

TREATY-MAKING IN FEDERATIONS

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VAN HET FISCAAL RECHT

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TREATY-MAKING IN
FEDERATIONS

Democratic Legitimacy Tried
and Tested in Matters of Taxation

Rik SMET

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SERIES PREFACE

Tax law is all too often perceived as a set of highly detailed legal provisions with a very technical content, the coherence of which is not always clear. This observation points to an increasing need for understanding the foundations of tax law.

The purpose of this series is to create a collection of concise and easily accessible monographs on general legal concepts and principles underlying contemporary tax law. It deals with fundamental principles and principles around which a number of fundamental rules that govern tax law can be grouped. It aims to showcase, for instance, scientific contributions covering legal topics such as the following: the concept of tax, the principle of legality, the principle of equality, the principle of legal certainty, the *ne bis in idem* principle, the interpretation of tax provisions, the public policy nature of tax law, the principle of territoriality, the temporal effect of tax laws, the division of tax competences in a (federal) state context, etc.

In this series, which originally contained only contributions written in Dutch or French, English-language books will now also be published. The subject matter of this series is not limited to domestic tax law, but also extends to international and European tax law. In this way, an attempt is made to identify in depth the fundamental principles governing tax law in the broad sense of the term and to highlight the coherence between the many tax provisions or the possible lack of coherence between them.

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FOREWORD

This book is an updated and developed version of the PhD thesis “Tax Treaty Making in Federations”, defended by Rik Smet on 23 June 2020 at the University of Antwerp Faculty of Law, Belgium. It contributes to the discussion on alternative solutions for the difficulties that currently exist in the treaty making practice of federal states. The author develops a new theory on how tax treaty making competence and power should be distributed between the different levels of government in federations. This work is outstanding for at least three reasons.

First, Rik Smet starts his PhD with a story about birds migrating between Canada and the southern United States. These birds were shot and killed during their migration somewhere above the centre of the United States. He explains how this triggered the anger of American ornithologists and animal activists. Starting from that bird story, the author makes the bridge to federal states and tax treaty making competences. People who can creatively connect two such, at first sight totally unrelated, topics, are scarce, but Rik Smet is certainly one of them.

Second, this PhD smoothly integrates a philosophical framework with a legal one. The author finds a delicate balance between the abstract philosophical theories of Habermas, Dworkin, and Rosanvallon on the one hand, and legal realities that govern international tax law on the other hand. Building on Rosanvallon, he introduces the new concept of “meritorious legitimacy”, which means that the legitimacy of tax treaties not only requires a suitable democratic process, but also concerns the question of whether treaties that have been concluded in the past still retain the support of society today. This triggers, for example, the question of whether countries still approve of treaties concluded years ago with tax havens. So far, these questions have remained largely unaddressed, and this PhD is an explicit call to deal with these problems.

Finally, Rik Smet does not limit his research to law in the books, but also looks at treaty making practice. Based on interviews with key actors and stakeholders, he identifies multiple practical problems and limitations, like a huge capacity issue within the Belgian department of the Federal Public Service Finance that is responsible for tax treaties. Then he turns the abstract philosophical and legal framework that he has so carefully developed into concrete suggestions to improve the practice of tax treaty making. In particular, the suggestion to replace the current Belgian procedure, under which new tax treaties require the approval of up to six parliaments in Belgium, with a simpler and faster endorsement procedure based on anticipative endorsement is very innovative.

The academic track record of Rik Smet is exemplary. First he obtained his bachelor's degree at the University of Antwerp in 2009. He then continued his law studies at the University of Ghent where he obtained his master's degree in 2011. Subsequently, in 2013 and again in Antwerp, he successfully obtained the degree of master in tax law. During his undertaking of this programme, Rik Smet stood out as an excellent student. He was part of the team for the International and European tax moot court in Leuven. The Antwerp team became a finalist and was named as "Winner for the best memorandum on behalf of the defendant". Moreover, Rik Smet combined these studies with an internship as a lawyer. Shortly afterwards he was appointed as a mandate assistant at the Antwerp Law faculty. He completed his dissertation well before the end of his period of appointment. In the meantime, he also wrote numerous other publications and collaborated on two research reports for Belgian tax authorities.

