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INTER-NATION EQUITY REVISITED

Ivan Ozai

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Inter-Nation equity revisited

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Abstract

States are on the verge of a new form of global competition. Some have taken unilateral measures to tax multinational profits that they would typically not be able to tax, at least not according to conventional international tax concepts and rules. Others have threatened to retaliate with economic countermeasures to protect their tax base and corporate residents. The recent attempt of the OECD to build consensus for a global tax compact has so far proven unsuccessful due to wide disagreements about how taxing rights should be equitably distributed between countries.

As policymakers and tax scholars increasingly call into question long-standing theories of international taxation, the concept of inter-nation equity plays a pivotal role as a guiding principle for how to divide the international tax base among states. Inter-nation equity is one of the most ubiquitous concepts appearing in international tax policy discussions and yet one of the most understudied in tax scholarship.

This Article introduces a comprehensive normative analysis of inter-nation equity by discussing how the concept should reconcile the two primary goals of international allocation of taxing rights: on the one hand, the concern of states to preserve their tax sovereignty and, on the other, the need to promote some degree of redistribution to take up the challenges of global poverty and inequality. This Article further explains how a similar notion of inter-nation equity has developed in other areas of international law and discusses some practical implications for tax policy design.

Keywords

Inter-nation equity, taxing rights, entitlement, tax jurisdiction, differential treatment

Introduction

In 1963, economist Peggy Musgrave (née Brewer, formerly Richman) forged the concept of inter-nation equity to refer to how rights to tax should be distributed among states.[1] Her work diverged from the more familiar tax policy analysis which focused on the distribution of tax burdens within closed societies.[2] A decade later, Peggy Musgrave teamed up with her husband Richard Musgrave to revise her 1963 work and made a compelling argument for allocating the international tax base in a way that acknowledges the entitlement of countries to tax income arising in their territories while making allowance for some degree of international redistribution.[3] The concept of inter-nation equity gained nearly universal embrace in tax scholarship and became the go-to normative principle in tax policy discussions regarding the distribution of taxes across jurisdictions. Yet, much of the purpose behind its original formulation has been lost over the years.

Inter-nation equity has become a vague enough term to be used to justify virtually any possible stance on how to distribute the international tax base while giving the impression that such a stance, because purportedly aligned with inter-nation equity, is grounded on some sense of fairness between nations. Some have argued that the Musgraves' formulation of inter-nation equity is too thin to lead to any guidance or practical recommendations.[4] A more charitable view of their scholarship, however, suggests that they provided an important starting point for a wider discussion about international distributive justice.[5]

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1 Peggy Richman [Musgrave], Taxation of Foreign Investment Income: An Economic Analysis (1963).

2 Previous discussions about distributive justice in the tax literature were mostly limited to the concept of inter-individual equity, which refers to how tax burdens should be distributed among fellow nationals.

3 Richard A. Musgrave & Peggy B. Musgrave, *Inter-Nation Equity*, *in* Modern Fiscal Issues: Essays in Honor of Carl S. Shoup 63 (Richard M. Bird & John G. Head eds.,1972). *See id.*, at 85 ("On the whole, it would seem desirable to implement redistributional objectives through rate differentiation while attempting to divide the source in line with 'true' economic imputation.").

4 A.J. Easson, Taxation of Foreign Direct Investment: An Introduction 36 (1999); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 Harv. L. Rev. 1573, 1648 (2000); Tim Edgar, *Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage*, 51 Can. Tax J. 1079, 1154 (2003).

5 Kim Brooks, *Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Policy Objective*, *in* Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave 471, 493 (John G. Head & Richard Krever eds., 2009).

This Article explores the rationale behind the original conception of inter-nation equity and demonstrates that it is more than a mere rhetorical device. The Musgraves' ingenious work on the notion of inter-nation equity was foundational and is still the leading contribution to the field.[6] Yet, it has two significant limitations from a normative standpoint. First, despite their meaningful concern with international justice, its focus unsurprisingly leans more toward the economic implications of different tax policies than to the normative underpinnings of inter-nation equity. Second, they wrote their 1972 seminal essay at a time where sophisticated discussions about global justice were still to unfold in the political philosophy literature.

This Article's first goal is to present a comprehensive normative analysis of the concept of inter-nation equity. Building on contemporary developments in global justice, it evaluates how the concept of inter-nation equity can reconcile two major goals of international allocation of taxing rights: on the one hand, the concern of states to having their tax sovereignty and tax entitlement preserved and, on the other, the need to promote some degree of redistribution to take up the challenges of global poverty and inequality. This analysis puts forth a two-pronged principle for how to allocate taxing rights among jurisdictions. It considers that whenever a normative approach based on tax sovereignty (entitlement approach) results in an inaccurate division of the international tax base, taxing rights should be allocated to the benefit of less affluent countries so as to address global poverty inequality (differential approach).

The Article's second contribution is to establish general but concrete normative requirements for differential mechanisms. The global recognition of the urgency to tackle global inequality has led some developed nations, both independently and collectively, to adopt tax measures to reduce that inequality. Some of these initiatives, however, are problematic for failing to address global inequality in a meaningful way. The normative requirements put forth in this Article indicate that redistribution through tax policy should be comprehensive and consistent so as not to produce further inequalities.

The remainder of the Article proceeds as follows. Part II introduces the concept of inter-nation equity. It demonstrates the significance of the concept in the tax literature, considers some of the varied and frequently conflicting interpretations the term has received over the years, and identifies the main assumptions and purposes behind its original formulation. Part III turns to the two normative components (entitlement and differentiation) comprising the original conception of inter-nation equity. It demonstrates that a dual conception of inter-nation equity finds some precedent in other areas of international law. Part IV puts forth normative requirements deriving from inter-nation equity and explores the practical implications of these requirements for tax policy design. Part V concludes by discussing potential constraints and objections to a dual conception of inter-nation equity.

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6 *See* Brooks, *supra* note 5, at 472.

1. The Concept of Inter-nation Equity

A. *Significance in the Literature*

Peggy Musgrave is generally regarded to have first coined the phrase inter-nation equity so as to make a conceptual distinction to the more common notion of inter-individual equity.[7] The conceptual development of inter-nation equity was made known more broadly in the 1972 essay co-authored with Richard Musgrave,[8] but Peggy Musgrave continued to develop the practical implications of inter-nation equity in her later work.[9] A great part of the originality of their contribution to the tax literature was establishing possible underlying principles for inter-nation equity and evaluating the consequences of these principles in concrete tax policy design.[10]

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7 Richman, *supra* note 1. *See also* Klaus Vogel, *Worldwide vs. Source Taxation of Income - A Review and Re-Evaluation of Arguments (Part III)*, 16 Intertax 393 (1988) (stating that Peggy Musgrave deserves tribute for being the first to distinguish inter-individual equity considerations from those based on inter-nation equity); Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 Brook. J. Int'l. L. 1357, 1395 (2001); Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 L. Pol'y Int'l Bus. 145, 153 (1998).

8 Musgrave & Musgrave, *supra* note 3.

9 *See*, *e.g.*, Peggy B. Musgrave, *The OECD Model Tax Treaty: Problems and Prospects*, 10 Colum. J. World Bus. 29 (1975); Peggy B. Musgrave, *Interjurisdictional Equity in Company Taxation: Principles and Applications to the European Union*, *in* Taxing Capital Income in the European Union: Issues and Options for Reform 46 (Sijbren Cnossen ed., 2000) [hereinafter Musgrave, *Interjurisdictional Equity*]; Peggy B. Musgrave, *Consumption Tax Proposals in an International Setting*, 54 Tax L. Rev. 77 (2000); Peggy B. Musgrave, *Sovereignty, Entitlement, and Cooperation in International Taxation*, 26 Brook. J. Int'l L. 1335 (2001) [hereinafter Musgrave, *Sovereignty*]; Peggy B. Musgrave, *Taxing International Income: Further Thoughts*, 26 Brook. J. Int'l L. 1477 (2001) [hereinafter Musgrave, *Taxing*]; Peggy B. Musgrave, *Combining Fiscal Sovereignty and Coordination: National Taxation in a Globalizing World*, *in* The New Public Finance: Responding to Global Challenges 167 (Inge Kaul & Pedro Conceição eds., 2006) [hereinafter Musgrave, *Combining*].
Although the term "inter-nation equity" remained popular in the tax literature, Musgrave shifted to "interjurisdictional equity" in her later work to mean the same thing. Because "jurisdiction" and "nation" are not precise substitutes, and the international allocation of taxing rights takes jurisdictions as the relevant political unit, "interjurisdictional equity" seems conceptually more accurate.

10 Brooks, *supra* note 5, at 477. For a review of the relevance of Peggy Musgrave's work in current tax policy discussions, *see* Allison Christians, *Digital Services Taxes and Internation Equity: A Tribute to Peggy Musgrave*, 95 Tax Notes Int'l 589 (2019).

The concept of inter-nation equity is now ubiquitous in the tax literature. Commentators have applied the concept to a wide array of subjects, frequently beyond the scenarios envisaged by the Musgraves themselves. For instance, the concept has been used to argue for replacing the arm's-length principles with formulary apportionment approach,[11] for a digital services tax,[12] a global e-commerce tax,[13] for the allocation of taxing rights to the country where economic activities occur and where value is created,[14] against the restrictions to source-based taxation in the OECD and the UN model tax treaties,[15] for regulation of tax competition,[16] for the expansion of the existing concept of permanent establishment to include sales jurisdictions,[17] for harmonizing the legal treatment of inheritance tax rules in European countries,[18] to assess treaty obligation to confer personal tax expenditures,[19] and to discuss standards for tax information exchange.[20]

Perhaps the most remarkable feature of inter-nation equity is that regardless of the disparities in how the concept is understood,[21] there is likely no disagreement about its primacy as a normative directive in how to allocate rights between jurisdictions.[22] Considering the nearly universal acceptance of inter-nation equity in international tax policy, the lack of a robust effort in the literature to provide a comprehensive examination of its conceptual content and normative

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11 Otto H. Jacobs, Christoph Spendgel & Anne Schäfer, *ICT and Profit Allocation within Multinational Groups*, 32 Intertax 268 (2004).

12 Wei Cui & Nigar Hashimzade, *The Digital Services Tax as a Tax on Location-Specific Rent* (CESifo, Working Paper No. 7737, 2019). *But see* Daniel Shaviro, *Digital Services Taxes and the Broader Shift from Determining the Source of Income to Taxing Location-Specific Rents* (NYU Law and Economics, Working Paper No. 19-36, 2019) (although supporting a digital services tax, arguing that inter-nation equity does not have much relevance to the discussion).

13 Rifat Azam, *Global Taxation of Cross-Border E-Commerce Income*, 31 Va. Tax Rev. 639 (2012).

14 OECD, Addressing the Tax Challenges of the Digital Economy: Action 1- 2015 Final Report (2015).

15 Oladiwura Ayeyemi Eyitayo-Oyesode, *Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform*, 13 L. & Dev. Rev. 193 (2020).

16 Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 Harv. Int'l L.J. 47, 73 (1993).

17 Justus Eisenbeiss, *BEPS Action 7: Evaluation of the Agency Permanent Establishment*, 44 Intertax 481, 496 (2016).

18 Jan Szczepański, *Personal Genuine Links under Domestic Inheritance Tax Rules in the Light of International and European Standards*, 43 Intertax 595, 604 (2015).

19 Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. Rev. 1540 (2009).

20 Christopher Rose, Exchange of Tax Information: Neutrality and Inter-Nation Equity (2007) (unpublished Ph.D. thesis, University of Oxford) (on file with the author).

21 For additional examples of how inter-nation equity has been used (and misused) in the literature besides the ones listed above, *see* Brooks, *supra* note 5, at 489–90.

22 Some may argue that inter-nation equity is insufficient as a sole guide for allocating taxing rights, but still do not disagree that it deserves consideration. *See supra* note 4 and accompanying text.

underpinnings is somewhat surprising.[23] The following will discuss a few conceptions of inter-nation equity put forth in the literature and then propose a more comprehensive understanding based on Peggy Musgrave's own developments of the concept.

