Taxation, Sovereignty and Just Cooperation: Realizing a Model for Distributive Justice in Global Tax Governance

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ABSTRACT

This thesis is intended to explore the normative questions surrounding the pursuit of global tax justice, through the lens of its conflicting demands of just cooperation and state sovereignty. Among the many pressing global problems which require cooperation between states, coordination on taxation presents particularly acute challenges. It is designed to protect tax sovereignty within the interdependence and interaction of diverse tax systems, while also requiring ever closer cooperation to secure this task for all countries. Considering the extent to which the international tax regime's commitment to sovereignty preservation has enabled a framework which restricts the autonomy of developing countries and produces inequitable outcomes, it is argued that reconciling this conflict requires a normative commitment to principles of global distributive justice.

The thesis pursues this argument by exploring the relational account given by John Rawls, which places duties of distributive justice as central to ensuring just forms of social cooperation, but argues that its applicability is limited to sovereign states. Seeking to account for the central problems of relational power and inequitable treatment within global tax cooperation, and utilizing the relational model of global justice as freedom from domination within republican theory, the thesis builds a normative account of global tax justice which reframes sovereignty as a reciprocal and collective value, in which the exercise of autonomy is constrained by commitments to the freedom of all states. Within this framework, it is argued, there are duties of distributive justice which can direct the aims of global tax governance to provide more genuinely equitable participation and a just distribution of power.

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AUTHOR'S DECLARATION

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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TABLE OF ABBREVIATIONS

ATAF	African Tax Administration Forum
BEPS	Base Erosion and Profit Shifting
CbCR	Country by Country Reporting
DTA	Double Tax Agreement
EU	European Union
FDI	Foreign Direct Investment
GMT	Global Minimum Tax
IIR	Income Inclusion Rule
MNC	Multinational Corporation
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
UN	United Nations
UT+FA	Unitary Taxation and Formulary Apportionment
UTPR	Undertaxed Payments Rule

INTRODUCTION

The international tax regime is in an unprecedented period of flux. In November 2022, in the midst of ongoing consultation on a 'groundbreaking' tax deal facilitated by the OECD,[1] the UN General Assembly provided the mandate to begin intergovernmental talks on 'the promotion of inclusive and effective international tax cooperation'.[2] A representative from the Nigerian delegation explained their motivation in adopting the resolution, commenting 'We note that the OECD has played a role in these areas. It is clear after ten years of attempting to reform international tax rules that there is no substitute for the global, inclusive, transparent forum provided by the United Nations'.[3] Referencing the long-standing leadership of the OECD, the comments reflected a growing frustration and criticism that its reform efforts were both inadequate to tackle the problems plaguing global taxation, and remained procedurally unfair by locking out effective participation from developing economies. Whether or not the efforts at the UN to take a more leading role in setting the agenda on reform will prove fruitful, it highlights an undeniable friction in perspectives about what justice in global tax governance requires.

The question is both timely and complex. Johanna Stark concludes that there is broad consensus that something is fundamentally unjust about the current framework, which requires both profound and systematic reform to effectively address, without conclusive agreement about what that injustice is or what 'more justice' in global taxation would look like.[4] Peter Hongler provides a comprehensive summary of the primary concerns, which are each in their own right highly impactful and pressing, while at the same time pulling policy-making priorities in varying directions.[5] There are the claims that through means of profit shifting and tax evasion multinational corporations (MNCs) do not pay their fair

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[1] OECD, 'International community strikes a ground-breaking tax deal for the digital age' (8 October 2021) <www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm?s=09> accessed 21 July 2023.

[2] United Nations General Assembly, 'Resolution adopted by the General Assembly on 30 December 2022' (A/RES/77/244, 9 January 2023) <https://digitallibrary.un.org/record/3999979?ln=en> accessed 22 August 2023, 1.

[3] Tobias Burns, 'UN votes to take the reins on global tax standards' *The Hill* (23 November 2022) <https://thehill.com/blogs/blog-briefing-room/news/3748214-un-votes-to-take-the-reins-on-global-tax-standards/> accessed 18 June 2023.

[4] Johanna Stark, 'Tax Justice Beyond National Borders – International or Interpersonal?' (2022) 42 Oxford Journal of Legal Studies 133, 133-134.

[5] Peter Hongler, *Justice in International Tax Law: A Normative Review of the International Tax Regime* (IBFD 2019) 14-15.

share, while wealthy residents are able to effectively escape their national tax obligations.[6] There are concerns about countries losing tax sovereignty, both being unable to maintain their tax base due to the pressures of tax competition, as well as being subject to the policy-making decisions of other states.[7] Related to this is the problem of legitimacy and procedural unfairness in global taxation, as states struggle to find scope for more equitable participation and to challenge the dominance enjoyed by wealthy nations in designing and implementing policy.[8] In a system designed to the benefit of a few, there are growing demands that just reform requires attentiveness to the specific losses suffered by developing countries, and the framework's negative impact on global poverty and inequality.[9]

Within these diverse concerns there is a seemingly intractable conflict that confronts the pursuit of global tax justice, between its cooperative obligations and the demands of state sovereignty.[10] 'Taxation is at the core of countries' sovereignty', the OECD writes, but given the interaction of these sovereign systems in the globalised economy there is a need for governance to reduce frictions and provide coherence, to prevent gaps and minimize scope for abuse, such that it 'requires countries to collaborate on tax matters in order to be able to protect their tax sovereignty'.[11] The reason taxation evokes such acute concern is because it is viewed as normatively vital to the exercise of national sovereignty, as 'the most important instrument by which the political system puts into practice a conception of economic or distributive justice'.[12]

In this normative conception of taxation put forward by Liam Murphy and Thomas Nagel in *The Myth of Ownership*, taxation thus sits at the heart of both state sovereignty and distributive justice.[13] The very legitimacy and authority of the state rests in part on its monopoly to tax citizens, which it requires to fulfil its obligations to them, including the

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[6] ibid 15-16.
[7] ibid 16-17.
[8] ibid.
[9] ibid 18-19.
[10] Rasmus Corlin Christensen and Martin Hearson, 'The new politics of global tax governance: taking stock a decade after the financial crisis' (2019) 26 Review of International Political Economy 1068, 1071-1074.
[11] OECD, 'Action Plan on Base Erosion and Profit Shifting' (July 2013) <https://doi.org/10.1787/9789264202719-en> accessed 31 July 2023, 9.
[12] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (OUP 2002) 3.
[13] ibid.

responsibility to ensure a fair distribution of social goods.[14] The paying of taxes by citizens represents their part of the 'social contract' that arises out of participation both in the market economy and public society.[15] Within this complex scheme of social cooperation, the implementation of distributive justice through taxation both 'creates and reflects' the binding relationship between the state and its citizens.[16] Looking to the global level, there is cooperation being undertaken, as the OECD puts it, to enjoy and promote the benefits of globalisation, which 'supports growth, creates jobs, fosters innovation, and has lifted millions out of poverty'.[17] Countries contribute to these beneficial outcomes and are mutually dependent on such cooperation, but there are no corresponding duties to distributive justice within such a scheme.

The OECD frames global tax governance as an attempt to strike an appropriate balance in securing a cooperative regime while affirming the autonomy and freedom of states to design their tax systems.[18] For many developing countries, the problem with this rhetoric and the reform priorities which flow from it, is that the regime has always failed abjectly at protecting their sovereignty. In fact, it has served to do the opposite; it is designed without their input and imposed on them, it restricts their autonomy for deciding tax policy while enabling others to freely engage in harmful tax practices, and it produces regressive distributive outcomes as they lose vital tax revenues from unfair treaty agreements.[19] The system is designed above all to uphold sovereignty, but without a requisite accompanying commitment to considerations of distributive justice, in the just allocation of the burdens and benefits of global cooperation, it has not served this function.

