying tax relief benefits to South African tax residents on the grounds of domestic tax law. The case regards classic retaliatory measures as a reaction to a breach of international law, the same way as economic sanctions. Given the contribution of tax treaty law to the human rights question, as described previously, the coercion in case of serious breach of human rights appears very coherent. The suspension of tax benefits for the residents of the co-contracting country is justified by the attitude of this country which is openly against human rights. The hypothesis of the tax-exempt organization demonstrates that tax treaty law may assume the same instrumental function towards tax-exempt organizations with a disrespectful attitude towards human rights but also constitutional rights standards of another country.

5. Concluding Remarks

It appears that bridging tax treaty law and human/constitutional rights is philosophically legitimate and methodologically possible. The major question, however, is if this approach is legally necessary, or if it responds simply to an academic curiosity. From the standpoint of substantive law, the answer has to be positive. The reading of tax treaty law proposed in this paper reveals not a legal vacuum but a legal gap between legal subsystems that needs to be bridged from the human rights protection perspective. The role of constructive judicial interpretation (at the international, regional and national level) is crucial in this sense. Bridging the gap by mere judicial interpretation can prove however unsatisfying. The specter of judicial free-riding, the potential divergences among different national legal orders and the horrible legitimacy question of judicial action call for an additional progress at the formal and/or institutional level. For the time being, any suggestions like including a human rights protection clause in tax treaties or multilateralizing international tax law seem unrealistic, for they need to be placed in a wider discussion on the radical reform of international tax treaties. This discussion has nevertheless been already engaged over these last years. May be it is time to discreetly introduce in this discussion the human rights claim.

⁸⁰ Calvin J. Allen, "The Effective Role of United States International Tax Law in Dismantling "Apartheid" in the Union of South Africa and in Rebuilding the Union of South Africa after the Demise of "Aprartheid"", 27 (2001-2002) *T. Marshall L. Rev.* 165.