B. *Competing Conceptions of an Uncontested Concept*

The absence of extended analyses of inter-nation equity did not bar commentators from employing it in ways that denote different (sometimes diverging) conceptions of this one concept. Probably the most common approach to inter-nation equity is to understand it as a substitute for a general notion of fairness in how tax revenues are shared among states. In this sense, inter-nation equity is employed as to provide certain normative legitimacy to the author's main claim but with no further elaboration on what it might mean as a normative guide.[24]

A second recurring conception of inter-nation equity is to understand it as the normative basis for taxation at source.[25] However, views differ on the extent to which source-based taxation is supported by inter-nation equity. Some argue that it requires greater taxing rights to source

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23 *See* Kaufman, *supra* note 7, at 203 (arguing that a conception of inter-nation equity deserves greater attention than it has received); Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 Fla. Tax Rev. 555, 583 (2009) ("firm foundations for a generally accepted vision of inter-nation equity have yet to be established"); Miranda Stewart & Yariv Brauner, *Introduction: Tax, Law and Development*, *in* Tax Law and Development 3, 18 (Miranda Stewart & Yariv Brauner eds., 2012) (pointing out that although some have engaged with the concept, inter-nation equity has remained thin and has not been tractable to substantive analysis). Besides the work of the Musgraves, rare exceptions include Kaufman, *supra* note 7; Brooks, *supra* note 5; Jinyan Li, *Improving Inter-nation Equity through Territorial Taxation and Tax Sparing*, *in* Globalization and Its Tax Discontents Tax Policy and International Investments (Arthur J. Cockfield ed., 2010) 117; Anthony C. Infanti, *Internation Equity and Human Development*, *in* Tax Law and Development 209 (Miranda Stewart & Yariv Brauner eds., 2012).

24 For recent examples, *see*, *e.g.*, Carlo Garbarino, *Inter-country Equity and Intra-group Transactions at EU Level: An Analysis of the CCCTB Proposal and ECJ Tax Cases*, 21 E.C. Tax Rev. 248 (2012); Reinout de Boer & Otto Marres, *BEPS Action 2: Neutralizing the Effects on Hybrid Mismatch Arrangements*, 43 Intertax 14 (2015); Jan Szczepański, *Personal Genuine Links under Domestic Inheritance Tax Rules in the Light of International and European Standards*, 43 Intertax 595 (2015); Bastiaan Starink, *Source versus Residence State Taxation of Cross-Border Pension Payments: Trouble Shared Is Trouble Halved*, 44 Intertax 6 (2016); Bruno Peeters & Herwig Verschueren, *The Impact of European Union Law on the Interaction of Members States' Sovereign Powers in the Policy Fields of Social Protection and Personal Income Tax Benefits*, 25 E.C. Tax Rev. 262 (2016); Wolfgang Schön, *One Answer to Why and How to Tax the Digitalized Economy*, 47 Intertax 1003 (2019); Johannes Becker & Joachim Englisch, *Taxing Where Value Is Created: What's 'User Involvement' Got to Do with It?*, 47 Intertax 161 (2019).

25 *See*, *e.g.*, Alex Easson, *Fiscal Degradation and the Inter-Nation Allocation of Tax Jurisdiction*, 3 E.C. Tax Rev. 112, 112–13 (1996) (arguing that inter-nation equity favours source-based taxation because capital-importing countries are usually poorer than capital-exporting countries); Michael P. Devereux & Peter Birch Sørensen, *The Corporate Income Tax: International Trends and Options for Fundamental Reform* 17 (European Commission, Working Paper No. 264, 2006) (arguing that a source-based corporation tax is legitimate on grounds of inter-nation equity since source countries provide costly infrastructure and protection of property rights which allow for profitable use of capital by foreign investors); Sijbren Cnossen, *Company Taxes in the European Union: Criteria and Options for Reform*, 17 *Fiscal Studies* 67, 79, n. 22 (1996); Veronika Daurer, *Tax Treaties and Developing Countries*, 42 Intertax 695 (2014). See also Avi-Yonah, *supra* note 4, at 1648 (noting that inter-nation equity relates primarily to the question of entitlement and favours the prevalent practice of source-based taxation against the preference for residence-based taxation).

countries.[26] Others take it to provide a much more limited support for taxation at source, limited to earnings with above-normal rates of return.[27] And some even take an absolutely opposite view by arguing that inter-nation equity leads to exclusive residence-based taxation.[28]

Inter-nation equity is also thought to provide normative grounds for how to allocate multinationals' profits among jurisdictions. However, whereas some argue that it supports a balanced consideration between the supply and demand sides of economic activity in allocating profits (that is, a supply-demand approach),[29] others argue, conversely, that inter-nation equity requires a supply-only approach to profit allocation.[30]

A quite less prevalent view of inter-nation equity focuses on its appeal for international redistribution aimed at addressing revenue concerns of lower-income countries.[31] In this sense, some point out that inter-nation equity captures the belief that the global tax revenue pie is distributed unfairly to developing nations and supports a claim for global distributive justice.[32] Similarly, some argue that inter-nation equity implies consideration for poorer countries' interests.[33] Others take inter-nation equity outside the context of tax jurisdiction allocation and understand it as a normative requirement for countries' commitment to aid low-income

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26 See, e.g., Eyitayo-Oyesode, *supra* note 15 (arguing that inter-nation equity should prevent the current restrictions to source-based taxation in the OECD and the UN model tax treaties).

27 See, e.g., Peter Birch Sörensen, *Issues in the Theory of International Tax Coordination* 14–15 (Bank of Finland, Working Paper No. 4/1990, 1990); Vincent C. Avagliano, *The Second Wave: IT Outsourcing, Globalization, and Worker Rights*, 23 Penn St. Int'l. L. Rev. 663, 684 (2005).

28 William B. Barker, *Optimal International Taxation and Tax Competition: Overcoming the Contradictions*, 22 Nw. J. Int'l L. & Bus. 161, 205 (2002) (arguing that inter-nation equity requires the assignment of the tax base exclusively to the residence state because that state provides the environment for the production and suffers a large loss in income and jobs due to the export of its capital and labour whereas the source state enjoys disproportionately greater benefit compared to what it provides).

29 *See*, *e.g.*, Erika Dayle Siu, Milly I. Nalukwago & Marcos Aurélio Pereira Valadão, *Lessons from Existing Subnational Unitary and Formulary Apportionment Approaches for a Regional Transition to Unitary Taxation*, *in* Taxing Multinational Enterprises as Unitary Firms 150, 169 (Sol Picciotto ed., 2017).

30 *See*, *e.g.*, Otto Jacobs, Christoph Spengel & Anne Schäfer, *ICT and International Corporate Taxation: Tax Attributes and Scope of Taxation*, 31 Intertax 214, 231 (2003).

31 *See*, *e.g.*, Avi-Yonah, *supra* note 4, at 1650 (noting that inter-nation equity can be interpreted as embodying explicit redistributive goals so that "when a choice is presented between two otherwise comparable alternative rules, one of which has progressive and the other regressive implications for the division of the international tax base between poorer and richer countries, the progressive rule should be explicitly preferred to the regressive one).

32 Ring, *supra* note 23, at 585. Ring shows some scepticism about this claim. As Section III.B will demonstrate, one of the reasons is that global justice claims at the time were mostly grounded on early cosmopolitanism. Recent discussions on global justice have gradually shifted toward a more refined, balanced view. See also Miranda Stewart, *Redistribution between Rich and Poor Countries*, 72 Bull. Int'l Taxation 297 (2018) (taking inter-nation equity to mean that redistribution is warranted when it is perceived that international tax system leads to an unfair allocation of the international tax base).

33 *See*, *e.g.*, S.A. Stevens, *The Duty of Countries and Enterprises to Pay Their Fair Share*, 42 Intertax 702, 705–06 (2014); Martin Hearson, *The Challenges for Developing Countries in International Tax Justice*, 54 *J. Develop. Stud.* 1932 (2018).

countries.[34] Conversely, some have suggested that inter-nation equity equates to the principle of non-discrimination, thus translating a notion of treating countries equally rather than benefiting lower-income states.[35]

Inter-nation equity has become the go-to concept when one needs to provide normative basis to a given stance on an international tax issue.[36] Yet, when it comes to understanding what the concept entails, one can find a significant amount of competing conceptions. These conceptions capture only parts of a much more nuanced concept. A partial view of inter-nation equity limits its potential as a normative guide for international tax policy and many times contradicts the main normative goal behind its original formulation. The following will go over a few aspects of the Musgraves' original formulation and then offer one possible interpretation of the concept.

C. The Musgraves' Original Formulation

Peggy Musgrave articulated her conception of inter-nation throughout dozens of papers, in which she translated the concept into practical policy recommendations.[37] She repeatedly noted that inter-nation equity does not apply exclusively to the distribution of tax jurisdictions, but it more broadly relates to overall economic gains and losses of the involved jurisdictions, which also include any impact on factor earnings such as in labor and capital. However, acknowledging the complexity in analyzing these additional aspects, she frequently limited her analysis to what an equitable allocation of tax bases should be.[38] Despite her extensive analyses and applications of the concept, inter-nation equity is most systematically articulated in the 1972 essay "Inter-Nation Equity",[39] co-authored with Richard Musgrave. In that paper, the Musgraves introduce inter-nation equity as a set of principles aimed to answer two fundamental questions: 1. which countries should tax income internationally and 2. how to distribute tax jurisdiction between them.[40]

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34 *See*, *e.g.*, Neil Brooks & Thaddeus Hwong, The Social Benefits and Economic Costs of Taxation: A Comparison of High- and Low-Tax Countries 24–25 (2006).

35 *See*, *e.g.*, Maarten F. de Wilde, *Some Thoughts on a Fair Allocation of Corporate Tax in a Globalizing Economy*, 38 Intertax 281, 287 (2010).

36 *See* Brooks, *supra* note 5, at 491 (noting that after decades of the publication of Musgrave and Musgrave's 1972 essay, it continues to be cited regularly and the concept of inter-nation equity continues to be relevant as a widely accepted criterion for assessing the international tax regime).

37 *See supra* note 9.

38 *See*, *e.g.*, Musgrave, *Interjurisdictional Equity*, *supra* note 9, at 54 ("In fact, the significance of these tax arrangements for IJE [interjurisdictional equity] goes beyond the mere revenue share. As capital moves from one jurisdiction to another, this not only affects tax bases but also has its impact on factor earnings in both host and home jurisdictions. For developing countries in particular, the gain to labour from a capital inflow may outweigh in importance any revenue to its Treasury. At the same time, allowance for these secondary effects in determining an equitable distribution of tax bases would be administratively unmanageable, so, for practical purposes, IJE has to be confined to revenue shares.").

39 Musgrave & Musgrave, *supra* note 3.

40 Musgrave's analysis is sophisticated in many respects and is not limited to these two normative principles. This article will not go into these details because the main goal of understanding the normative grounds for the principles they articulate and how these principles are situated in the current global justice debate.

The first aspect of the Musgrave's conception of inter-nation equity, regarding the allocation of taxing rights, is the question of how to divide the international tax base among countries when a business residing in one (residence country) earns income in another (source country). Entitlement to tax is typically attributed on the basis of the source principle—which allows a jurisdiction to tax foreign income arising within its territory—and the residence principle—which recognizes the right of a jurisdiction to tax all income of its residents regardless of where it was earned. The Musgraves argue for the precedence of the source principle, giving the source country the primary right to tax income in cross-border activity. In their view, there are two main reasons for this choice. First, because low-income countries are typically source jurisdictions, it would be inequitable to favor residence-based taxation.[41]

The rationale behind the Musgraves' assumption that the residence country has primary interest over its residents' earnings—and thus that foreign income is part of the residence country's national gain—is not clear.[42] But the practical consequences of this assumption are significantly attenuated by their preference for the source principle for allocating tax jurisdiction, thus giving the source country the primary entitlement to tax. Second, the place of corporate residence involves a fairly arbitrary decision by the corporation itself and can be easily manipulated.[43]

Once the source principle is established as the primary entitlement to tax, the second question is how much the source country is entitled to tax.[44] Two assumptions made by the Musgraves are relevant here. First, any income earned by an investor arising from international trade and investment is part of the residence country's earnings. This means that any taxes imposed at source will result in inter-nation redistribution (transfer of international gains from the residence to the source country), whereas any taxes imposed by the residence country will not (because it

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41 Musgrave & Musgrave, *supra* note 3, at 78.