Looking to the normative debate, many argue that distributive justice lies outside the scope of global obligations, based on the idea famously elucidated by John Rawls that its demands are only relevant within the interconnected and onerous cooperative scheme of domestic societies.[20] Representing a prominent example of the statist view, this can be contrasted with cosmopolitanism, which argues that distributive justice ought not to be confined to sovereign states. Many cosmopolitans have contended for decades that the

[14] ibid 7-8.
[15] ibid 7.
[16] Allison Christians, 'Sovereignty, Taxation and Social Contract' (2009) 18 Minn J Intl L 99, 99.
[17] OECD, 'Action Plan on Base Erosion and Profit Shifting' (n 11) 7.
[18] ibid 9.
[19] Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (CUP 2018) 73.
[20] John Rawls, *The Law of Peoples With "The Idea of Public Reason Revisited"* (Harvard UP 1999).

global order is defined by similar levels of complex and interdependent cooperation which requires duties of justice,[21] an argument which is becoming more compelling as tax reform efforts intensify and increasingly invoke departure from the belief that states can enjoy absolute sovereignty without some duties to the global community.[22] The motivation for this thesis arises out of the view that the challenges of global tax governance reveal exactly why distributive justice is not confined to sovereign states. Global distributive justice is absent as a normative goal and operational reality, yet within global taxation its implications lie everywhere. As a cooperative scheme, it is tasked with resolving collective action problems to secure taxation capacities to fulfil domestic duties of distributive justice, and is intended to provide a fair framework to allocate and distribute the taxable incomes of global economic activity to all countries.

By assessing the issue of global tax justice through the lens of this 'missing account' of global distributive justice, this thesis is intended to explore the unique insights that global tax governance can offer to the normative debate. The purpose of each chapter is to construct the building blocks for an account of global tax justice: that explains why the problems of tax governance are ones of distributive justice, why these demands are normatively justified within the relational account of justice within forms of social cooperation, and how this normative account can inform both understanding of the system's historic and current failings, and importantly can provide a path forward for resolving its central conflicts.

Chapter 1 sets out this project by examining how the development of global tax governance, from its inception at the League of Nations to the leadership of the OECD, has built unjust foundations and led to its contemporary dysfunctions because of its commitment to sovereignty-preservation. As the problems of tax competition and tax base erosion have proliferated under this system, attempts at reform have revealed the need for a greater commitment to wider participation that regards all countries' interests. Even out of such efforts, however, there has been no confrontation of the underlying principles, which has maintained a system of tax right allocation that is both arbitrary and produces inequitable outcomes. A re-evaluation of the normative account is thus essential.

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[21] see eg Charles R Beitz, *Political Theory and International Relations* (Princeton UP 1999); Thomas Pogge, *Realising Rawls* (Cornell UP 1989).

[22] Christians, 'Sovereignty, Taxation and Social Contract' (n 16) 100-101.

Recognizing that normative discussion on the demands of global tax justice is broadly built on statist premises, Chapter 2 will examine such arguments by exploring Rawls' account of distributive justice within the basic structure, and the duty of assistance for securing just relations between states. Utilizing this model, a number of authors have constructed a more demanding account of global justice, an endeavour which provides a richer understanding of global tax cooperation and deeper insight into the implications of Rawls' theory, but ultimately struggles to escape the limitations of statism in resolving the central concerns of relational power and inequality within tax governance.

Chapter 3, acknowledging the value and relevance of the relational account, aims to develop a normative argument to extend its scope to global tax justice. By reframing the purpose of the basic structure as necessary to secure the requirements of 'background justice' within social cooperation, there is room for a constructed account of global tax governance as a cooperative scheme of states subject to duties of distributive justice. Additionally, understanding the nature and demands of background justice is explored by utilizing the republican conception of justice as 'freedom from domination', offering a relevant model for the purpose of tax cooperation: to ensure the reciprocal non-domination of states.

Chapter 4 will consider the implications of this model to the design of global tax governance, providing a lens for reform which is centrally concerned with the need for redistributive principles to govern the allocation of tax rights, and the institutional reform required to address the problems of systemic bias and relational power that makes the current regime unjust. Understanding the scale of the challenge in directing global tax reform to engage with the demands of global distributive justice, more practical discussion of its feasibility and establishing a realistic route towards the possibilities of its normative ambition will provide a suitable site to build towards the conclusion.

1 THE PROBLEM OF SOVEREIGNTY-PRESERVATION IN GLOBAL TAX GOVERNANCE

> This is the story of the global tax regime, which carries the seeds of its own undermining, but nonetheless persists to this day.[23]

As the OECD has contended with the complex demands of reform, there has been commensurate scholarship concerned with accurately diagnosing the ills that make the current system unfit for purpose.[24] Many would arrive at the same conclusion as Thomas Rixen quoted above - that the framework for global tax governance is failing precisely because it has remained fundamentally unchanged from its century-old origins. It is not simply that it has been unable to respond to novel problems thrown up by the forces of globalization, but rather that the prevailing concerns of tax competition, of profit shifting and domestic tax base erosion that currently threaten its functioning are an endogenous consequence of its institutional foundations, underlying principles, and policy aims.[25] As Rixen argues, the global tax regime was designed primarily to promote cross-border trade by preventing double taxation, underpinned by a normative model which prioritized protecting the tax sovereignty of states – two features which enabled both individuals and companies to utilise the mechanisms of a fragmented network to minimize their tax liability, and incentivised states to design their tax systems so as to attract and benefit from such activity.[26]

Similarly, for those concerned about global justice it is not merely a regrettable state of affairs that international tax policy neglects these aims. The global tax regime is unjust *because* it is duty bound to the equitable treatment of all states yet functions to entrench and deepen global inequalities, whether by being inattentive to the distributive implications of its rules, or by impeding the capacity of developing countries to tackle poverty and

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[23] Thomas Rixen, 'From double tax avoidance to tax competition: Explaining the institutional trajectory of international tax governance' (2011) 18 Review of International Political Economy 197, 197.

[24] An assessment the OECD itself makes in discussing reform efforts. See eg OECD, '130 countries and jurisdictions join bold new framework for international tax reform' (01 July 2021) <www.oecd.org/tax/beps/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm> accessed 30 July 2023.

[25] Rixen, 'From double tax avoidance to tax competition' (n 23) 208-10.

[26] ibid.

advance their interests.[27] The compounding injustice, Brock and Pogge highlight, is that these deleterious effects on developing countries are caused by a regime that 'richer, more powerful states are *imposing* on them.'[28]

The reasoning which unites both these perspectives is that the failure to adequately account for other normative responsibilities beyond sovereignty-preservation has enabled conditions under which the tax regime struggles to advance any of its goals. A framework which was founded upon a commitment to protect tax sovereignty, while also being dominated by the interests of a very few, powerful countries, would inevitably infringe on the sovereignty of others who must respond to its demands while having little say over its terms.[29] As it has developed, moreover, even those states who benefited from the status quo have faced increased threats to fiscal sovereignty as they too struggle to resist the pressures of tax competition, and to combat the erosion of tax revenues.[30]

1.1 LESSONS FROM HISTORICAL DEVELOPMENT

Rixen draws a clear throughline from the inception of global tax governance in the 1920s to its challenges today, rooted in the principles and guidelines of the first model tax treaties developed by the League of Nations. If the central thesis here is that the problems of unfair tax distribution, of tax avoidance and competition have arisen as a consequence of the regime's institutional foundations, it might be readily assumed that its authors necessarily failed to consider these issues at all. Historical assessment presents a more complex picture; research by Sunita Jogarajan into the League's work reveals an attentiveness to the complex issues at stake striking a fair balance in allocating tax rights among states, and concern not only for the problem of double taxation but also for securing domestic tax revenues and preventing tax evasion.[31] That such considerations did not translate into more foundationally equitable policy outcomes was not predetermined, but instead a consequence of the principles guiding the deliberative process of the League's experts.[32]

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[27] Gillian Brock and Thomas Pogge, 'Global Tax Justice and Global Justice' (2014) 1 Moral Philosophy and Politics 1, 1-2.
[28] ibid 2 (emphasis added).
[29] Allison Christians, 'BEPS and the Power to Tax' in Allison Christians and Sergio André Rocha (eds), *Tax Sovereignty in the BEPS Era* (Kluwer Law International 2016) 10-12.
[30] Reuven S Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) 113 HLR 1573.
[31] Sunita Jogarajan, *Double Taxation and the League of Nations* (CUP 2018) 22.
[32] ibid 253-55.