As supervisors of his PhD thesis, we greatly appreciate Rik's scientific research. This book undoubtedly fills a gap in legal doctrine.

Prof. dr. Bruno Peeters,
Prof. dr. Anne Van de Vijver
Antwerp, March 2021

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LIST OF ABBREVIATIONS

Adv. CoS	Advice by the Council of State
<i>AFT</i>	Algemeen Fiscaal Tijdschrift
AR	Arrêt Royal / Royal Decree
Arr. Cass.	Arresten van het Hof van Cassatie
art.	Article
ATAD	Anti-Tax Avoidance Directive
B.Z.	Buitengewone Zitting van het parlement – Extraordinary Session of parliament
Bel. Const.	Belgian Constitution
BEMU	Belgian Economic and Monetary Union
BEPS	Base Erosion and Profit Shifting
BFN	Between Facts and Norms (book Jürgen Habermas)
<i>BG</i>	Belgian (Official) Gazette
BIT	Bilateral Investment Treaty
<i>BTNG-RBHC</i>	Belgisch Tijdschrift voor Nieuwste Geschiedenis – Revue belge d'histoire contemporaine
<i>Bull. Int'l Taxn</i>	Bulletin for International Taxation
BvE	Bundesverfassungsgericht Entscheidung / Decision by the (German) Federal Constitutional Court
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts / Decisions by the (German) Federal Constitutional Court Collection
BvR	File number of a German Federal Constitutional Court case
BZ	(Commissie) Buitenlandse Zaken / Foreign Affairs (Commission)
C & FP	Comptabilité et fiscalité pratiques
Cass.	Judgment of the Court of Cassation
<i>CDPK</i>	Publiekrechtelijke Kronieken / Chroniques de droit public
CETA	Comprehensive Economic and Trade Agreement between Canada, the EU and its member states

<i>Cfr</i>	Confer
chaps.	Chapters
CI	Cadastral Income / Kadastraal Inkomen / Revenu Cadastral
CIT	Corporate Income Tax / Taxation
CJEU	Court of Justice of the European Union
cl.	Clause
CNRS	Centre National de la Recherche Scientifique
<i>Colum. J. Transnat'l L.</i>	Columbia Journal for Transnational Law
COM	Proposed legislation and other Commission communications to the Council and/or the other institutions, and their preparatory papers
concl.	Conclusion
Const.	Constitution
Const. Ct.	Constitutional Court
Cooperation Agreement	The cooperation agreement of 8 March 1994 between the Federal State, the Communities and the Regions on the further rules for the conclusion of mixed treaties
Cooperation Agreement International Organizations	Framework agreement of 30 June 1994 for co-operation between the Federal State, the Communities and the Regions on the representation of the Kingdom of Belgium to the international organizations whose activities concern mixed competences
Coormulti	The section of the federal Ministry of Foreign Affairs coordinating the general consultations where the Belgian position to be taken in international organizations is determined
<i>Cornell L.Q.</i>	The Cornell Law Quarterly
CoS	Council of State
CRS	Common Reporting Standard
CUP	Cambridge University Press
DGE	Directorate General for European Affairs and Coordination
DOC	Document
DRC	Democratic Republic of Congo
DTC(s)	Double Tax Convention(s)

<i>DW</i>	The Divided West (book Jürgen Habermas)
<i>et al.</i>	Et alia
<i>e.g.</i>	Exempli gratia
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECR	European Court Reports
ed	Editor
eds	Editors
<i>EJPT</i>	European Journal of Political Theory
EMU	European Monetary Union
Etc.	Et cetera
EU	European Union
<i>OJ</i>	Official Journal of the European Union
European Affairs Cooperation Agreement	Cooperation agreement of 8 March 1994 between the Federal State, the Communities and the Regions on the representation of the Kingdom of Belgium within the Council of Ministers of the European Union
EEA	European Economic Area
<i>Eur. Const. L. Rev.</i>	European Constitutional Law Review
<i>Eur. J. Int'l L.</i>	European Journal of International Law
FATCA	Foreign Account Tax Compliance Act
<i>ff.</i>	And following
FPS	Federal Public Service
GC	General Court
GST	Gross Sales Tax
<i>i.e.</i>	Id est
IBFD	International Bureau for Fiscal Documentation
ICFP	Interministerial Conference for Foreign Policy
ICHNP	Interministerial Committee for Host Nation Policy
IFA	International Fiscal Association
ILC	International Law Commission
IMF	International Monetary Fund
ITC	Income Tax Code
<i>JCMS</i>	Journal of Common Market Studies