42 One reason might be that until 1991, the United States used as its overall economic indicator the gross national product (GNP), which includes income earned by residents overseas and excludes income earned by non-residents in the country. In 1991, the U.S. shifted to gross domestic product (GDP), which computes exclusively income produced in the country, either by residents or non-residents. See United States Bureau of Economic Analysis, Gross Domestic Product as a Measure of U.S. Production 8 (1991). Another reason might that they adopted the typical assumption that income is owned by who produces it, regardless of its place of origin. Klaus Vogel criticized this assumption by arguing that it ignores the fact that when income is produced it consists of values integrated into the economy of the source country and thus subject to that state's sovereignty (Vogel, *supra* note 7, at 400–01). Kaufman also questions the Musgraves' assumption in today's international tax system because of the present universality of source-based taxation (Kaufman, *supra* note 7, at 194). Kaufman's criticism, however, seems to conflate *entitlement to overall earnings* (which is what Musgrave's assumption refers to) with *entitlement to tax* (which is what the source principles relates to). The main question here is about which country has the legal or moral right over gains arising from international trade and investment. The main problem with the Musgraves' assumption that the residence country holds primary entitlement over gains from international investment is that the issue might require a more in-depth discussion over international property rights that are not explicitly addressed.

43 Musgrave & Musgrave, *supra* note 3, at 78.

44 The highlight that inter-nation equity is relevant not only to determine the distributional claims between source and resident countries, but also among the different possible source countries and the different possible residence countries. As for the latter, they argue that a residence country should be entitled to tax only if it is either the country of source or the country of primary tax allegiance (residence or citizenship) for individual shareholders owning a substantial proportion of the equity (Musgrave & Musgrave, *supra* note 3, at 78–79).

only transfers earnings from a resident to the treasury of the residence country).[45] Second, as a corollary, taxation by the residence country affects inter-individual equity in that country but does not interfere with inter-nation equity. Therefore, in their view, inter-nation equity is exclusively determined by how much tax jurisdiction is given to the source country. Since the tax rate applied at source will determine how much of the international gains is transferred from the residence to the source country, and thus determine how taxing rights are divided between residence and source, the appropriate tax rate applicable at source is an important factor of inter-nation equity. The Musgraves propose three alternative principles: the principle of non-discrimination, the principle of national rental, and the distributional approach.

The first possible criterion for determining the tax rate at source is the *principle of non-discrimination*, which follows what they take to be "the general principle of equality under the law" and requires that all economic activity within a country's border be treated alike.[46] The practical implication is that source countries' withholding tax rates should vary according to their own rate structure so that domestic and foreign taxpayers are applied the same combined tax rate.

The *principle of national rental* considers the total national gains of each country (residence and source) accruing from international investment[47] and suggests that there should be some form of equal net benefit to both sides. According to this principle, for example, if the source country is resource-rich but capital-poor, it should be allowed to charge a national rental charge for the use of its investment environment and natural resources.[48]

The *distributional approach* builds on the national rental principle, but the rates adopted by each source country vary according to "distributional considerations".[49] Rather than a reciprocal or equal rate schedule, tax rates at source should be differentiated so that they would relate inversely to per capita income in the source country and directly to per capita income in the residence country, so as to improve the relative position of low-income countries.[50] The main underpinning for the distributional approach is the normative demand to promote international redistribution in a world with a "highly unequal distribution of resource endowments and per capita income among countries and in the absence of an adequate method for dealing with the problem".[51]

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45 This assumption is later relaxed, when they consider that whenever the incidence of corporation tax falls on consumers rather than solely on profits, taxation by the residence country on its foreign investment results in a national loss to the source country (and a gain to the residence country). In such a case, they argue that residence-based taxation would be inappropriate for redistributive reasons because the capital exporting country will hardly be the low-income country (Musgrave & Musgrave, *supra* note 3, at 80–81).

46 *Id.*, at 71–72.

47 This includes the net gain to the residence country due to increased capital income and the net gain to the source country due to increased labour income.

48 Musgrave & Musgrave, *supra* note 3, at 72–74.

49 The Musgraves describe it as rental rates tempered by distributional considerations.

50 Musgrave & Musgrave, *supra* note 3, at 74.

51 *Id*.

The Musgraves note that these principles are incompatible with each other, so that a choice must be made as to which principle applies in each case.[52] The choice, in their view, depends fundamentally on whether the residence and the source countries are at the *same* or *different* levels of development. When both are high-income countries, either the non-discrimination or the national rental principle could apply. However, in treaty arrangements between low-income and high-income countries, the distributional approach takes priority.[53] This two-pronged standard for allocating taxing rights among jurisdictions points to a dual notion of inter-nation equity. The following will explore a few normative implications of this view.

52 *Id.*, at 80.

53 The Musgraves explicitly reject the principle of reciprocity, which requires that countries adopt equal tax rates on income accruing to non-resident corporations. They point out that the principle has little economic justification and is incompatible with the more sensible principles they propose, namely the principle of non-discrimination, the national rental principle, and the distributional approach. *See* Musgrave & Musgrave, *supra* note 3, at 80.

2. Inter-nation Equity as a Two-fold Concept

A. *Two Normative Components*

As shown in Section II.B, most conceptions of inter-nation equity tend to incorporate only partial aspects of the concept originally formulated by the Musgraves. These conceptions usually fail to recognize the importance of the Musgraves' call for allocating rights on a two-pronged basis that considers, on the one hand, economic imputation and, on the other, international redistribution.[54]

For this discussion, it is helpful to consider two alternative normative approaches for allocating tax jurisdiction at an international level. *Entitlement approaches* consider a jurisdiction entitled to tax by virtue of a specific political or economic relationship with the person or income being taxed. From a moral perspective, this approach relies on the notion of tax sovereignty and builds on a statist view of international relations.[55] Discussions around source and residence are fundamentally informed by entitlement approaches.[56] *Differential approaches* tend to disregard direct economic and political connections between a taxpayer and a state as morally relevant criteria to divide the tax base among countries. According to this view, tax jurisdiction should be distributed so as to carry out a universal moral objective, in particular one that aligns with a concern about global justice.[57] Differential

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54 *Id.*, at 85 ("On the whole, it would seem desirable to implement redistributional objectives through rate differentiation while attempting to divide the source in line with 'true' economic imputation.").

55 Laurens van Apeldoorn, who calls this view an internationalist position, has accurately described it as the "model [that] conceives of states as independent and autonomous, entitled to shape their social, political and economic institutions as they see fit, [where] states are presumed to have an unqualified right to the resources they control and the wealth they create in their territory." (Laurens van Apeldoorn, *Exploitation, International Taxation, and Global Justice*, 77 Rev. Soc. Econ. 163, 167 (2019)).

56 For a broader analysis of this view, see Ivan Ozai, *Origin and Differentiation in International Income Allocation*, 44:1 Dal. L.J. (forthcoming 2021) (using the term origin-based approaches to refer to normative theories that build on the entitlement view).

57 Alexander Cappelen calls this the assignment approach. See Alexander W. Cappelen, *The Moral Rationale for International Fiscal Law*, 15 Ethics & Int'l Aff. 97, 108 (2001) ("A characteristic feature of international fiscal law is that considerations of international income distribution do not have any role in the distribution of tax rights. The assignment approach would challenge this feature of international fiscal law based on what we could call the distributional objection. In its general version this objection points out that benefits arising from special relationships might work to the disadvantage of those who are most in need.").

approaches take taxing rights allocation as a significant tool for addressing global inequality and propose a distribution according to characteristics of each country such as per capita income or number of inhabitants. Proposals for global taxes typically endorse this view. One prominent example is Thomas Pogge's global resources dividend (GRD), effectively a tax on the use of natural resources, the revenue of which would be distributed to less affluent countries.[58] A recent proposal that does not entirely abandon the entitlement approach but could result in a regionally differential one is a recent call by a group of European tax professors for transferring to the European Union the power to levy specific taxes.[59]

The Musgraves seem to embrace neither of these approaches as a whole. They rather advance an allocation of tax jurisdiction based on "economic imputation" "tempered by distributional considerations",[60] which indicates a two-fold view that combines an entitlement component—based on the notions of economic allegiance,[61] benefit terms,[62] and tax sovereignty[63]—with a differential one.[64]

The *entitlement component* of inter-nation equity is grounded on the idea of sovereignty and conveyed through the general alignment with the benefit principle, which requires an entitlement to tax according to the benefits derived from each country's provision of public goods and services. The Musgraves embrace source-based taxation by arguing that "a sovereign country is entitled to tax all activity which occurs within its borders",[65] but also residence-based taxation, although only as a normatively residual right over the entitlement of the source country.[66] The principles of non-discrimination and of national rental are two corollaries of this normative component. As Section II.B has shown, this is markedly the most prevalent interpretation of inter-nation equity in the tax literature.

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58 Thomas W. Pogge, *Eradicating Systemic Poverty: Brief for a Global Resources Dividend*, 4 Sur Rev. Int'l Direitos Humanos 142 (2007) ("The scheme for disbursing GRD funds is to be designed so as to make these funds maximally effective toward ensuring that all human beings can meet their own basic needs with dignity.").

59 Frans Vanistendael et al., *European Solidarity Requires EU Taxes*, EU Law Live (April 21, 2020), eulawlive.com.

60 Musgrave & Musgrave, *supra* note 3, at 78.

61 Musgrave, *Combining*, *supra* note 9, at 168.

62 *Id.*, at 172–73.

63 Musgrave & Musgrave, *supra* note 3, at 71–72.

64 *Id.*, at 74, 75, 80, 89.

65 *Id.*, at 71–72.

66 In later work, Peggy Musgrave takes a more nuanced view of the residence country's entitlement to tax. She grounds residence entitlement as a matter of tax sovereignty (because residents owe tax allegiance to their country of residence in return for rights and privileges they receive), as a requirement of inter-individual equity (by ensuring equitable tax treatment of resident taxpayers by taxing all their income wherever earned), and as corollary of the benefit principle (since the residence country provide productivity-enhancing benefits to residents' factors of production prior to foreign investment as well as rights and privileges resulting from registration). *See* Musgrave, *Combining*, *supra* note 9, at 168–69). But she still regards the residence country as a residual taxing authority vis-à-vis the source country (*id.*).

The *differential component* is an equally important but significantly overlooked aspect of the Musgraves' conception of inter-nation.[67] The idea that international taxation should be informed by a moral requirement of redistribution from high- to low-income countries run through many of the policy recommendations offered in their 1972 essay. Along with the case they made for a differentiated tax rate schedule based on each country's different level of per capita income (referred to in Section II.C),[68] they also took distributional considerations into account when they argued for an internationally agreed-upon framework to replace the existing bilateral treaty network,[69] against taxation at residence whenever the corporation tax incidence falls on consumers,[70] for primary source-based taxation,[71] and when considering an apportionment formula for allocating the international tax base among multiple source countries.[72] In later work, Peggy Musgrave also referred to distributional considerations when calling for investment in low-income countries,[73] condemning tax competition,[74] and arguing against the unilateral substitution of consumption taxes for the income tax by the United States[75] and compensatory revenue transfers in case of global substitution of consumption taxation.[76]

Despite the ubiquitous concern with distributional considerations in the Musgraves' (notably in Peggy Musgrave's) scholarship,[77] it would be misleading to take their case for international redistribution as a call for cosmopolitan global justice.[78] Global cosmopolitanism typically disregards the significance of states and treats each individual as a member of a universal society and thus deserving an equal share of entitlements.[79] Although the differential component makes an important part of the Musgraves' conception of inter-nation equity, they still take the entitlement component as fundamental. As the following section will discuss, this normative

67 For a similar argument, see Kaufman, *supra* note 7, at 203 (pointing out that it would be a mistake to disregard the differential aspect of the Musgraves' scholarship and think of inter-nation equity only in terms of entitlement theory).

68 The idea for a tax rate schedule inversely related to per capita income was reiterated in Musgrave, *Interjurisdictional Equity*, *supra* note 9, at 59.

69 Musgrave & Musgrave, *supra* note 3, at 79–80.

70 *Id.*, at 81.

71 *Id.*, at 78.

72 *Id.*, at 85.

73 Musgrave, *Combining*, *supra* note 9, at 170.

74 Musgrave, Sovereignty, *supra* note 9, at 1343–44; Musgrave, *Taxing*, *supra* note 9, at 1478.

75 Musgrave, *Sovereignty*, *supra* note 9, at 1353–54.

76 *Id.*, at 1355.

77 *But see* Infanti, *supra* note 23, at 214 (noting that although Peggy Musgrave often revisited her articulation of inter-nation equity in later work, she has never returned to its differential aspect in a similarly sustained way).