The interaction of a number of features stands out – the agenda setting power of the nations represented,[33] the 'spirit of compromise' which shaped decision-making,[34] and the focus on practical solutions which promoted a preference for the status quo.[35]

1.1.1 Foundations at the League of Nations

Against the backdrop of changing economic circumstances and reconstruction efforts in the aftermath of WWI, and motivated to reduce barriers to cross-border trade and investment, the newly formed League viewed the problem of double taxation within the broader context of supporting countries' economic recovery and growth.[36] The four economists who produced the initial 1923 Report on Double Taxation were tasked with identifying effective principles to allocate tax rights so as to remove double taxation, as well as the appropriate mechanisms to secure this.[37] In considering this question they dismissed the relevance of a taxpayer's nationality as decisive compared to the overarching principle of economic allegiance; what mattered in justifying taxation was the location of their 'true economic interests', which encompassed all the complex factors that enable not only the production of wealth but also its legal possession and disposition.[38] Thus economic allegiance justifies taxation based on both the origin of wealth (source) and the permanent domicile of the taxpayer (residence), meaning different countries could have legitimate claims on the same income.[39] Acknowledging this suggested an implicit need for fair distribution between such states, and they referred to the theoretical task of assigning 'in a quantitative sense the proportions of allegiance of the different countries interested'.[40]

However, the overwhelming complexity involved in accurately assigning the relevant factors led the economists to conclude it was impossible to achieve in practice without significant arbitrariness,[41] and so they offered a second-best solution which was to separate categories of income and offer recommendations in each case whether they should

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[33] ibid 252-53.
[34] ibid 27-28.
[35] ibid 250.
[36] ibid 3-4.
[37] Gijsbert Bruins and others, 'Report on Double Taxation: Submitted to the Financial Committee' (League of Nations 1923) <https://archives.ungeneva.org/report-on-double-taxation> accessed 28 August 2023, 3.
[38] ibid 19-23.
[39] ibid.
[40] ibid 27.
[41] ibid.

predominantly be assigned to source or residence.[42] The report focused on states using bilateral agreements to determine which party should forgo its tax rights to relieve double taxation, notably arguing that while there is a more 'instinctive principle' that states treat origin over residence as the primary tax right, as a practical matter it is easier for states' income allocation to be resolved by reciprocally exempting non-residents.[43] Driven by practical concerns and deciding to account for their disagreements about best methods rather than resolve them, it offered its various solutions as a matter to be determined in each case by individual treaty makers.[44]

These sovereignty-preserving approaches continued throughout the League's deliberative process, and subsequent reports tended to build on the foundations of what had come before. While compromise and pragmatism informed an attempt to offer both source and residence taxation neutrally, in practice these principles served to give residence preference precisely because it was easier to determine and, if established reciprocally, required less intervention.[45] In 1925 the experts, representing an expanded list of countries, were similarly reluctant to offer determinative conclusions even in areas where a majority expressed preference for source taxation, such as the allocation of business profits.[46] Calls to principles of fairness and finding consensus meant objections from Britain and Belgium informed the approach that profits could be taxed by both countries which hosted the company's activities or its head office, with treaty agreements left to determine the appropriate distribution.[47]

The benefits of a multilateral convention were discussed but deemed unworkable due to the diversity of tax systems and the need for flexibility, so that states could take into account their economic circumstances in determining the optimal arrangement between two countries.[48] Richard Vann emphasises that the resulting fragmentation from a system that left states free to set different tax rates states was intensified due to the framework also treating categories of income separately, thus providing fertile ground for companies to

[42] ibid 27-39.
[43] ibid 40-51.
[44] Jogarajan (n 31) 21.
[45] Kim Brooks and Richard Krever, 'The Troubling Role of Tax Treaties' in Geerten MM Michielse and Victor Thuronyi (eds), *Tax Design Issues Worldwide* (Kluwer Law International 2015) 169.
[46] Jogarajan (n 31) 37-38.
[47] ibid 38-40.
[48] ibid 250.

minimize their tax liabilities by manipulating the categories and shifting the income to favourable jurisdictions.[49]

A repeated theme throughout Jogarajan's review is the out-sized role participating countries had to both represent their interests and shape outcomes, and the experts grappled with the dual nature of their role - as government representatives and technical experts, aligned with the idealism of the League's goals yet also constrained by practical considerations.[50] Participation itself did not guarantee achieving desired outcomes, especially for those joining at later stages who faced additional barriers in the established pattern of leaving complex issues unresolved and a preference for adhering to previous decisions, as the South American experts found in 1927.[51] Prominent representatives offered a greater benefit to having a seat at the table, especially for states like Britain whose experts were both instrumental and often unwilling to compromise.[52] The starkest example can be found in the crafting of the so-called 'Mexico' and 'London' model treaties, when Latin American countries took advantage of Europe's absence in 1943 to formulate a model which gave greater weight to source tax rights, which was then promptly reassessed in 1946, with an alternative model reverting to original residence principles once those countries who had dominated negotiation from the outset returned to the table.[53]

1.1.2 OECD governance and the treaty network

If one were to present the development of international taxation as a series of critical junctures, the transfer of leadership to the OECD as the seat of multilateral policy development would stand out as pre-eminent. While the Fiscal Commission of the UN inherited the League's work, attempts at moving forward on taxation issues faltered under the weight of Cold War divisions and a focus on other priorities.[54] Richard Vann gives voice to a pertinent question given recent movements to revive the UN's role, namely whether the development of international taxation might have looked very different had the

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[49] Richard Vann, 'A Model Tax Treaty for the Asian-Pacific Region?' (2010) Sydney Law School Research Paper 10/122 <https://ssrn.com/abstract=1705765> accessed 13 August 2023, 9-10.
[50] Jogarajan (n 31) 82-83.
[51] ibid 165.
[52] ibid 252-53.
[53] Brooks and Krever (n 45) 163.
[54] Martin Hearson, *Imposing Standards: The North-South Dimension to Global Tax Politics* (Cornell UP 2021) 41.

Fiscal Commission succeeded.[55] Vann relatedly observes that the OECD's leadership ultimately represented continuity of the League's approach rather than a new departure, because it adopted not only much of the content of its model treaties but also its sovereignty-preserving goals and principles, while also creating increased scope for powerful countries to dominate its governance.[56] As Tsilly Dagan summarizes:

> By effectively combining their power as a group, OECD countries were able to entrench their market power and dominance and reap disproportionate benefits from multilateral cooperation. Thus, the current international tax arena was designed to serve the OECD's interests. It targeted the issues that are most important to developed countries and adopted solutions that are tilted in their favor in terms of tax-revenue allocation, the income tax base, and information sharing standards.[57]

That the OECD Model maintained the League's preference for residence taxation is both understandable and a justifiable reciprocal approach given it was intentionally drafted for member countries to use when negotiating treaties with each other.[58] However, the model's growing strength within the multilateral forum and a lack of alternatives made it the default starting point for negotiating treaties with non-member states, and in this OECD members – predominantly rich, capital-exporting nations – held a distinct advantage over most capital-importing developing countries in obtaining the income of residence taxation.[59]

The features which exemplified the success of the treaty network, Dagan argues – its rapid proliferation, and its promotion of coordinated rules and uniform standards – also served to restrict developing countries by creating a network effect.[60] As the treaty network expands there is increased motivation to join separate from its intrinsic benefits, as more universalized practices make defection more costly and more likely to risk disincentivising foreign investment.[61] Thus developing countries were incentivised to conclude double tax agreements (DTAs) that required forgoing source tax revenues, an effect which becomes

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[55] Vann (n 49) 8.
[56] ibid 7.
[57] Dagan, *International Tax Policy* (n 19) 168.
[58] Brooks and Krever (n 45) 164.
[59] ibid.
[60] Dagan, *International Tax Policy* (n 19) 172-73.
[61] ibid.

self-reinforcing within the network structure as it entrenches the initial bias in decisions about tax-revenue allocation and standard setting, and limits the options states have to pursue unilateral approaches to collecting foreign tax revenues.[62] DTAs placed the burden of avoiding double taxation on source countries, under measures established not because of their normative justification or a superior claim to effectiveness, but because of the market power of those initial authors, who were 'able to extract monopolistic rents at the expense of late-coming developing (host) countries'.[63]

Increased concern that the model treaty was unfairly biased and failed to account for specific problems with treaties between developed and developing nations provided impetus for the creation of the UN Model Convention in 1980.[64] The alternative model treaty provides more favourable rules for source taxation.,[65] and through updates over the years has offered a framework that is more responsive to the changing priorities of developing countries' tax policies.[66] However, it was also developed using the OECD model as a guiding template and retained many of its definitions and rules, thus failing to challenge some of the most important fundamental elements that were producing inequitable results.[67]