<i>JO</i>	Journal Officiel
<i>JT</i>	Journal des Tribunaux
<i>JTI</i>	Jointly Taxable Income
<i>Yale L.J.</i>	The Yale Law Journal
<i>LOB</i>	Limitation of Benefits
<i>MAP</i>	Mutual Agreement Procedure
<i>MC</i>	Model Convention
Mixed Treaties Working Group	Working group advising the Interministerial Conference for Foreign Policy
<i>MIT</i>	Massachusetts Institute of Technology
<i>MJ</i>	Maastricht Journal of European and Comparative Law
<i>MLI</i>	Multilateral Instrument
<i>MNC</i>	Multinational Company
<i>MP</i>	Member of Parliament
<i>NL</i>	Dutch
<i>nr.</i>	Number
<i>nrs.</i>	Numbers
<i>NATO</i>	North Atlantic Treaty Organization
<i>NSDAP</i>	Nationalsozialistische Deutsche Arbeiterpartei
<i>OECD</i>	Organisation for Economic Co-operation and Development
<i>OECD MC</i>	OECD Model Tax Convention
<i>OECD MC 2017</i>	OECD Model Tax Convention version 2017
<i>OJ</i>	Official Journal of the European Union
<i>Ord</i>	Ordinance
<i>p.</i>	Page
<i>para.</i>	Paragraph
<i>Parl. St.</i>	Parliamentary Documents
<i>Pas.</i>	Pasicrisie
<i>PhD</i>	Doctor of Philosophy
<i>PIT</i>	Personal Income Tax / Taxation
<i>pp.</i>	Pages
<i>RBDC</i>	Revue Belge de Droit Constitutionnel
<i>RBDI</i>	Revue belge de droit international
<i>resp.</i>	Respectively
<i>Rev. dr. Commun.</i>	Revue de droit communal
<i>RFRL</i>	Revue de la fiscalité régionale et locale

<i>RGF</i>	Revue générale de fiscalité
<i>RW</i>	Rechtskundig Weekblad
<i>SDU</i>	Sdu Uitgevers
<i>SEW</i>	Tijdschrift voor Europees en Economisch Recht
<i>SFA</i>	Special Financing Act of 16 January 1989
<i>SHAPE</i>	Supreme Headquarters Allied Powers Europe
<i>SLRI</i>	Special Law on the Reform of the Institutions of 8 August 1980
<i>STI</i>	Separately Taxable Income
<i>STPS</i>	The Structural Transformation of the Public Sphere
<i>T.v.W.</i>	Tijdschrift voor Wetgeving
<i>TBP</i>	Tijdschrift voor Bestuurswetenschappen en Publiekrecht
<i>TEU</i>	Treaty on European Union
<i>TFEU</i>	Treaty on the Functioning of the European Union
<i>TFR</i>	Tijdschrift voor Fiscaal Recht
<i>TIEA</i>	Tax Information Exchange Agreement
<i>T. Not</i>	Tijdschrift voor Notarissen
<i>UCCCC</i>	United College of the Communal Community Commission
<i>UK</i>	United Kingdom
<i>UN</i>	United Nations
<i>UN MC</i>	United Nations Model Double Taxation Convention
<i>v.</i>	Versus
<i>VAT</i>	Value Added Tax
<i>FTC</i>	Flemish Tax Code / Vlaamse Codex Fiscaliteit
<i>VCLT</i>	Vienna Convention on the Law of Treaties (1969)
<i>VCLT 1986</i>	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986)
<i>vol.</i>	volume
<i>WBI</i>	Wallonie-Bruxelles International
<i>WTO</i>	World Trade Organization