78 This seems to be the position taken, for example, by Avi-Yonah, *supra* note 4, at 1648–49.

79 Cosmopolitanism and other views on the global justice debate will be further discussed in Section III.B.

position aligns with what could be regarded in today's global justice debate as a middle course between cosmopolitanism and statism.[80] That the Musgraves took such an unorthodox position in their 1972 essay at a time when discussions about global justice were still incipient is but one trace of the ingenuity of their scholarship.

B. *Normative Compromise*

Global justice asks whether principles of distributive justice should constrain to the domestic realm or extend to the international domain. On one end stands *global cosmopolitanism*, which argues that normative requirements of distributive justice should apply at the global level.[81] Global cosmopolitan theories are rich and nuanced, and they increasingly vary in content, scope, and justification.[82] But all cosmopolitan theorists share the belief that human beings—and not families, cultures, or nations—are the ultimate units of moral concern and thereby should be treated equally regardless of nationality or citizenship.[83] On the other end stands *statism*, which typically claims that no duty of egalitarian distributive justice exists outside the state.[84] Statists usually accept that we have universal duties to humanitarian assistance to those in desperate need, but these duties are limited and not grounded on principles of distributive justice.[85]

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80 See Laura Valentini, Justice in a Globalized World: A Normative Framework 3–4 (2011). Peggy Musgrave's adoption of a moderate view on global justice is also indicated by the fact that her scholarship is significantly informed by the concept of inter-individual equity (within a state) as a normative requirement that is separate from inter-nation equity.

81 Early works embracing global cosmopolitanism are Charles Beitz, Political Theory and International Relations (1973) and Thomas W Pogge, Realizing Rawls (1989). More recent theories of global cosmopolitanism include Darrel Moellendorf, Cosmopolitan Justice (2002); Kok-Chor Tan, Justice without Borders: Cosmopolitanism, Nationalism and Patriotism (2004); Simon Caney, Justice beyond Borders: A Global Political Theory (2005).

82 One fundamental distinction is offered by Andrea Sangiovanni. *See* Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 Phil. & Pub. Aff. 3 (2007). He divides cosmopolitan theories in relational and non-relation conceptions of distributive justice. In non-relational cosmopolitanism, duties of justice should extend beyond national borders because they rest on a conception of person rather than of the existence of particular types of social relations or institutions. Conversely, relational cosmopolitanism conditions the extension of principles of distributive justice to the international realm to the existence of shared political, social or cultural shared values or institutions. They typically argue that there exists a global basic structure which requires that liberties, opportunities and wealth be equally distributed across the world.

83 Kok-Chor Tan, *The Demands of Global Justice*, 13 Oeconomia 665 (2013). See also Sangiovanni, *supra* note 82, at 3.

84 One important representative of this view is Thomas Nagel, *The Problem of Global Justice*, 33 Phil. & Pub. Aff. 113 (2005). Frequently deemed as representatives of a moderate statist view include Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 Phil. & Pub. Aff. 257 (2001); Samuel Freeman, *The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice*, 23 Soc. Phil. & Pol'y 29 (2006). For a discussion about the statist view applied to international tax policy, see Laurens van Apeldoorn, *A Sceptic's Guide to Justice in International Tax Policy*, 32 Can. J.L. & Jur. 499 (2019).

85 This normative concession was taken by many critics as inadequate to addressing global economic injustice. *See, e.g.*, Thomas Pogge, *'Assisting' the Global Poor*, *in* The Ethics of Assistance: Morality and the Distant Needy 260 (Deen K Chatterjee ed., 2004). Pogge points out that duties of assistance differ from duties of distributive justice mainly because the former has an absolute target (no people should be prevented by severe poverty from organizing themselves as a liberal or decent society, so that any inequalities beyond that threshold is a matter of moral indifference) whereas the latter has a relative target that constrains international inequalities (*id.*, at 261).

Between these two normative accounts of global justice, several recent theories have positioned themselves somewhere in the middle of the spectrum. Some have called this a "third wave" of the debate on global justice.[86] This middle course position generally rejects theories that accept no principles of justice at the global level as well as theories that claim the same principles to apply both domestically and globally. Intermediary positions on global justice generally agree with cosmopolitans that duties of justice exist in regards of global distributions, while standing with statists in that the state has a special place in accounts of justice, so that duties of justice applied internationally differ in content and scope to those applied domestically.[87]

This middle course position has sometimes been called "internationalism". The term is fitting, as it conveys the idea that the scope of principles of distributive justice extend not only *outside* but also *between* ("inter") states.[88] Because there is currently no substitute for the state as a political mechanism for realizing people's democratic preferences, global distributive justice is to be achieved through states rather than beyond them. A normative compromise that includes both an entitlement component (recognizing state sovereignty) and a differential one (allowing for demands of global distributive justice) should require that international regimes and institutions allocate both political and economic rights to jurisdictions in a way that do not worsen global inequality and, to some degree, promote global justice. How and to what extent the differential component applies will be further explored in Section IV.

C. *The Concept of Differentiation*

The dual conception of inter-nation equity introduced in Section III.A prominently aligns with the internationalist stance of global justice advanced in Section III.B. It demands the integration of two apparently opposing normative requirements: that states are entitled to the wealth generated in their territories or arising from the resources they control; and that the distribution of rights over that wealth should allow for a differential regime that favors less affluent economies.[89]

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86 In Laura Valentini's reading, this "third wave" provides "a sustained critical discussion of cosmopolitanism and statism, and a fresh perspective helping us to steer a middle course between them" (Valentini, *supra* note 80, at 3–4). According to Valentini, two representatives of this position are Gillian Brock, Global Justice: A Cosmopolitan Account (2009) and David Miller, National Responsibility and Global Justice (2007). Yet, as she notes, these authors explicitly place themselves respectively in the cosmopolitan and statist traditions.

87 *See, e.g.*, Jon Mandle, Global Justice (2006); Sebatiano Maffettone, *Global Justice: Between Leviathan and Cosmopolis*, 3 Global Policy 443 (2012); Mathias Risse, On Global Justice (]2012).

88 Risse, *supra* note 87, at 10.

89 Laurens van Apeldoorn, although adopting different normative assumptions and a different scope, has recently made a similar case for restricting the entitlement approach to promote some degree of international redistribution. See Laurens van Apeldoorn, *International Tax Co-operation in an Unjust World: Do States Have an Entitlement to Tax Income Arising in Their Territory?*, 4 Brit. Tax Rev. 528, 529 (2019) ("relatively affluent states have an exclusive (or primary) entitlement to tax income arising in their territory only in the absence of subsistence rights deficits abroad (in so far as such deficits can be prevented by curtailing that entitlement").

Although the differential approach is still quite unorthodox in international tax law, it has been applied to some degree in international labor law,[90] law of the sea,[91] international trade law,[92] international climate law,[93] and international patent law,[94] as a way to foster substantive equality among states with varying levels of capacity.

One of the fundamental tenets of international law is the *principle of sovereign equality*, which conveys the notion of equal rights and strict reciprocity between states.[95] Sovereign equality is limited to recognizing states' sovereignty and implies formal equality between states, despite background economic, political, and military inequalities.[96] *Differential treatment* is a deviation to the principle of sovereign equality.[97] It typically comprises non-reciprocal arrangements aimed at promoting substantive equality between countries.[98] The rationale behind differentiation in international law lies in the recognition that formally equal treatment can secure equality only among parties at an identical or similar level of economic and political power, and that differentiated treatment is warranted to correct inequalities among different parties.[99] Differentiation is also seen as a way to foster cooperation and facilitate the effective implementation of international norms.[100]

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90 Article 19(3) of the Constitution of the International Labour Organization.

91 Articles 61 and 62 of the United Nations Convention on the Law of the Sea.

92 Article XVIII of the Agreement on Tariffs and Trade.

93 Article 3(1) of the United Nations Framework Convention on Climate Change.

94 Articles 65(2), 65(4), 66(2), and 67 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

95 Brad R. Roth, Sovereign Equality and Moral Disagreement 55 (2011). Sovereign equality is codified in article 2(1) of the Charter of the United Nations of 1945: "The Organization is based on the principle of the sovereign equality of all its Members."

96 Lora Anne Viola, Duncan Snidal & Michael Zürn, *Sovereign (In)Equality in the Evolution of the International System*, *in* The Oxford Handbook of Transformations of the State 221, 223–24 (Stephan Leibfried et al. eds., 2015) ("Traditional theorizing on international relations takes state relations to be characterized by resource inequality on the one hand, and sovereign equality on the other hand. [...] As a principle of the international system, sovereign equality emphasizes the equality of states in spite of obvious resource inequalities.").

97 Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations*, 10 *E.J.I.L.* 549, 550 (1999).

98 Differential treatment recognizes the limits of a system based on a fiction of legal equality between states that imposes reciprocity of commitments by all state parties to any treaty. *See* Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 Colo J. Int'l Envtl. L. & Pol'y 69 (1990). For a discussion in international taxation about rules that are nominally reciprocal but substantively asymmetrical, see Steven A. Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime*, 84 Tul. L. Rev. 125 (2009).

99 See Oscar Schachter, *The Evolving Law of International Development*, 15 Colum. J. Transnat'l L. 1 (1976) (grounding differential treatment on a consideration of need as basis for entitlement); Cullet, *supra* note 97, at 550; Frank J. Garcia, Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade (2003) (taking differentiation as a mechanism to achieve wealth redistribution in the face of substantial inequalities); Eduardo Tempone, *Special and Differential Treatment*, *in* Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum eds., 2014).

100 Cullet, *supra* note 97; Tempone, *supra* note 99.

One prominent example of differential treatment is the principle of common but differentiated responsibilities and respective capabilities, formalized in the United Nations Framework Convention on Climate Change.[101] The principle distinguishes between countries according to their level of responsibility for greenhouse gas emissions and their varying capacities to act in response. It not only guides differentiated obligations under the UN's climate change convention, but also has specific applications in particular areas of activity, such as adaptation, technology transfer, finance and capacity building, and allows for other tailored interpretations by negotiating groups.[102]

The principle of common but differentiated responsibilities and respective capabilities allocates greater environmental burdens and costs to more affluent countries than poorer ones. The rationale derives from both distributive justice and a form of restorative justice. The former holds that distribution of burdens should be made according to countries' ability to pay to avoid delaying poverty eradication in less developed countries.[103] The latter holds that the distribution of burdens should consider countries' historical contribution to climate change as a measure of their responsibility.[104]

When it comes to the international tax system, similar normative grounds call for differentiation.[105] From a historical point of view, some of the fundamental problems with the international tax regime affecting the current distribution of taxing rights such as tax competition and tax avoidance significantly result from how the present rules were designed in the 1920s, when the League of Nations commissioned a group of experts to evaluate how to avoid the problem of double taxation in cross-border transactions.[106] The decision made then by today's most powerful economies resulted in the current web of inconsistent rules that are increasingly exploited by multinationals to avoid taxes.[107] Low-income economies have oftentimes been encouraged by wealthier countries and by international organizations such as the IMF or the

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101 Article 3(1).

102 Sébastien Jodoin & Sarah Mason-Case, *What Difference Does CBDR Make? A Socio-Legal Analysis of the Role of Differentiation in the Transnational Legal Process for REDD+*,5 Transnat'l Environ. L. 255, 257 (2016).

103 Darrel Moellendorf, The Moral Challenge of Dangerous Climate. Change: Values, Poverty, and Policy 173–77 (2014).

104 Henry Shue, *Global Environment and International Inequality*, 75 Int'l Aff. 531 (1999); Simon Caney, *Climate Change and the Duties of the Advantaged*, 13 Crit. Rev. Int'l Soc. & Pol. Phil. 203 (2010).

105 For an exploration of how a similar principle could apply to reform proposals aimed at addressing tax competition, see Ivan Ozai, *Tax Competition and the Ethics of Burden Sharing*, 42 Fordham Int'l L.J. 61 (2018).

106 See Allison Christians, *BEPS and the Power to Tax*, *in* Tax Sovereignty in the BEPS Era (Sérgio André Rocha & Allison Christians eds., 2016).

107 Policymakers at the time did foresee that this tax regime would allow taxpayers to more easily engage in tax avoidance and evasion, but they were more concerned that an alternative solution would harm efforts to liberalize trade and investment, the primary objective at the time. See Thomas Rixen, *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance*, 18 Rev. Int'l Pol. Econ. 197, 212 (2011).