Developing countries were also subject to more direct influence on their internal tax structures, especially by European powers retaining control on former colonies in the design of their tax systems.[68] Throughout the post-war period experts from developed nations offered their domestic tax policies as models of 'best practice', recommending the adoption of progressive forms of income taxation.[69] Even setting aside the erroneous assumptions underlying this project, Ozai and Magalhães note the problematic fact that developed nations abandoned their own 'best practice' in the 1980s as they embraced

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[62] Reuven S Avi-Yonah, 'Tax Competition, Tax Arbitrage, and the International Tax Regime' (2006) 61 BFIT 130, 131.
[63] Dagan, *International Tax Policy* (n 19) 174.
[64] Vann (n 49) 7-8.
[65] Alberto Vega, 'Tax Treaties between Developed and Developing Countries: The Role of the OECD and UN Models' in Jeremy Leaman and Attiya Waris (eds), *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (Berghahn 2013) 147.
[66] Bob Michel and Tatiana Falcão, 'Pillar 1 as a Ticket to a Fairer Taxation for Low- and Middle-Income Countries' (2022) 106 Tax Notes International 655, 657
[67] Vann (n 49) 7-8.
[68] Nicholas Shaxon, *Treasure Islands: Uncovering the Damage of Offshore Banking and Tax Havens* (Palgrave Macmillan 2011) 20-22.
[69] Tarcisio Diniz Magalhães and Ivan Ozai, 'A Different Unified Approach to Global Tax Policy: Addressing the Challenges of Underdevelopment' (2021) 4 Nordic Journal on Law and Society 1, 1-4.

neoliberal commitments to financial deregulation, free trade, and shifted their tax base from capital to labour, thus intensifying conditions of tax competition.[70] The connection between these issues did not go unnoticed, with Peggy and Richard Musgrave in 1972 offering prescient concern about the problems that would proliferate by maintaining current approaches to taxing multinationals, and recommending reforming tax treaty rules in allocating tax rights to explicitly consider fair distribution to lower-income countries.[71]

1.1.3 The problem of tax competition

If the treaty network served to incentivise convergence on DTAs, Dagan notes, it produced the opposite effect by preserving the freedom of states to decide domestic tax policy and tax rates, enabling them to undercut one another to attract investment, residents and business activity.[72] The guidelines for regulating transfer pricing (the internal pricing of cross-border transactions within an MNC group) under the arm's length standard treated related entities as independent, failing to reflect the integrated reality of intra-company transactions and thus proving vulnerable to manipulation.[73] Within this environment multinationals found relative ease in aggressively structuring their affairs to artificially shift profits to low-tax jurisdictions, even while remaining headquartered or commercially active in a different state.[74]

In these circumstances, which Dietsch distinguishes as 'virtual' over 'real' tax competition, both source and residence countries could lose income revenues they might normally be entitled to.[75] Global corporate profits, and multinational profits in particular, continued to enjoy substantial growth while the effective corporate income tax rate experienced decline, as profit shifting to tax havens became a more extensive phenomenon.[76] Recent historical estimates of global profit shifting reveal how fast this growth occurred – while less than

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[70] ibid 4-5.
[71] Richard A Musgrave and Peggy B Musgrave, 'Inter-nation equity' in Richard M Bird and John G Head (eds), *Modern Fiscal Issues: Essays in Honour of Carl S. Shoup* (Google Books edn, University of Toronto Press 1972) 131.
[72] Dagan, *International Tax Policy* (n 19) 26.
[73] Reuven Avi-Yonah, 'A Proposal for Unitary Taxation and Formulary Apportionment' in Peter Dietsch and Thomas Rixen (eds), *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016) 292.
[74] Peter Dietsch, 'Whose Tax Base? The Ethics of Global Tax Governance' in Dietsch and Rixen (eds), *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016) 232.
[75] ibid 233.
[76] Ludvig Wier and Gabriel Zucman, 'Global profit shifting, 1975-2019' (2022) WIDER Working Paper 2022/121 < https://doi.org/10.35188/UNU-WIDER/2022/254-6> accessed 22 July 2023, 1-2.

2% of multinational profits shifted to tax havens in 1975, by 1998 this had increased to 20%, and nearly doubling again to 37% by 2019.[77]

Where multinationals found increased facility to shift profits, states in contrast struggled to prevent tax loss unilaterally. Nor was this burden equitably shared, as developing countries had more limited resources, institutional experience and administrative capacity to tackle the problem effectively.[78] Compared to developed nations which were largely able to avoid severe revenue losses by broadening their tax base, African countries suffered a 20% decline in corporate tax revenues in the 90s, with the tax base actually shrinking in that time.[79] Rixen points out this loss of corporate income was particularly significant given they are easier and cheaper to administrate and enforce compared to personal income taxes, and for the many developing countries rich in natural resources corporate taxes on the extractive industries can offer a substantial income source.[80]

1.2 ASSESSING REFORM EFFORTS AT THE OECD

The OECD took steps to confront the growing problem in its 1998 Report on Harmful Tax Competition, which acknowledged that multilateral solutions were necessary to enable states to 'limit the problems presented by countries and fiscally sovereign territories engaging in harmful tax practices'.[81] The resulting project attempted in part to identify and publish a list of 'non-cooperative tax jurisdictions', but faced stumbling blocks from strident opposition both within its membership and from those identified as tax havens.[82] Jason Sharman describes this episode as a battle waged through public rhetoric that tax havens won, notably in part because they used the OECD's rhetorical arguments against them.[83] They argued that implementing more economically coercive measures to pressure states to change their fiscal practices transgressed the OECD's commitment to state sovereignty, and that publicly identifying such states as engaged in 'harmful' tax competition was hypocritical given the OECD's commitment to the virtues of free markets

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[77] ibid 6.
[78] Philipp Genschel and Laura Seelkopf, 'Winners and Losers of Tax Competition' in Dietsch and Rixen *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016) 63.
[79] Thomas Rixen, 'Tax Competition and Inequality: The Case for Global Tax Governance' (2011) 17 Global Governance 447, 456.
[80] ibid.
[81] OECD, 'Harmful Tax Competition: An Emerging Global Issue' (May 1998) <https://doi.org/10.1787/9789264162945-en> accessed 22 July 2023, 8.
[82] Jason Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation* (Cornell UP 2006) 7.
[83] ibid 7.

and liberalized trade, and ultimately was an attempt to 'bully' states to rewrite the rules for their own benefit.[84]

Nicholas Shaxon addresses the magnitude of a deeper issue that made tax competition such an intractable problem – the OECD's own member states, particularly Britain and the United States, were key authors and beneficiaries of the offshore network.[85] Unable to achieve the internal consensus that had previously driven its success, and facing a loss in its institutional standing, the OECD abandoned its attempt at a more confrontational approach.[86] Less ambitious measures pursued to enhance tax transparency faltered, but opportunity for more fundamental reform would soon follow, as renewed pressure to act and prospects for consensus building arose out of the 2008 financial crisis.[87] The high levels of sovereign debt and tepid economic recovery which resulted left developed economies with reduced capacity to fund their welfare states, and so reclaiming tax revenue losses became more urgent where such losses had for so long been tolerated.[88] Alongside this, increased public anger about tax avoidance and the profit-shifting activities of global companies, as well as growing civil activism generated further momentum.[89]

1.2.1 The BEPS era

New attempts at co-ordinated reform by the OECD, boosted by the political support and endorsement of the G20, resulted in the Base Erosion and Profit Shifting (BEPS) initiative, which had numerous goals aimed at both building on previous efforts at increasing transparency and information-exchange between countries, as well as new and ambitious reforms intended to counter tax avoidance and the growing erosion of domestic tax bases.[90] It set out 15 Actions intended to respond to specific BEPS problems, including making changes to transfer pricing guidelines and to the definition of 'permanent establishment' within allocation rules, to tackle treaty abuse and artificial profit shifting.[91] Measures to

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[84] ibid 8-10.
[85] Shaxon (n 68) 24-25.
[86] Sharman (n 82) 8-10.
[87] Richard Eccleston, *The Dynamics of Global Economic Governance: The Financial Crisis, the OECD and the Politics of International Tax Cooperation* (Edward Elgar Publishing 2012) 82-91.
[88] Jeremy Leaman and Attiya Waris (eds), *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (Berghahn 2013) 2.
[89] Dietsch, 'Whose Tax Base?' (n 74) 231.
[90] Richard Eccleston and Helen Smith, 'The G20, BEPS and the Future of International Tax Governance' in Dietsch and Rixen, *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016) 176-77.
[91] OECD, 'Action Plan on Base Erosion and Profit Shifting' (n 11) 19-21.

introduce country-by-country reporting (CbCR) would require multinationals to report tax information on their global operations in every country, and a new multilateral treaty instrument (MLI) would allow countries to implement agreed BEPS measures without having to amend existing treaties.[92] Recognising successful implementation of such proposals would require wider participation beyond its membership, the OECD established the Inclusive Framework, inviting the collaboration of non-member states to implement the BEPS reform package.[93]

While previous initiatives had involved outreach to non-members, the unique and unprecedented mandate for their equitable participation within the Inclusive Framework signalled a sea change in the OECD's approach.[94] It currently includes over 135 countries and provides a forum for open consultation, and while joining required agreeing to implement the BEPS agenda, it was intended that the Inclusive Framework would provide an avenue to explore wider concerns and to advance the agenda in areas where further work was required.[95] The OECD also committed to offering ongoing support and to accompany developing countries in capacity-building efforts to implement BEPS measures.[96] Whether this amounted to meaningful change in practice will be discussed in more depth further on, but at least formally the setting was created in which more countries could contribute to policy-making, and lay the groundwork for the subsequent phase of the BEPS agenda.[97]

1.2.2 A new tax deal - BEPS 2.0

Commonly referred to as BEPS 2.0, the second phase of the project followed an agreed approach by the Inclusive Framework to develop two 'pillars' of reform.[98] The first was aimed as reassessing the framework determining the allocation of tax rights to respond to

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[92] Yariv Brauner, 'Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument' (2021) University of Florida Levin College of Law Research Paper 22/6 <https://ssrn.com/abstract=3885602> accessed 29 July 2023, 3-5.
[93] ibid.
[94] Allison Christians and Laurens van Apeldoorn, 'The OECD Inclusive Framework' (2018) 72 BFIT 226, 228.
[95] Brauner, 'Serenity Now!' (n 92) 5.
[96] ibid 24-25.
[97] ibid 5.
[98] OECD, 'Policy Note – Addressing the Tax Challenges of the Digitalisation of the Economy' (January 2019) <www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf> accessed 31 August 2023, 1.

novel BEPS pressures created by the growth of digital companies.[99] The second, recognising that the implications of the first pillar might 'reach into fundamental aspects of the current international tax architecture,'[100] intended to address remaining BEPS issues with a focus on strengthening the ability of states to tax profits which were subject to minimum effective rates in other jurisdictions.[101] This process culminated in a finalized agreement in 2021, described by the OECD with rhetorical flourish as a 'landmark deal, agreed by 136 countries and jurisdictions representing more than 90% of global GDP'.[102] Under Pillar One the taxing rights of the top 100 multinational enterprises (MNEs) would be reallocated to market jurisdictions, 'ensuring that these firms pay a fair share of tax wherever they operate and generate profits'.[103] Under Pillar Two the agreement would establish for the first time a minimum corporate tax rate of 15%, which the OECD estimated would generate around $150 billion annually in additional global tax revenues.[104]

Political and academic responses at the time seemed to share the enthusiasm of the OECD's view of the deal as indeed 'ground-breaking', and that it amounted to substantial change of the current framework.[105] The new taxing right under Pillar One extends its scope beyond targeting only digital services but any MNE which meets the turnover and profitability thresholds,[106] and provides new allocation rules for a portion of their residual profits to be assigned to market countries – constituting a limited but noteworthy move away from the arm's length standard and 'permanent establishment' nexus rules.[107] Establishing the global minimum tax (GMT) under Pillar 2 involves two mechanisms that would make foreign-sourced profits subject to a top-up tax where MNEs paid an effective rate below 15% - the income inclusion rule (IIR) and the undertaxed payments rule (UTPR), applicable depending on whether the company is a parent entity of an MNE or a subsidiary.[108] Within this structure countries would be able to implement these rules without universal adoption, and the nature of its design and hierarchical structure (as the

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[99] ibid 1-2.
[100] OECD, 'Policy Note' (n 98) 2.
[101] ibid 2-3.
[102] OECD, 'International community strikes a ground-breaking tax deal for the digital age' (n 1).
[103] ibid.
[104] ibid.
[105] Rita de la Feria, 'The Perceived (Un)Fairness of the Global Minimum Corporate Tax Rate' in Werner Haslehner and others (eds), *The Pillar 2 Global Minimum Tax* (Edward Elgar, 2023) (forthcoming) <https://ssrn.com/abstract=4205720> accessed 20 August 2023. 1-2.
[106] Michel and Falcão (n 66) 656.
[107] Reuven S Avi-Yonah, Young Ran (Christine) Kim and Karen Sam, 'A New Framework for Digital Taxation' (2022) 63 Harvard Intl LJ 279, 280-81.
[108] Feria (n 105) 2.

IIR takes priority over the UTPR) means that coordinated implementation in even a few countries could create significant incentive for others to do the same.[109]

At the same time, there was reason to be hesitant given the measures only constituted changes to allocation rules in narrow areas, and the crucial question of whether they could be successfully implemented.[110] The GMT still ranked residence rules as taking first preference in the tax allocation scheme, and the top-down approach of the IIR and UTPR gave preference to countries which host parent entities of MNEs, meaning that in practice most income would accrue to countries who were already entitled to the bulk of corporate income, essentially serving to strengthen residence rights.[111] Additionally, the minimum rate of 15% is far below the 25-30% rates common in African and other developing countries, raising concern that it would not be enough to stem the flow of artificial profit shifting.[112] Similarly, the Pillar One rules only offered an 'additional layer' to the established tax allocation rules,[113] being applicable to 25% of residual rather than routine profits.[114] It also notably placed limits on unilateral digital service taxes, leaving both EU and developing countries who had already adopted or had material interest in such measures disadvantaged, given the tax rights of Pillar One would require a multilateral agreement to be implemented.[115]

1.2.3 Reviewing reform

In the short time since the deal was announced there has been an oddly swift rise and decline of expectations towards its prospects. A significant reason for this is that there is no reasonable prospect for Pillar One's implementation without agreement from the United States, who have expressed continued opposition to the adoption of digital service taxes

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[109] Michael P Devereux, Johanna Paraknewitz and Martin Simmler, 'Empirical evidence on the global minimum tax: what is a critical mass and how large is the substance-based income exclusion?' (2023) 44 Fiscal Studies 9, 10.
[110] Yariv Brauner, 'Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective' (2022) 50 Intertax 2, 2.
[111] Andrea Riccardi, 'Implementing a (global?) minimum corporate income tax: an assessment of the so-called "Pillar Two" from the perspective of developing countries' (2021) 4 Nordic Journal on Law and Society 1.
[112] ATAF, 'A new era of international taxation rules – what does this mean for Africa?' (October 2021) <https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa> accessed 28 August 2023.
[113] Michel and Falcão (n 66) 657.
[114] ATAF, 'A new era of international taxation rules' (n 112).
[115] Avi-Yonah, Kim and Sam, (n 107) 281-282.

and have demonstrated willingness to carry out unilateral retaliatory measures in response, which speaks to a continued problem for effective tax governance being subject to the most dominant economic powers.[116] It is also uncertain where the work of the Inclusive Framework has meaningfully changed this dynamic. The participation of developing countries had some impact on the final agreement, demonstrated by the inclusion, among other measures, of an additional 'subject to tax rule' (STTR) which provided additional treaty rights to source income.[117] However, such amendments were the exception rather than the rule, and overall proposals tended to be watered down in the process of negotiation. The subsequent changes were such that, by the time the OECD released its Outcome Statement in June 2023, the amended rules if implemented provided even less taxable income to developing countries.[118]

Developing countries came to the negotiation table facing the very familiar barriers of having more limited resources to find inroads in expertise-driven discussion, and difficulties 'shifting the direction of travel' in the OECD's established agenda and commitment to the framework's underlying principles.[119] The central problem is that there was little attention given to developing countries' primary reform need – securing stronger source tax rights.[120] Indeed, the OECD was explicit from the outset that the BEPS plan was not intended to pursue any fundamental changes of the governing principles and existing standards that determined the allocation of tax rights.[121] While the process of policy development through the Inclusive Framework meant conceding some changes were necessary, they were applied in very limited circumstances.[122]