World Bank to pursue policies that include low taxation of capital.[108] Moreover, policy choices made by developed countries in the last few decades have intensified tax competition. The adoption of specific domestic policies of developed countries has created international conditions that favored tax competition over cooperation, constraining policy alternatives of less developed countries, as multinationals put pressure on them to reduce their taxes.[109]

From a broader perspective, economic globalization is at least partly a factor in global poverty.[110] This causal relationship implies that some degree of partial correction is warranted to reduce or eliminate inequalities stemming from global factors.[111] While globalization of markets has allowed rapid growth for some economies, it has left many others lagging behind in living standards.[112]

From a distributive justice standpoint, the international tax regime increasingly constitutes a strong and largely non-voluntary economic association between countries. This raises *special associative duties*—duties owed to parties with whom one stands in a robust relationship or interaction[113]—one of which is the requirement that international institutions do not become

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108 Philipp Genschel & Laura Seelkopf, *Winners and Losers of Tax Competition*, *in* Global Tax Governance: What Is Wrong with It and How to Fix It 55 (Peter Dietsch & Thomas Rixen eds., 2016) at 69 (pointing out that international organizations such as the United Nations Conference on Trade and Development (UNCTAD) often encourage small, resource-poor countries to embrace tax-haven strategies as a means for accelerating development). An important point to make is that the current tax regimes of many tax havens hardly result from an expression of their will as they are "often holdovers from the colonial era." Steven A. Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 Hastings L.J. 911, 936 (2007).

109 *See* Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*, 42 U.B.C. L. Rev. 239, 265–66 (2010) (pointing to the United States' international tax rules as an example that increases the sensitivity of taxpayers to foreign tax rates); Karen B. Brown, *Taxation and Development: Overview*, *in* Taxation and Development: A Comparative Study (Karen B. Brown ed., 2017) ("policies instituted by the leaders of the more industrialized, higher-income nations in their quest to produce and prosper helped to create the environmental degradation plaguing everyone, particularly nations which are geographically and economically vulnerable."). *See also* Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015) at 44–46. Some have noted that given the need for tax revenues, developing countries would generally prefer not to engage in tax competition, but they are compelled to grant tax incentives in response to the existing competitive scene. *See, e.g.*, Reuven Avi-Yonah, *Globalization and Tax Competition: Implications for Developing Countries*, 44 L. Quadrangle Notes 60, 63 (2001).

110 This view is sometimes called "explanatory pluralism" and rejects that global poverty can be *wholly* explained as either a product of domestic factors (explanatory nationalism) or a result of global factors (explanatory globalism). *See* Chris Armstrong, *Defending the Duty of Assistance?*, 35 Soc. Theory & Prac. 461, 468–69 (2009).

111 Building on luck egalitarianism, Cappelen argues for what he calls a principle of equalization at the international level, according to which the opportunities different countries have to pursue their goals be equalized, so that differences stemming from global factors be eliminated. *See* Alexander Cappelen, *Responsibility and International Distributive Justice*, *in* Real World Justice: Grounds, Principles, Human Rights, and Social Institutions (Andreas Follesdal & Thomas Pogge eds., 2005) 215. See also Mandle, *supra* note 87, at 102 (arguing that this duty of justice is stronger among wealthy states and those that played a historical role in making the social order unjust such as through colonialism).

112 Ilan Benshalom, *How to Redistribute: A Critical Examination of Mechanisms to Promote Global Wealth Redistribution*, 64 U.T.L.J. 317, 322 (2014). *See generally* Joseph E. Stiglitz, Making Globalization Work 100 (2006).

113 These duties are sometimes called *relational* duties. *See* Andrea Sangiovanni, *On the Relation Between Moral and Distributive Equality*, *in* Cosmopolitanism versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations 55 (Gillian Brock ed., 2013).

sources of privileges to wealthier, more powerful participants.[114] More broadly, the current level of economic integration of nations has made the global economy a substantial presence in the lives of all states, and economic regulation and policy decisions today take place in a global setting that is inescapably interdependent. The fact that rules made by a state (or by supranational rule-making bodies) are consequential to other states raises the need for some degree of coordination and equity beyond the national level.[115]

114 Darrel Moellendorf, *Cosmopolitanism and Compatriot Duties*, 94 Monist 535 (2011). See also Darrel Moellendorf, *Human Dignity, Associative Duties, and Egalitarian Global Justice*, *in* Cosmopolitanism versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations 222 (Gillian Brock ed., 2013).

115 Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 Phil. & Pub. Aff. 147, 165 (2006).

3. Allocating Rights According to Inter-nation Equity

A. *Reconciling Entitlement and Differentiation*

Section III has introduced the dual conception of inter-nation equity, showing that, from a normative perspective, it builds on an internationalist view of global justice and, from a legal perspective, it can operate through the mechanism of interjurisdictional differentiation. Once the dual conception of inter-nation equity is established as a normative guide for allocating taxing rights, the following question is how to reconcile its two normative components. When should the allocation of taxing rights be guided by an entitlement approach (thus preserving allocation on the basis of sovereignty and economic allegiance) and when should it give way to a differential approach (thereby tackling global inequality)?

A solution for how to reconcile entitlement and differentiation might arise from the limitations of entitlement approaches as a sole normative guide for the allocation of taxing rights. A largely uncontested feature of the current tax rules for determining entitlement to tax is its significant degree of arbitrariness. The concept of residence, for instance, particularly when applied to corporations, is significantly problematic.[116] In contrast to an individual's residence, which more clearly relates to where that person lives and makes a home, the place of a corporation's residence is subject to a high degree of legal discretion and is hardly consistent throughout different tax systems.[117] Despite a foundational legal construct in international taxation,[118] the concept of corporate tax residence is commonly regarded as

116 See Tsilly Dagan, *The Future of Corporate Residency* (Bar Ilan University Faculty of Law, Research Paper No. 18-14, 2017).

117 *See, e.g.*, Brian J. Arnold, *A Tax Policy Perspective on Corporate Residence*, 51 Can. Tax J. 1559 (2003). For an extended analysis of the varying criteria employed be different jurisdictions to determine corporate residence, see Robert Couzin, Corporate Residence and International Taxation (2002). Assigning tax residence to individuals, however, is without problems. For a comparative overview, *see* Reuven S. Avi-Yonah, Nicola Sartori & Omri Marian, Global Perspectives on Income Taxation Law 515–54 (2011).

118 Omri Marian, *Jurisdiction to Tax Corporations*, 54 Boston College L. Rev. 1613 (2013).

unstable,[119] incoherent,[120] completely artificial,[121] a "crude, if not naive, criterion",[122] lacking economic substance[123] and not very meaningful.[124] Some have gone further as to call for the abandonment of the concept altogether.[125] As a result, multinational enterprises are able to easily adopt foreign statehood while governments complain about the abuse of corporate residence for tax-avoidance purposes.[126]

Establishing a coherent concept of source appears to be an even more challenging task. Countries establish different sets of criteria[127] and use fictitious thresholds to limit the taxation of non-residents at source (permanent establishment).[128] The allocation of profits among jurisdictions also builds on concepts, such as transfer pricing and arm's-length, that require a significant degree of stipulation and are subject to varying accounting methods that lead to significantly different distributional outcomes.[129] The digitalization of the economy in recent decades only compounds the problem.[130] Recent difficulties in aligning tax jurisdictions with

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119 *See, e.g.*, Graetz, *supra* note 7, at 320.

120 *See, e.g.*, Michael J. McIntyre, *Determining the Residence of Members of a Corporate Group*, 51 Can. Tax J. 1567, 1568 (2003).

121 *See, e.g.*, Edward D. Kleinbard, *The Lessons of Stateless Income*, 65 Tax L. Rev. 99, 159 (2011).

122 *See, e.g.*, David R. Tillinghast, *A Matter of Definition: 'Foreign' and 'Domestic' Taxpayers*, 2 Int'l Tax & Bus. L 239, 260 (1984).

123 *See, e.g.*, Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. Rev. 443, 465–67 (2007).

124 *See, e.g.*, Reuven S. Avi-Yonah, *Tax Competition and the Trend Toward Territoriality* (University of Michigan Public Law, Working Paper No. 297, 2012).

125 *See, e.g.*, David Elkins, *The Myth of Corporate Tax Residence*, 9 Colum. J. Tax L. 5 (2017).

126 Geoffrey Loomer, *The Disjunction between Corporate Residence and Corporate Taxation: Is Improvement Possible*, 63 Can. Tax J. 91 (2015).

127 *See* Hugh J. Ault & Brian J. Arnold, Comparative Income Taxation: A Structural Analysis 495–526 (3rd ed. 2010); John Prebble, *Ectopia, Tax Law and International Taxation*, 5 Brit. Tax Rev. 383, 386 (1997); Alex Easson, *Common Law Approaches to the Determination of the Source of Income: Pragmatism over Principle*, 60 Bull. Int'l Taxation 495 (2006).

128 The permanent establishment model imposes two constraints on taxation at source. One, source states may only tax non-resident corporations if the corporation has a "permanent establishment" (a physical presence) in the country and, two, source-based taxation is limited to the income attributable to that permanent establishment. See OECD, Model Tax Convention on Income and on Capital 116–69, 173–218 (2017). *See* Arthur Cockfield, *Reforming the Permanent Establishment Principle Through a Quantitative Economic Presence Test*, 38 Can. Bus. L.J. 400 (2003) (providing the historical evolution of the concept of permanent establishment and noting its arbitrariness despite practical usefulness). For a critical view of permanent establishment from the perspective of developing countries, *see* Sergio André Rocha, *Should Developing Countries Include Article 7 in Their Tax Treaties?*, 71 Bull. Int'l Taxation 354 (2017).

129 *See* Michael Mazerov, *Why Arm's Length Falls Short*, 5 Int'l Tax Rev. 28 (1994); Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 Va. Tax Rev. 89 (1995). *See also* Yariv Brauner, *Between Arm's Length and Formulary Apportionment*, *in* The Allocation of Multinational Business Income: Reassessing the Formulary Apportionment Option (Rick Krever & François Vaillancourt eds., 2020) (pointing out the complexity and costliness of arm's length standard-based transfer pricing for developing countries).

130 *See, e.g.*, Alessandro Turina, *Which 'Source Taxation' for the Digital Economy?*, 46 Intertax 495 (2018); Yariv Brauner, *Taxing the Digital Economy Post-BEPS, Seriously*, 46 Intertax 462 (2018).

where economic activity takes place and attempts by the OECD to update rules for nexus and profit attribution to the digitalization of the economy also point to a significant arbitrariness in how entitlement to tax is assigned.[131]

All these difficulties demonstrate that the effectiveness of existing tax concepts in asserting tax entitlement is limited. They have been historically useful to determine international tax rules, but the increasing complexity—and, more importantly, arbitrariness—involved in redefining and adapting them to the present reality reveals the limitations of entitlement approaches as normatively justified tools to determine allocation.[132] These limitations make it hard to assume that an allocation of the international tax base can be justified solely on the basis of sovereignty or economic allegiance. When these entitlement approaches fail to accurately determine how rights should be normatively distributed, some other normative criterion is required to address their shortcomings.[133]

Taking the insufficiency of entitlement approaches as an uncontested feature of the current international tax system, a dual conception of inter-nation equity entails what might be called the *differential principle*,[134] according to which:

1. states are entitled to tax income generated in their territories or arising from the resources they control – entitlement component;
2. whenever allocation according entitlement cannot be asserted unambiguously, taxing rights should be assigned on the basis of differentiation so as to promote international distributive justice – differential component.

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131 *See, e.g.*, Michael P. Devereux & John Vella, *Are We Heading towards a Corporate Tax System Fit for the 21st Century?*, 35 *Fiscal Stud.* 449 (2014); Allison Christians, *Taxing According to Value Creation*, 90 Tax Notes Int'l 1379 (2018); Allison Christians & Laurens van Apeldoorn, *Taxing Income where Value is Created*, 22 Fla. Tax Rev. 1 (2018); J. Scott Wilkie, *The Way We Were? The Way We Must Be? The 'Arm's Length Principle' Sees Itself (for What It Is) in the 'Digital' Mirror*, 47 Intertax 1087 (2019); Ruth Mason, *The Transformation of International Tax*, Am. J. Int'l L. 44–49 (forthcoming 2020). For the OECD's work on addressing the digitalization of the economy, see OECD, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy: Inclusive Framework on BEPS (2019) [OECD, Programme of Work]; OECD, Secretariat Proposal for a "Unified Approach" under Pillar One: Public Consultation Document (2019) [OECD, Secretariat Proposal]; OECD, Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy (2020).