As discussions proceed there is growing evidence the problem of profit shifting continues largely unabated. One of the tangible benefits of the BEPS project has been provided by the implementation of CbCR standards, which has offered new datasets to research the

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[116] ibid 282-83.
[117] Riccardi (n 111) 28.
[118] South Centre, 'Statement by the South Centre on the Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (July 2023) <https://www.southcentre.int/sc-statement-two-pillar-solution-28-july-2023/ > accessed 30 August 2023
[119] Rasmus Corlin Christensen, Martin Hearson and Tovony Randriamanalina, 'Developing influence: the power of 'the rest' in global tax governance' (2023) 30 Review of International Political Economy 841, 851-52.
[120] Riccardi (n 111) 9.
[121] Mindy Herzfeld, 'The Case Against BEPS: Lessons for Tax Coordination' (2017) 21 Florida Tax Review 1, 24.
[122] ibid.

movement of global profits more accurately. Research published in 2021 was able to use this data and provide new insight, revealing that in the four years following the publication of the BEPS Action Plan there had been no reduction in the scale of profit shifting. [123] Between 2015 and 2019 the amount of shifted profits as a share of global multinational profits actually increased slightly from 36 to 37%, with the absolute amount of profits shifted increasing from $616 to $1 trillion in that time.[124] Another recent study revealed, following the announced closure in 2015 of the infamous 'double Irish' tax loophole, that not only had the arrangement allowed US multinationals to shift an estimated $1.2 to $1.4 trillion in profits to low-tax jurisdictions between 1998-2019, but that by its final closure in 2020 the amounts redirected to the US suggest 62 to 69% of profits remain abroad.[125] The Tax Justice Network, noting the disappointing implications of both the CBCR data and the stunted progress of the two-pillar proposals, grimly concluded the BEPS reforms amounted to 'a lost decade' at the OECD.[126]

A more significant outcome of the OECD's reform efforts might be in revealing that the 'lock in' effects of the its hegemonic position and commitment to the status quo have lost their durability.[127] The ongoing narrative is that the interests of developing countries are best served by closer cooperation and alignment with the OECD's agenda and consensus-building approach.[128] As can be seen by the attempts to provide an alternative forum for tax cooperation within the UN, this narrative is increasingly seen as wanting. The OECD has staked the legitimacy of its reform on the wide membership of the Inclusive Framework, recognising the need for greater responsiveness to the more diverse concerns of developing countries, who are increasingly setting their sights on more fundamental changes.[129] Despite continued resistance to such pressures, there is increasing support for the idea that meaningfully solving the collective action problems of tax governance requires re-

[123] Wier and Zucman (n 76) 4-5.
[124] ibid.
[125] Navodhya Samarakoon, 'The Effect of the Closure of the Double Irish Arrangement on the Location of U.S. Multinational Companies' Profits' (2023) <http://dx.doi.org/10.2139/ssrn.4285001> accessed 28 August 2023.
[126] Tax Justice Network, 'The State of Tax Justice 2023' (July 2023) <https://taxjustice.net/reports/the-state-of-tax-justice-2023/> accessed 31 July 2023, 17-20.
[127] Christensen and Hearson (n 10) 1078.
[128] Vega (n 65) 148.
[129] Herzfeld (n 121) 27.

evaluating the ‘basic principles and mechanisms of sovereignty preservation’ that underlie the whole framework.[130]

1.3 SCOPE FOR A NEW APPROACH

Within this current context there is both crisis and opportunity, because where global tax governance currently functions to contribute to global injustice it also contains the possibility of offering solutions.[131] How then can global taxation be directed to the aims of global justice? Stark offers a useful distinction to frame these considerations, which is the difference between taxation as a political *instrument* for redistribution, and taxation as the *object* of distribution within global tax governance.[132] What she means is that the connection between taxation and distribution, especially domestically, establishes its role as an instrument to tackle inequalities and achieve other goals of justice, but that at the global level taxation is the object of global distribution as well, as a right to be allocated among countries.[133]

Considering this conceptual distinction, and the fundamental structural and relational problem that have been identified, there are three interrelated aspects to global tax justice that emerge. The first is concerned with the just allocation of tax rights as an *object* of global distribution, and focuses on the foundational principles that make the current framework a source of unjust distribution and inequitable outcomes. The second considers the possibilities of global tax governance as an *instrumental* framework equipped to address global injustices. Finally, recognising that both these goals necessitate genuinely equitable participation, the third focuses on addressing two prominent barriers to securing just cooperation – namely the problem of relational power and the commitment to sovereignty-preservation.

1.3.1 Righting distributive wrongs

The OECD continues to frame reform as a response to purely novel problems, without interrogating the view that, in their own words, ‘In many circumstances, the existing

[130] Rixen, ‘From double tax avoidance to tax competition’ (n 23) 207.
[131] Allison Christians and Laurens van Apeldoorn, *Tax Cooperation in an Unjust World* (OUP 2021) 1.
[132] Stark (n 4) 6.
[133] ibid.

domestic law and treaty rules governing the taxation of cross-border profits produce the correct results and do not give rise to BEPS'.[134] To presume such outcomes are 'correct', Allison Christians points out, is simply to restate the arbitrary consensus positions first determined by the four economists at the League of Nations 'as if they were principles'.[135] The failure from the outset, she argues, was that faced with the complexity of allocating tax rights under principles of economic allegiance, the economists ought to have recognised that the reason assigning origin to international income escapes straightforward assessment is because it is fundamentally a product of economic cooperation and interdependence.[136] If there is to be any possibility of a framework that is just for all countries, this implications of this idea need to be addressed.

While the rhetoric employed within the BEPS project, of ensuring tax rights are allocated 'where value is created', might suggest reform is being guided by some new normative principle, it is too vaguely defined to be determinate.[137] If anything it further entrenches current biases, as the logic of supply chain valuation will inevitably assign more profits to higher-income countries over those who provide the resources and manufacturing of products.[138] Just reform will only be possible if tax right allocation is recognised as a fundamentally distributive question rather than an economic one, and it is not enough to simply offer some concessions in reallocation.[139] As Mitchell Kane argues, the prospect of incremental reform as an exercise in developed countries 'giving up' some revenue means little in comparison to a complete restructuring of the framework to establish the right of developing countries to source tax revenues in the first instance.[140] Currently it is estimated that through the current taxation regime developing countries lose tax revenue greater than the annual flow of aid.[141] More than simply considering the ways source rights can be

[134] OECD, 'Action Plan on Base Erosion and Profit Shifting' (n 11) 9.
[135] Christians, 'BEPS and the Power to Tax' (n 29) 12.
[136] ibid 9.
[137] Richard Collier, 'The Value Creation Mythology' in Werner Haslehner and Marie Lamensch (eds), *Taxation and Value Creation* (IBFD 2021) (forthcoming) <https://ssrn.com/abstract=3711318> accessed 01/09/2023, 13.
[138] Allison Christians, 'Taxing According to Value Creation' (2018) 90 Tax Notes International 1379
[139] ibid.
[140] Mitchell A Kane, 'Tax and Human Rights: The Moral Valence of Entitlements to Tax, Sovereignty, and Collectives' in Philip G Alston and Nikki R Reisch (eds), *Tax, Inequality, and Human Rights* (2019) 100.
[141] Gillian Brock, 'Taxation and Global Justice: Closing the Gap between Theory and Practice' (2008) 39 Journal of Social Philosophy 161, 164.

better protected or promoted, there needs to be a return to the principles underpinning the framework, to consider normative goals beyond sovereignty preservation.

1.3.2 Tackling global inequality

Few would disagree that the problems of global poverty and inequality constitute some of the world's foremost challenges, with severe impact on the lives of the majority of the world's population, and having profound moral implications for the global community. In terms of scale, the richest 10% of the global population own 76% of all wealth, with the poorest half possessing only 2%.[142] Given the extent to which the problems of tax competition contribute to growing inequalities both within and between borders, Rixen argues, reform ought to be explicitly aimed at reducing its harms.[143] In addition, a number of writers have argued that the BEPS agenda should be directed towards meeting the UN's Sustainable Development Goals, which requires the mobilization of domestic revenues for developing countries, and is thus directly tied to the tax reform agenda.[144]

Writers on global justice have written extensively about taxation measures which could be used instrumentally to address issues of global inequality and poverty. Gillian Brock notes that discussions on proposals to implement taxes encompass a broad spectrum of areas, from currency transactions to global aviation, to world trade and particularly the global arms trade.[145] Pogge in particular makes the argument for a Global Resource Dividend – an effective tax on the resources states decide to use or sell, which would raise tax revenue and go some way to addressing the fact that currently in many countries citizens do not benefit economically from the sale of their natural resources.[146] Ayelet Shachar offers a 'birthright privilege levy' which accounts for the benefits received from citizenship in richer countries.[147] Such measures could still be implemented through state infrastructure but would require a more comprehensive cooperative regime to effectively co-ordinate and to determine the fair allocation of collecting and spending such revenues.[148] Faced with the

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[142] Lucas Chancel and others, 'World Inequality Report 2022' (World Inequality Lab 2022) <https://wir2022.wid.world/> accessed 22 July 2023.
[143] Rixen, 'Tax Competition and Inequality' (n 79).
[144] Christians and Apeldoorn, *Tax Cooperation in an Unjust World* (n 131) 74.
[145] Brock, 'Taxation and Global Justice' (n 141) 170-74.
[146] Thomas Pogge, 'Eradicating Systemic Poverty: Brief for a Global Resources Dividend' (2001) 2 Journal of Human Development 59.
[147] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global* Inequality (Harvard UP 2009) 15.
[148] Brock, 'Taxation and Global Justice' (n 141) 174-75.

enormity of challenges like climate change, Darrel Moellendorf argues, it is not simply desirable but essential to develop the capabilities of the global order to ensure the equitable sharing of global burdens .[149]

1.3.3 Equitable participation and power

Throughout its history the equitable outcomes of global tax governance are inescapably connected to the biases and processes undertaken by only a few privileged and powerful actors. The Inclusive Framework is framed as a meaningful change to this historic legacy, by mandating participation 'on equal footing'.[150] The African Tax Administration Forum (ATAF) used an updated metaphor to describe participating in the Inclusive Framework as having a seat at the table 'where the menu was set and prepared by OECD countries with the ensuing dishes being available for eating as is to all countries, including developing countries, irrespective of their tastes and preferences.'[151]

If global tax cooperation is to be aimed at pursuing global justice, it is more meaningful to reframe global inequality as not only a material concern but at its core a problem of relational power, and without accounting for this problem there is limited prospects of securing truly equitable participation. As Jason Sharman argues, in the conflict of interests over securing the benefits of international cooperation the role of states exerting power over others is pivotal.[152] Tarcisio Magalhães points out the importance of the hegemonic power of the OECD itself maintaining a framework which benefits its members and serves to dominate other countries.[153] The continued framing of allocation rules as an economic question has obscured the reality that 'power was the key to dividing the global income tax base then, as it is today'.[154]

Tax competition is traditionally framed as a collective action problem that has arisen because the advancement of globalization 'has far outpaced states' capacities to control

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[149] Darrel Moellendorf, *Global Inequality Matters* (Palgrave Macmillan 2009) 106.
[150] Christians and Apeldoorn, 'The OECD Inclusive Framework' (n 94) 228.
[151] ATAF, 'The Place of Africa in the Shift Towards Global Tax Governance' (2019) <https://events.ataftax.org/index.php?page=documents&func=view&document_id=35> accessed 28 August 2023, 6
[152] Sharman (n 82) 5.
[153] Tarcisio Diniz Magalhães, 'What is Really Wrong with Global Tax Governance and How to Properly Fix it' (2018) 10 WTJ 499, 508-09.
[154] Christians, 'BEPS and the Power to Tax' (n 29) 6.

it'.[155] Yet as Dietsch and Rixen point out, globalization flourished as a result of political *choices*, including the choices within tax cooperation to prioritize the dual aims of reducing trade barriers and protecting national sovereignty.[156] It was foreseeable that such choices would result in the problems of tax avoidance and tax competition, since pursuing both aims required a framework which would demand international convergence on standards to avoid double taxation, and at the same require minimal interference on autonomous tax systems - and so gave states broad scope to compete on tax rates and incentives, and global taxpayers ample opportunity to exploit this.[157] In sum, committing to both principles meant restricting the capacity to tax income (for certain parties) and liberalizing the capacity to not tax income or to undercut rates, and applied to a world of diverse states with diverse tax systems, inequitable outcomes were guaranteed.

The problem of balancing the demands of cooperation and national autonomy has only grown more complex since first identified, so to maintain the same sovereignty-preserving approach has become even more untenable. Providing a more effective and just framework for global tax governance thus ought to begin with meaningful re-assessment of the normative principles which provide its foundation. Given the central problems identified, the task is to find a normative model that can account for the interconnection between the demands of national sovereignty and the equitable treatment of states, the fair allocation of tax rights and the problems of global inequality, and the relationship between just cooperation and the distribution of power.

With these features in mind a specific question stands out: whether the framework for international taxation is subject to the demands of global distributive justice.[158] A key part of the debate itself is of course defining what distributive justice means as applied to the international arena, but it can be broadly summarized as the argument that there is duty as a matter of justice to the equitable distribution of the burdens and benefits of global cooperation and to addressing the relative inequalities between states.[159] Answering the question of its applicability requires assessment of both whether it can be normatively

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[155] Sharman (n 82) 3.
[156] Peter Dietsch and Thomas Rixen (eds), *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016) 5.
[157] ibid 5-6.
[158] Stark (n 4) 135.
[159] Chris Armstrong, *Global Distributive Justice: An Introduction* (CUP 2012) 16.

justified, and whether it offers an effective answer to the problems identified and provides a workable model for just governance.

2 A STATIST ACCOUNT OF GLOBAL TAX JUSTICE

Like many contemporary writers on global taxation who have turned to its normative assessment, Miriam Ronzoni focuses on the traditional debate in global distributive justice between the competing perspectives of statism and cosmopolitanism.[160] Defining the debate in purely statist or cosmopolitan terms of course cannot fully capture the entire breadth of perspectives on global justice. As Matthias Risse points out, both statists and cosmopolitans can agree on justice having relational grounds where others offer non-relational arguments, and the central point of dispute - the normative peculiarity of the state – cannot solely determine one's conclusions about the demands of global justice.[161]

At the same time, the debate offers a useful framework to examine the central conflict between national sovereignty and global inequality within global tax governance, and whether states have redistributive duties to each other within the cooperative framework.[162] What is notable is that most accounts of global tax justice appear to share a baseline presumption against the relevance of distributive justice beyond state borders which requires countering, and many take an explicitly statist perspective. To answer why this dynamic exists, as well as to offer any challenge to its premise, the discussion must turn to John Rawls.

The centrality of Rawls in the debate is unsurprising, since it was his account in *A Theory of Justice* which triggered the explosion of modern discourse on global distributive justice, notably because he explicitly excluded application of his theory of justice to global affairs.[163] By grounding the demands of distributive justice in the relational duties that arise out of social cooperation within the basic structure, Rawls offered an analytically comprehensive account which both explained why such duties were unique to domestic societies, and offered powerful insight into what makes certain forms of inequality unjust, and what establishes duties of redistribution within societies.[164] As a result, much of the

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[160] Miriam Ronzoni, 'Tax Competition: A Problem of Global or Domestic Justice?' in Peter Dietsch and Thomas Rixen (eds), *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016) 201.
[161] Mathias Risse, *On Global Justice* (Princeton UP 2012) 10.
[162] Stark (n 4) 135.
[163] Rawls, *The Law of Peoples* (n 20) 85.
[164] Michael Blake and Patrick Taylor Smith, 'International Distributive Justice' *The Stanford Encyclopedia of Philosophy* (Summer edn, 2021) <https://plato.stanford.edu/archives/sum2021/entries/international-justice/> accessed 01 December 2022.

debate that followed was indelibly influenced by his arguments. This chapter aims then to assess some of the normative accounts of global tax justice that rely on statist framing, by examining the central dispute between statist and cosmopolitan perspectives, and exploring Rawls' dual account of distributive justice within the basic structure and the demands of global justice within the duty of assistance.