132 For analyses pointing to the problematic normative underpinning of entitlement approaches for assigning tax jurisdiction, see Hugh J. Ault & David P. Bradford, *Taxing International Income: An Analysis of the US System and Its Economic Premises*, *in* Taxation In the Global Economy 11, 30 (Assaf Razin & Joel Slemrod, eds., 1990) (arguing that "the idea that income has a locatable source seems to be taken for granted, but the source of income is not a well-defined economic idea"); Wei Cui, *Minimalism about Residence and Source*, 38 Mich. J. Int'l L. 245 (2017) (pointing to the insufficiency of the concepts of source and residence and arguing they require additional considerations such as tax enforceability and normative objectives).

133 *See* Stewart, *supra* note 32, at 307–09 (noting that the increasing reconfiguration of the concepts of source and residence should lead to a differential approach to international taxation).

134 Despite the lexical similarity, the differential principle proposed in this article should not be confused with Rawls's difference principle, which is significantly distinct in scope and content.

Whenever an entitlement approach is unable to accurately determine where income should be allocated or how much it should be allocated to different jurisdictions, a decision about allocation requires additional moral judgment to be regarded as normatively legitimate. In the absence of clear moral criteria, such a decision will be made by either some form of dispute resolution or political negotiation. If the former is adopted, a purportedly technical solution will eventually conceal a political or moral judgment,[135] since a straightforward answer based on entitlement is, in this case, unavailable. If the latter is adopted, the final decision will inevitably be made on the basis of influence and power, and the resulting allocation of rights will ultimately favor more powerful countries, compounding global inequality.[136] Both alternatives are problematic for lacking sound normative basis. In the absence of a justifiable normative criterion for allocating taxing rights, priority should be given to a solution that promotes, rather than departs from, distributive justice.

A controversial aspect of the differential principle might be determining the meaning of "unambiguously" (in proposition 2) since the term establishes the threshold from which the differential component takes on. A starting point would be to limit the application of a differential approach to cases where the allocation of taxing rights according to entitlement is contentious enough to generate hard-to-solve disputes. Section IV.C will consider a few cases where entitlement approaches are ineffective to a sufficient degree as to trigger a differential approach.

This section offered a solution for reconciling the entitlement and the differential components of inter-nation equity by addressing the question of *when* a differential approach should apply to the allocation of taxing rights. The remaining question is *how* a differential approach should operate. This is the focus of the following section.

B. *Requirements for Differentiation*

Differentiation has been used in different areas of international law. Yet, both the literature and the real-world applications of differential treatment do not provide straightforward normative requirements that could apply to interjurisdictional differentiation to ensure that

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135 For a discussion on the relevance of political and moral biases in legal interpretation, *see, e.g.*, Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 Geo. L.J. 583 (1992); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. Chicago L. Rev. 853 (2008); Jill Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 Harv. L. Rev. 1521 (2014).

136 For a discussion about how influence and power affect matters of distributive justice in international tax policy, see Ivan Ozai, *Two Accounts of International Tax Justice*, 33 Can. J.L. & Jur. 317 (2020). Hugh Ault identifies two distinct strands of tax competition. Besides the more commonly observed competition for investment, the recent disagreements about how to allocate taxing rights to deal with the challenges posed by the digitalization of the economy has unveiled the concurrent competition for revenues, which despite largely unnoted, goes back to the work of the League of Nations in the 1920s. See Hugh J. Ault, *Tax Competition and Tax Cooperation: A Survey and Reassessment*, *in* International Taxation in a Changing Landscape: Liber Amicorum in Honour of Bertil Wiman (Jérôme Monsenego & Jan Bjuvberg eds., 2019).

it promotes international distributive justice. Nonetheless, based on the normative objectives and underpinnings of differentiation, this section will put forward three core requirements of a legitimate use of this mechanism in international tax policy design.

Universality. The first requirement is a corollary of the notion of horizontal equity as applied in the international domain.[137] Since the primary goal of differentiation is to promote international equity, a differential regime that includes some but excludes other states that are equally in need of resources is normatively problematic. One example is a policy that aims at improving the position of low-income countries by using a differentiating factor that favors some of them but excludes others that do not qualify according to such factor. As Section IV.B will discuss, some recent proposals to reform the international tax regime draw on economic impact assessment to argue that a given policy is likely to favor low-income countries which have a specific attribute (such as being rich in natural resources or in labor supply). The main problem with this approach is that it fails to include other countries that are equally poor but do not happen to possess the attribute chosen for differentiation. It might improve vertical equity (by reducing overall inequality between more and less affluent countries) but to the detriment of horizontal equity (by creating further inequalities between equally low-income countries).

Universality also favors a multilateral approach in place of the bilateralism that informs the current international tax system. Besides several problems with bilateral tax treaties, largely documented in the tax literature,[138] bilateralism is also problematic for leaving weaker states susceptible to power imbalances[139] and resulting in a non-universal regime.[140] Section IV.B will

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137 The terms horizontal and vertical equity appear frequently in the economics literature to refer to the moral requirement of treating equals equally and unequals unequally, respectively. For a discussion about the relationship between these two notions, *see* Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 Fla. Tax Rev. 607 (1993). These concepts, used as measures of equity between individuals in a domestic context, are rarely used to describe equity between nations. Even in those cases, commentators employ the terminology without much elaboration on the concept. *See, e.g.*, Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries*, 23 Va. Tax Rev. 157, 198 (2003); Adam H. Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 Va. Tax Rev. 555 (2007); Reuven S. Avi-Yonah & Yoram Margolioth, *Taxation in Developing Countries: Some Recent Support and Challenges to the Conventional View*, 27 Va. Tax Rev. 1 (2007).

138 *See, e.g.*, Michael Rigby, *A Critique of Double Tax Treaties as a Jurisdictional Coordination Mechanism*, 8 Australian Tax F. 303 (1991); John F. Avery Jones, *Are Tax Treaties Necessary*, 53 Tax L. Rev. 1 (2000); Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 Brook. J. Int'l L. 1641 (2000); Ricardo García Antón, *The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes?*, 8 World Tax J. 147 (2016); Vincent Arel-Bundock, *The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy*, 71 Int'l Organ. 349 (2017).

139 *See* Ivan Ozai, *Institutional and Structural Legitimacy Deficits in the International Tax Regime*, 12 World Tax J. 53 (2020); Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. Int'l L. Pol'y. 939 (2000); Kim Brooks & Richard Krever, *The Troubling Role of Tax Treaties*, *in* Tax Design Issues Worldwide 159 (Geerten M.M. Michielse & Victor Thuronyi eds., 2015); Yariv Brauner, *The True Nature of Tax Treaties*, 74 Bull. Int'l Taxation 28 (2020).

140 *See* Musgrave & Musgrave, *supra* note 3, at 79–80 (arguing that international tax policy should not be left to purely bilateral agreements but should be based on an internationally agreed-upon framework). A similar case made by Philippe Cullet regards the use of equity in international law. One pitfall of differentiation made by judicial equity such as has been advanced by the International Court of Justice (ICJ)—the same as any solution limited to individual cases—is its incapacity to consider structural inequalities in the medium and long term, in contrast to structural reform that moves away from the idea of strict reciprocity. *See* Philippe Cullet, *Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps*, 5 Transn'l Environ. L. 305, 308 (2016).

show that differential approaches taken through bilateralism, such as tax sparing provisions, are problematic among other reasons for their non-universal nature.

Granularity. This requirement builds on the notion of vertical equity.[141] Differential mechanisms should provide countries in unequal positions with distinct treatment. This requirement disapproves of differential regimes that fit low-income countries into generalizing categories such as developing countries, least developed economies, transition economies, newly industrialized countries, and small island developing states. Besides practical hurdles—such as disputes regarding membership to one or other category, particularly in borderline cases[142]—this approach is normatively problematic because it disregards relevant inequalities within the group and thereby limits the ability of the differential regime to efficiently achieve its normative goal.[143] Taxing rights are rivalrous goods, and so their availability for allocation to developing countries through differentiation is limited.[144] A differential mechanism that allocates the same share of rights to countries with significantly different levels of development reduces the share that would be available to the ones in the lowest position had a more granular approach (where each country is differentiated individually rather than as part of a group) been applied.[145] A less practical but normatively superior approach would be to differentiate each country individually rather than as part of a group.

Consistency. The third normative requirement is in part a logical corollary of the previous one. Since differentiation aims to address a certain type of inequality (economic, political, geographical), any mechanism used for differentiation should conform to (1) its targeted inequality and to (2) its regulatory context. Regarding (1), if differentiation is used to reduce economic inequality between countries, a mechanism that differentiates countries based on a factor that is disproportionate to their actual levels of economic development is problematic.

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141 This granularity requirement, however, is less demanding than vertical equity. Vertical equity, as applied to the distribution of tax burdens between nationals, is frequently deemed to warrant progressivity. The granularity requirement discussed here does not go that far. For a discussion about the relationship between vertical equity and progressivity in domestic settings, *see* C. Eugene Steuerle, *And Equal (Tax) Justice for All?*, *in* Tax Justice: The Ongoing Debate 253 (Joseph J. Thorndike & Dennis J. Ventry eds., 2002).

142 *See* Kristin Bartenstein, *De Stockholm à Copenhague : genèse et évolution des responsabilités communes mais différenciées dans le droit international de l'environnement*, 56 McGill L.J. 177, 212 (2010).

143 See Patricia Galvao Ferreira, *Differentiation in International Environmental Law: Has Pragmatism Displaced Considerations of Justice?*, *in* Global Environmental Change and Innovation in International Law 21 (Neil Craik et al. eds., 2018) (noting the need for considering the growing South-South differences in interests and values in future differential policy design).

144 The discussion over the allocation of resources (in this case rights) presupposes scarcity. For a historical analysis of the role of the concept of scarcity in political economy, see Raphael Sassower, *Scarcity and Setting the Boundaries of Political Economy*, 4 Soc. Epistemol. 75 (1990).

145 Yet, differential regimes in place today rarely fulfill this requirement. *See* Cullet, *supra* note 140, at 317–19 (noting that most of the existing differential treatment provisions in international law are still based on classification systems that essentially divide the world in North and South).

Section IV.C will show that a few reform proposals purportedly aimed at improving taxing rights allocation to low-income countries fail to meet this normative requirement. Regarding (2), if the context in which the differential norm is designed has specific normative goals, the differentiating factor should take them into consideration. One prominent example comes from climate change. Besides economic considerations, differential treatment in climate law might additionally require social and environmental considerations to identify the vulnerability of states and their resilience to environmental problems.[146]

C. *Practical Implications*

Differentiation seems to have been implicitly embraced in the international tax system to some degree. Despite the absence of clear normative underpinnings for its application in tax policy, some mechanisms adopted in international tax law clearly take a differential approach by specifically targeting the improvement of the position of less affluent countries. This section will submit that, despite their laudable intent, some of these initiatives are normatively problematic for failing to meet the basic normative requirements for differentiation.

1. *Tax Sparing Agreements*

Although in disuse in today's treaty negotiations, tax sparing provides one of the most visible forms of differentiation in international taxation, notably when applied to an asymmetrical agreement between developed and developing countries.[147] Developing countries often offer tax incentives as a way to attract foreign investors either through reduced tax rates or exemptions. However, the main goal of these incentives is defeated whenever the developed country where the investor resides taxes the low-taxed or untaxed income earned by its resident. Through a tax sparing agreement, a developed country commits to "spare" the tax that it would otherwise impose, thus preserving the economic benefits of tax incentives provided by the developing country to foreign investors.

Some have voiced a firm defense of tax sparing mechanisms from a normative point of view, praising it as a meaningful and necessary mechanism of international redistribution.[148] However, the adoption of tax sparing provisions has largely decreased since 1999, in part as result of a negative view of the mechanism by the OECD in its 1998 tax sparing report.[149] Other

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146 Cullet, *supra* note 140, at 317–19. See also Ferreira, *supra* note 143.

147 Tax sparing has also been used as a reciprocal mechanism between countries with similar trade and investment volumes or close political connections. *See* Na Li, The Tax Sparing Mechanism and Foreign Direct Investment 44–46 (2019).

148 *See, e.g.*, Li, supra note 23, at 121.

149 OECD, Tax Sparing: A Reconsideration (1998).

explanations for its decline are a widespread recognition that tax sparing provisions allow for abuses by multinational corporations through tax avoidance strategies,[150] the lack of evidence that tax sparing increases foreign investment,[151] and the fact that tax sparing clauses often requires low-income countries to make relevant concessions in exchange.[152]

The normative framework put forth in Section IV.B for differentiation suggests that tax sparing is problematic as a differential mechanism. Because only developing countries that are able to secure a tax sparing agreement benefit from the mechanism, tax sparing does not meet the universality requirement for differentiation. Non-universality results in part from the bilateral context from which it arises. At the same time, it is an underlying condition for tax sparing to work, since a comprehensive application of the mechanism would in great part defeat its effectiveness.[153] Tax sparing also fails to meet the consistency requirement. Since negotiation of tax treaty clauses significantly depends on political negotiation and other contextual factors, the global redistribution effected by tax sparing is strikingly arbitrary from a normative point of view.[154] Additionally, tax sparing agreements encourage a competitive environment that generally leads to the erosion of tax bases and might make low-income countries that do not have similar agreements even worse-off as a result. Again, this points to the need for universality in differential mechanisms.[155]

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150 Deborah Toaze, *Tax Sparing: Good Intentions, Unintended Results*, 49 Can. Tax J. 879 (2001).

151 *See, e.g.*, William B. Barker, *An International Tax System for Emerging Economies, Tax Sparing, and Development: It Is All about Source*, 29 U. Pa. J. Int'l L. 349, 388 (2007) (pointing as a relevant reason the fact that tax sparing decreases investment in low-income countries by encouraging repatriation); Allison Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 Brook. L. Rev. 639, 693–94 (2005); Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice*, 34 Queen's L.J. 505, 555–56 (2009). *But see* James R. Hines Jr, *Tax Sparing and Direct Investment*, *in* Developing Countries International Taxation and Multinational Activity 39 (James R. Hines Jr. ed., 2000) (demonstrating some positive correlation between tax sparing and foreign direct investment increase); Céline Azémar, Rodolphe Desbordes & Jean-Louis Mucchielli, *Do Tax Sparing Agreements Contribute to the Attraction of FDI in Developing Countries?*, 14 Int'l Tax & Pub. Fin. 543 (2006).

152 Developing countries might have to accept, for example, lower withholding tax rates or stricter permanent establishment rules in exchange for tax sparing. *See also* Richard D. Kuhn, *United States Tax Policy with Respect to Less Developed Countries*, 32 Geo. Wash. L. Rev. 261, 263–64 (1963) (pointing out that tax sparing are negotiated in a quid pro quo context); Hope Ashiabor, *Tax Sparing: A Timeworn Mechanism in Australia's Bilateral Treaties with Its Trading Partners in Southeast Asia*, 24 Int'l Tax J. 67, 75 (1998).

153 Because tax sparing aims to favour a given country in its efforts to attract foreign investment through tax holidays, it presupposes that other competing countries do not have a similar advantage. The effectiveness of tax sparing provisions relies in great part precisely on the fact that it is non-inclusive.

154 *See* Brooks, *supra* note 151, at 557 ("Granting one low-income country a tax sparing arrangement will undoubtedly encourage other such countries to seek similar arrangements with their treaty partners, thereby reducing the advantage any one country has. This inevitably discriminates against low-income countries that have neither the political nor the economic clout to press for tax treaties in the first place, even though they are likely the ones that most need to encourage investment in some fashion.").

155 *See* Christians, *supra* note 151, at 694.

2. *Unitary Taxation with Formulary Apportionment*

One proposal prominently advanced in tax policy circles to tackle the differential component of inter-nation equity is a shift in how profits earned by multinational corporations are allocated among jurisdictions. Many scholars have called for a departure from separate accounting under the arm's-length principle toward a unitary taxation system with formulary apportionment. A unitary taxation system would apportion multinationals' profits based, partially or entirely, on a multi-factor formula that considers the location of economic factors such as assets, sales, and employees or more commonly payroll. The shift toward unitary taxation would eliminate the complexity of transfer pricing rules and associated administrative and compliance costs that currently take a toll on lower-income countries.[156]

One important and challenging aspect of adopting unitary taxation is settling on the formula according to which profits would be allocated among jurisdictions. Since the rights of countries to tax are determined by where the income is allocated, formulary apportionment would significantly change the current distribution of taxing rights. Proposals for formulary apportionment mostly suggest a formula based on a combination of economic factors, such as the location of sales, payroll expenses, and physical assets. Different proposals suggest varying weights to each of these economic factors.[157] Considering the relative arbitrariness according to which such a formula is to be eventually decided (that is, considering the insufficiency of an entitlement approach as normative guidance),[158] the differential principle stated in Section III.A implies that a differential approach should take priority in determining allocation.[159]

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156 Michael C. Durst, *The Tax Policy Outlook for Developing Countries: Reflections on International Formulary Apportionment* (International Centre for Tax and Development, Working Paper No. 32, 2015).

157 For a brief analysis of the distributive outcome of different formulas, *see* Heinz-Klaus Kroppen, Roman Dawid & Richard Schmidtke, *Profit Split, the Future of Transfer Pricing? Arm's Length Principle and Formulary Apportionment Revisited from a Theoretical and a Practical Perspective*, *in* Fundamentals of International Transfer Pricing in Law and Economics 267, 273–76 (Wolfgang Schön & Kai A Konrad eds., 2012).

158 *See* Edgar, *supra* note 4 ("formulary allocation approaches cannot be justified as realizing some correct allocation defined in any precise normative sense"); Reuven S. Avi-Yonah, Kimberly A. Clausing and Michael C. Durst, *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 Fla. Tax Rev. 497, 516–17 (2009) (acknowledging that any formula can produce arbitrary results in a given industry but arguing that the present separate accounting system is equally or more arbitrary); James R. Hines Jr, *Income Misattribution Under Formula Apportionment*, 54 Eur. Econ. Rev. 108 (2010) (showing that formulas included in proposals for formulary apportionment are not strongly correlated with determinants of business incomes). The normative arbitrariness is also clear when noted that in countries where a formulary apportionment was adopted to allocate tax base among states, the choice of formula significantly relies on pragmatism rather than on an entitlement approach. In the U.S., states gradually shifted to sales as the main allocating factor, not because of its normative appeal but because it is less vulnerable to corporations' arbitrage. *See* Michael Mazerov, *The Single-Sales-Factor Formula: A Boon to Economic Development or a Costly Giveawav?*, 20 *State Tax Notes* 1775 (2001) (noting the weak economic rationale behind the shift toward a single-sales-factor formula); Jack Mintz, *Europe Slowly Lurches to a Common Consolidated Corporate Tax Base: Issues at Stake*, *in* A Common Consolidated Corporate Tax Base for Europe (Wolfgang Schön, Ulrich Schreiber & Christoph Spengel eds., 2008). For some legal implications of a sales-based formula at the international level, *see* Charles E. Mclure Jr & Walter Hellerstein, *Does Sales-Only Apportionment of Corporate Income Violate International Trade Rules?*, 27 Tax Notes Int'l 1315 (2002).

159 For a similar observation, *see* Tommaso Faccio & Valpy Fitzgerald, *Sharing the Corporate Tax Base: Equitable Taxing of Multinationals and the Choice of Formulary Apportionment*, 25 Transnat'l Corp. 67, 85 (2018) (pointing out that the existing formula proposals lack clear economic rationale and pay insufficient attention to the equitable treatment of developing countries).

The relevance of a differential approach in formulary apportionment seems to have been recognized in tax policy circles. In a policy paper released in 2014, the International Monetary Fund's staff aimed to assessed "spillover effects on developing countries of major tax reforms proposed".[160] One of the major concerns presented in the paper is how different formulas would significantly impact the distribution of tax base to developing countries. Based on an economic impact assessment of how different formulas would impact different groups of countries (divided in advanced, developing, and conduit countries), the paper emphasizes criteria that would favor poorer economies, namely a formula that places heavy weight on employment factors (based on headcount, not wages).[161]

The initiative deserves praise for taking the interests of developing countries into consideration. However, there are some problems with this approach. The first is methodological, since it relies on data with only limited availability.[162] The second is that, in the absence of a clear economic rationale behind any choice of formula, an evaluation based exclusively on economic factors lacks transparency. Disagreements over criteria with significant distributive consequences are concealed under a purportedly technical discussion.[163] Third, and most importantly from an internation perspective, choosing a formula based on the economic impacts on groups of countries violates the normative requirements for differentiation put forth in Section III.B. By analyzing the economic impacts of formulas to three generalizing groups of countries (advanced, developing, and conduit countries), the IMF study disregards the varied levels of development within each of them. Although some low-income countries would potentially benefit from a formula based on employment, other might not. A final allocation of multinationals' profits largely based on employment might reduce overall global inequality but would potentially leave many low-income countries unattended, thereby failing to meet the granularity requirement. Additionally, even countries that would benefit from such an approach would likely benefit disproportionately to their development needs, thus failing to meet the consistency requirement.

The problem, of course, is not with IMF's study but rather the idea that the allocation of profits based on one or a set of production factors would offer a fair division of taxing rights. Taking again into consideration the reasonable degree of arbitrariness that a choice of formula

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160 International Monetary Fund, *Spillover in International Corporate Taxation* 24 (IMF, Policy Paper, 2014). Stating a similar conclusion, *see* Faccio & Fitzgerald, *supra* note 159, at 72–73 (noting that developing countries gain from employment factors but lose from payroll factor because wages are much higher in developed countries).

161 *Id*., at 39–40.

162 *Id*., at 40 (stating that data limitations prevent precise calculations); Sol Picciotto, *Unitary Alternatives and Formulary Appointment*, *in* Taxing Multinational Enterprises as Unitary Firms 27, 37 (Sol Picciotto ed., 2017) (emphasizing the lack of data, especially relating to developing countries, for this type of quantification).

163 For example, it has been noted that capital-importing countries might argue for factors based on destination sales while capital-exporting states might argue for apportionment focused primarily on aspects relating to residence. See Arthur J. Cockfield, *Formulary Taxation Versus the Arm's-Length Principle: The Battle Among Doubting Thomases, Purists, and Pragmatists*, 52 Can. Tax J. 114, 120 (2004).

involves—in which case the differential principle gives priority for a differential approach—some economic or human development indicator is called for as a contributory factor to the apportionment formula. Including a direct measure of international inequality to the formula is perhaps the only possible way to achieve a universal, granular, and consistent approach.[164] It would not only be more suitable to accomplishing inter-nation equity, but should also bring greater transparency regarding normative rationale and distributional outcomes and be less reliant on estimations that frequently suffer from data limitations.[165]

3. *The OECD's "Unified Approach"*

In a project aimed to address the tax challenges arising from the digitalization of the economy, the OECD has put forward, among other measures, a proposal to allocate a portion of multinationals' residual profits to the jurisdictions where customers and users are located, also referred to as "market jurisdictions".[166] The proposal is part of what the OECD has called the "unified approach" and comes as a response to demands from countries with substantial consumer markets to update the current allocation of profits generated by digitalized businesses.[167] The phrase "unified approach" indicates the OECD's stated goal to achieve a compromise solution that satisfies all conflicting proposals at the table, namely the European Union's focus on user participation, the US preference for considering marketing intangibles, and the Group of Twenty-Four's proposal for allocating income based on multinationals' significant economic presence.[168]

The unified approach proposal allocates a share of multinational residual profits to market jurisdictions using a formulaic approach.[169] The distributional impacts of this proposal are however unclear. In February 2020, the OECD has suggested that it would significantly favor low- and

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164 Although the most common approach would be to use per capita income as a reference, other indexes may be more appropriate to measure and compare international inequality. *See* Infanti, *supra* note 23 (arguing for expanding the focus of inter-nation equity beyond economic growth to incorporate other non-economic considerations, such as feminist, social or strategic ones, and proposing the use of other indexes that include non-economic dimensions as criteria for a differential approach, such as the Human Development Index (HDI), the Inequality-adjusted HDI (IHDI), Gender Inequality Index (GII), and the UK Department for International Development (DFID)). *See also* Kim Brooks, *Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation*, 21 Can. J. Women & L. 267 (2009) (arguing that one of the implications of a feminist analysis of international tax policy is the requirement to allocate greater taxing rights to lower-income countries).

165 Due to the absolute immobility of development indexes to corporate decisions, this approach could also potentially limit tax-avoidance opportunities resulting from formulas that rely on mobile factors.

166 OECD, Programme of Work, *supra* note 131, at 23.

167 OECD, Secretariat Proposal, *supra* note 131.

168 For a detailed discussion about the political struggles and distributive implications involving these proposals, see Allison Christians & Tarcisio Diniz Magalhaes, *A New Global Tax Deal for the Digital Age*, 67 Can. Tax J. 1153 (2019).

169 In addition to this formulaic approach (which the OECD calls Amount A), the unified approach includes a fixed baseline return for routine market-facing activities (Amount B) and incremental return attributable to a jurisdiction when Amount B falls short of the market-based routine return assumed under the application of the arm's-length principle (Amount C). For an overview, see Kartikeya Singh, W Joe Murphy & Gregory J Ossi, *The OECD's Unified Approach — An Analysis of the Revised Regime for Taxing Rights and Income Allocation*, 97 Tax Notes Int'l 549 (2020).

middle-income economies,[170] but commentators are skeptical as to the validity of these results.[171] Considering that the OECD's proposal aims to favor countries with larger consumer markets, low-income countries with small consumer markets will hardly benefit from this approach.[172]

More importantly, the same criticisms made above to the IMF's approach to unitary taxation apply here. Considering the relative normative arbitrariness according to which the OECD's unified approach was established, the differential principle warrants a differential approach to take priority in determining allocation. Although suggesting that the new approach should significantly favor low- and middle-income economies, the OECD's argument suffers from methodological problems due to limitations in data availability, the absence of clear normative or economic rationale behind the chosen formulary approach, and the lack of transparency that conceals disputes about rights allocation under an apparent technical discussion. But more importantly, the OECD's unified approach fails to meet the normative requirements for a differential approach.

In a context where the transfer pricing regime is maintained, apportioning residual profits on a formulaic basis seems promising.[173] However, considering that residual profits, by definition, are not directly attributable to any specific jurisdiction, any formula established on the basis of an entitlement approach will largely lack economic rationale and thus be significantly arbitrary.[174] The lack of normative guidance for allocating residual profits among jurisdictions calls for the application of the differential principle advocated in this Article, which warrants a differential approach in such cases. Similar to the case of unitary taxation discussed above, an appropriate approach to the allocation of residual profits should include some development indicator as a factor in the apportionment formula.[175]

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170 *See Webcast: Update on Economic Analysis and Impact Assessment*, oecd.org/tax/beps/webcast-economic-analysis-impact-assessment-february-2020.htm; *Tax Challenges Arising from the Digitalisation of the Economy Update on the Economic Analysis & Impact Assessment*, oecd.org/tax/beps/presentation-economic-analysis-impact-assessment-webcast-february-2020.pdf.

171 *See, e.g.*, Alex Cobham, Tommaso Faccio & Valpy FitzGerald, *Global Inequalities in Taxing Rights: An Early Evaluation of the OECD Tax Reform Proposals* (2019), osf.io/preprints/socarxiv/j3p48 (concluding that the reallocation of taxing rights deriving from OECD's proposal is likely to reduce revenues for several low-income countries). *See also* Allison Christians, *OECD Digital Economy Designers: Share Your Work!*, 97 Tax Notes Int'l 1251 (2020) (noting that the information provided in February 2020 by the OECD was only partial—a webcast and a few slides outlining its findings—and the underlying data that led to these results was not made publicly available, raising questions about transparency and inclusivity).

172 See Christians & Magalhaes, *supra* note 168, at 1173–76 (showing that the shift of profits allocation toward location of consumers will mostly benefit countries with larger consumer market such as EU countries, the U.S., and middle-income countries rather than lower-income ones). *See also* Faccio & Fitzgerald, *supra* note 159, at 85; ICRICT, A Roadmap to Improve Rules for Taxing Multinationals: A Fairer Future for Global Taxation 10 (2018).

173 *See* Reuven S. Avi-Yonah & Ilan Benshalom, *Formulary Apportionment – Myths and Prospects: Promoting Better International Tax Policies by Utilizing the Misunderstood and Under-Theorized Formulary Alternative*, 3 World Tax J. 371 (2011).

174 *See* Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 Va. Tax Rev. 89, 148–49 (1995) (noting that residual profit, by definition, is the return resulting from the interaction of the constituent parts of a multinational and thereby cannot be assigned to any of its components without significant degree of arbitrariness).

175 For the idea of including a differential approach to the allocation of multinationals' profits, *see* Musgrave & Musgrave, *supra* note 3, at 84–85 (arguing that "the only satisfactory solution… would be the taxation of such [multinational] income on an international basis with subsequent allocation of proceeds on an apportionment basis among the participating countries, making allowance for distributional considerations."

Conclusion

Normative discussions on how to distribute tax jurisdictions are frequently met with skepticism. The realist view of international relations, where any agreements on normative principles are based on self-interest and bargaining power, still predominate in tax policy analysis. Yet, there is evidence that governments are, at least to some extent, motivated by a concern with international justice. Initiatives such as the United Nations' Sustainable Development Goals (SDGs),[176] the OECD's Task Force on Tax and Development,[177] and the inter-agency Platform for Collaboration on Tax,[178] seem to demonstrate a substantial effort to improve economic development in less affluent countries. Additionally, a meaningful concern with international redistribution may be warranted to secure cooperation of lower-income countries in undertaking obligations required for a coordinated effort to address the current international tax challenges. Insofar that this is the case, more extended discussions about inter-nation equity should provide normative guidance for an allocation of the international tax base that allows for meaningful redistribution while preserving nations' entitlements.

There is also reason to argue that redistribution through allocation of taxing rights is a viable option compared to alternative policies. For instance, there are doubts as to the effectiveness of development aid, especially considering its potential to exacerbate corruption and reduce incentives to develop sustainable policies.[179] Foreign aid also frequently limits recipient countries'

176 *Resolution on the 2030 Agenda for Sustainable Development*, UNGA, 7th Sess, UN Doc A/RES/70/1 (2015) (among other goals, aimed at "mobiliz[ing] public resources domestically, especially in the poorest and most vulnerable countries with limited domestic resources").

177 OECD, *OECD Work on Tax and Development 2018-2019* 32, www.oecd.org (established to "build an environment in developing countries that will enable them to collect appropriate and adequate tax revenues and build effective states").

178 United Nations Economic and Social Council, *Strengthening Tax Capacity in Developing Countries: Inter-agency Platform for Collaboration on Tax*, www.un.org (a joint collaboration between the IMF, the OECD, the UN, and the World Bank Group established "to facilitate the participation of developing countries in the global dialogue on tax matters" and "strengthen domestic revenue mobilization in developing countries").

179 *See* Stephen Knack, *Does Foreign Aid Promote Democracy?*, 48 Int'l Stud. Q. 251 (2004) (suggesting that when aid dependence increases as a proportion of government consumption, recipient states will become less accountable for their own actions, and conflicts over aid funds increase); Stephen Knack & Aminur Rahman, *Donor Fragmentation and Bureaucratic Quality in Aid Recipients*, 83 J. Dev. Econ. 176 (2007).

fiscal autonomy donor countries frequently impose direct control over expenditure of aid toward specific projects.[180] Moreover, redistribution through foreign aid lacks uniformity since the choice of country recipients depends on reasons that are fairly arbitrary from a normative point of view, such as close economic ties or geographic proximity.[181] Compared to differential treatments adopted in other areas of law, differentiation in international tax law also seems to offer a more promising and direct form of redistribution due to its less distortionary effects.[182] Improving taxing rights of lower-income countries also contributes to their ability to mobilize revenue, which is a fundamental requirement to finance achievements of sustainable development goals.[183]

Recent developments in international tax policy seems to offer an unparalleled opportunity to rethink the normative justification of long-standing criteria for the international allocation of taxing rights.[184] The relevance of multinational corporations and the global changes arising from digitalization have recently impelled a revision of the present distribution of taxing rights,[185] thus motivating a re-examination of the normative underpinnings for the division of the international tax base.[186] Claims from countries with large consumer markets—mostly high- and middle-income countries—that a revised global compact should give them a greater share of tax revenues seems to hold valid, but the lack of clear entitlement for a significant portion of the international tax base calls for more sustained normative criteria.

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180 Stewart, *supra* note 32, at 304–05.

181 *But see* Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. Rev. 1, 29 (2010) (arguing that arbitrary geographic proximity may a factor sufficiently relevant to trigger or intensify a duties of justice).

182 Differential approaches included in specific regulatory frameworks, such as the CBDR-RC principle adopted in the United Nations Framework Convention on Climate Change (see Section III.C), can potentially cause inefficiencies that impact its main goal, namely fighting climate change. The problem does not exist in international taxation, whose fundamental goal is to allocate taxing rights among jurisdictions. *See* Benshalom, *supra* note 112, at 328 ("In the international tax context, the distribution of the right to tax is the main objective, and there is no external, common good objective that can be distorted. Because the policy objective of the international tax regime is to achieve sustainable distribution of profits derived from international commerce, there may be less of a dichotomy between redistributive equity and efficiency.").

183 See UN Committee of International Experts on International Cooperation in Tax Matters, *The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals* (Policy Note E/C.18/2018/CRP.19, 2018). *See also* Apeldoorn, *supra* note 89 (arguing that allocating taxing rights in a way that favours low-income states is fundamental to increasing their capacity to mobilize revenue while preventing double taxation that could disturb international investment).

184 *See* Steven A. Dean, *A Constitutional Moment for Cross-Border Taxation* (unpublished manuscript, on file with the author) (2020) (pointing out that for the first time in decades, international tax policy has entered a fluid phase in which fundamental reform becomes possible, and warning for the urgency in recognizing the opportunity for critical improvements before the moment passes by); Mason, *supra* note 131.

185 *See* OECD, Addressing the Tax Challenges of the Digitalisation of the Economy: Public Consultation Document (2019). For an overview of the context and political motivations of OECD's efforts to address this issue, see Allison Christians & Magalhaes, *supra* note 168.

186 *See, e.g.*, Christians & Apeldoorn, *supra* note 131; Michael P. Devereux & John Vella, *Value Creation as the Fundamental Principle of the International Corporate Tax System* (European Tax Policy Forum, Working Paper, 2018); Wolfgang Schön, *One Answer to Why and How to Tax the Digitalized Economy*, 47 Intertax 1003 (2019); Wilkie, *supra* note 131; Svitlana Buriak, *A New Taxing Right for the Market Jurisdiction: Where Are the Limits?*, 48 Intertax 301 (2020).

A dual conception of inter-nation equity entails the accommodation of two normative components to international justice (entitlement and differentiation) in a way that the limitations of the entitlement approaches are offset by differential ones. The differential principle put forward in this Article requires that whenever entitlement to tax cannot be clearly established based on an entitlement approach, redistributive goals gains significant strength and should contribute in guiding the allocation of taxing rights. Differentiation must meet three main normative requirements: universality, so that it does not shut out countries equally in need; granularity, so that differentiation considers countries individually rather than classify them in generalizing groups that disregard relevant intra-group inequalities (e.g., developing countries); and consistency, so that rights be assigned in a way that adequately reflects the targeted inequality that gave rise to a differential approach. These seemingly evident normative requirements have robust practical implications and proscribe some initiatives that are commonly regarded to favor lower-income countries.

One may view the normative requirements put forth in this Article as excessively demanding. At the end of the day, it could be argued, any change in the current international tax system that contributes to tilting the scale in favor of lower-income countries should deserve praise and encouragement. Although this may hold some truth—pointing to an important difference between duty of assistance and claims of distributive justice—satisfying international justice is not simply about improving the situation of worse-off countries, but also about doing it in a way that is consistent to their needs. The fundamental problem with accepting any differential mechanism as normatively satisfying is that, regardless of normative demands, agreement of more powerful, affluent countries to redistribution faces political limitations. Without clear normative guidelines for meaningful redistribution, promotion of suboptimal initiatives might prevent the consideration of normatively superior ones. Or, as a more cynical view may suggest, the absence of criteria for appropriate redistribution may lead to the opportunistic use of modest or unsatisfactory concessions to excuse the lack of more significant initiatives.

At a time when governments struggle with more immediate, domestic concerns to fight a global pandemic and an upcoming economic crisis, it might seem futile to argue for placing attention on normative demands to address international inequality in the international tax system. Yet, if there are valid reasons for embracing aspirations for justice in times of stability, this becomes even more pressing during a recession where the global poor is left to bear a higher impact.

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INTER-NATION EQUITY REVISITED

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