2.1 JOHN RAWLS AND THE GLOBAL JUSTICE DEBATE

For Rawls, what triggers principles of social justice is the form of social cooperation that takes place within domestic states. While the view of society as a 'cooperative venture for mutual advantage' is not to be taken entirely literally, it speaks to the responsibility that the state is given to govern those within the cooperative endeavour fairly as free and equal citizens, and to distribute the benefits and costs that are created from such cooperation in a just way.[165] Arguing from the 'original position', Rawls offers a powerful conceptual tool to demonstrate the vast array of arbitrary factors that inform one's chances in life, and to argue that the appropriate principles of justice must account for their impact on fair distribution – by ensuring both formal equality of opportunity and that any inequalities are to the benefit of those worst off.[166] A crucial element of this analysis for Rawls was that such duties are relevant only within the context of the basic structure, as they do not derive from universal first principles which would exist to govern all types of relations – whether it be families, civic or private institutions, or the relations between sovereign states.[167]

To cosmopolitan authors this exclusion was morally problematic. If institutional inequalities that derive from qualities beyond one's control, such as race, gender, or genetic inheritances, cannot be justified because they are arbitrary, surely the country of one's birth is as inescapable a contingency.[168] If the justification for an egalitarian distributive principal domestically rests on the fundamental equality of peoples, similar implications must follow at the global level if Rawls' account is to be coherent.[169] 'After all, the requirement contains a universal quantifier'.[170]

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[165] John Rawls, *A Theory of Justice: Original Edition* (Harvard UP 1971) 84-85.
[166] ibid 60-65.
[167] Rawls, *The Law of Peoples* (n 20) 85.
[168] Thomas Pogge, *Realising Rawls* (Cornell UP 1989) 247.
[169] Moellendorf (n 149) 19.
[170] ibid.

As Charles Beitz argues:

> If evidence of global economic and political interdependence shows the existence of a global scheme of social cooperation, we should not view national boundaries as having fundamental moral significance. Since boundaries are not coextensive with the scope of social cooperation, they do not mark the limits of social obligation. Thus the parties to the original position cannot be assumed to know that they are members of a particular national society, choosing principles of justice primarily for that society. The veil of ignorance must extend to all matters of national citizenship, and the principles chosen will therefore apply globally.[171]

The cosmopolitan places the individual as the fundamental moral unit of concern, and it carves out no unique distinction to states in this regard. Thomas Pogge argues as well as this commitment to individualism, cosmopolitanism is defined by its universality and generality, in that this concern applies to all people equally and is given global force rather than being solely an associational obligation owed to fellow citizens.[172] To fulfil these principles, cosmopolitans argue that there ought to be relevant constraints on global political organization as there are domestically within Rawls' account.[173] Similarly, there are enough relevant considerations at the global level, akin to the basic structure of society, that duties of distributive justice would also be rationally chosen to govern the relations between peoples.[174]

The problem arises in determining, if not the locus of the state, what is it that positively grounds the scope of distributive justice within a cosmopolitan framework. As Beitz noted, it is easier to understand the force of moral cosmopolitanism from what it rules out than what it requires.[175] The essential dilemma is that attempting to establish a global distributive principle requires severing Rawls' account of distributive justice within the

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[171] Charles R Beitz, *Political Theory and International Relations* (Princeton UP 1999), 151.
[172] Thomas Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 Journal of Ethics 48, 48.
[173] Thomas Pogge, 'Concluding Remarks' in Philip G Alston and Nikki R Reisch, *Tax, Inequality and Human Rights* (OUP 2019) 301.
[174] Beitz, *Political Theory and International Relations* (n 171) 156-58.
[175] Charles R Beitz, 'Cosmopolitanism and Global Justice' (2005) 9 Journal of Ethics 11, 17.

basic structure from the other parts of his theory relating to political rights and political justification.[176] For Rawls, this severing would be unacceptable.

2.2 REJECTING A GLOBAL DISTRIBUTIVE PRINCIPLE

Rawls was able to lay out his specific responses to cosmopolitan critique in *The Law of Peoples*, where he gave two arguments for rejecting a global distributive principle: that the features of the basic structure which generate the demands of distributive justice are uniquely held by states, and that at the global level different principles would be chosen to govern just relations between states, that would amount to duties of assistance rather than redistributive duties.[177]

While Rawls is emphatic about the contextual importance of the basic structure in grounding duties of distributive justice, there is little explicit discussion about the features of the basic structure that uniquely give rise to such duties. This is a task that numerous writers have taken up, to identify the most relevant features which distinguish the nature of domestic and global justice. The goal, as Andrea Sangiovanni puts it, is to show that applying different principles of justice to the global order and to the domestic state is not an arbitrary one, even if one accepts cosmopolitan premises regarding the primacy of human beings as the ultimate units of moral concern.[178] The diversity of thought in this arena is wide, but two highly relevant features stand out in the discussion - the coercive nature of the state, and the strong relationship of reciprocity between the state and its citizens.[179]

2.2.1 The coercive basic structure

Kenneth Waltz describes the vast difference in structure between the global and domestic order: while global governance is decentralized and requires the cooperative efforts of states who are formally equal, the domestic basic structure is centralized and hierarchic.[180] Central to this hierarchical relationship between the state and its citizenry is its governance

[176] Blake and Smith (n 164).
[177] ibid.
[178] Andrea Sangiovanni, 'Global Justice, Reciprocity, and the State' (2007) 35 Philosophy & Public Affairs 3, 3.
[179] Risse (n 161) 42.
[180] Kenneth Waltz, *A Theory of International Politics* (Addison-Wesley Publishing 1979) 88.

through coercive force. Matthias Risse emphasises the pervasiveness of coercion in domestic legal systems, whereas international rules require the powers of states in order to be enforceable.[181] Notably as well, Samuel Freeman argues, any obligations at the global level are supervenient to the demands of justice within states because they rely on the coercive force states have within the basic structure.[182]

What is the significance of coercion in justifying claims of distributive justice? Michael Blake argues that the egalitarian demands of distributive justice offer strong justification to the powerful imposition on freedom that state coercion enables.[183] For Blake, the coercive powers of the state must be justified because they are an imposition on autonomy – the principle that all people are entitled to exist as autonomous agents.[184] Coercion stands as an intrinsically oppositional quality that hinders autonomy, since it serves to subvert an individual's chosen plans and pursuits with those of another. For such coercion to be justified there must be a model for hypothetical consent to it, and Blake argues that this comes from the concern for relative deprivation and material equality provided by the demands of distributive justice.[185] As to why this dynamic is unique to the state, he writes:

> Only the state is both coercive of individuals and required for individuals to live autonomous lives. Without some sort of state coercion, the very ability to autonomously pursue our projects and plans seems impossible; settled rules of coercive adjudication seem necessary for the settled expectations without which autonomy is denied. International legal institutions, in contrast, do not engage in coercive practices against individual human agents. Other forms of coercion in the international arena, by contrast, are indefensible-or, if they are defensible, do not find their justification in a consideration of their distributive consequences.[186]

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[181] Risse (n 161) 25.
[182] Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (OUP 2009) 269.
[183] Michael Blake, 'Distributive Justice, State Coercion, and Autonomy' (2001) 30 Philosophy & Public Affairs 257, 257.
[184] ibid 272.
[185] ibid.
[186] ibid 280.

2.2.2. The basic structure and reciprocity

Blake's account necessarily admits that coercive force does exist at some level beyond the state, and for some the distinguishing features are not so clear-cut. The claim that the international order does not involve coercion against individuals is challenged by Arash Abizdadeh, who argues that the restriction of movement across borders by foreign states clearly constitutes the use of coercive force against people outside its citizenry.[187] Thomas Nagel argues that unlike domestic states, international governance is reliant on autonomous states fully volunteering to be subject to international coercive practices.[188] However, given the significant costs states face from exit or non-compliance with global institutions, this distinction is severely weakened. As Cohen and Sabel argue, 'Opting out is not a real option…and given that it is not, and that everyone knows that it is not, there is a direct rule-making relationship between the global bodies and the citizens of different states'.[189]

Andrea Sangiovanni argues that instead what is normatively unique to the state is the condition of reciprocity – the relation between citizens who enable the state's capacity to provide the collective goods for society.[190] For Rawls, all people ought to benefit from social cooperation since it requires their mutual contributions, and unlike other forms of socially coordinated activity it is 'guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct'.[191] The domestic legal system, through its laws, norms, institutions, and administration, governs the shared economic system and allows for economic exchange. If distributive concerns are required for there to be demands of distributive justice, it is only through the existence of the basic structure that there are social goods to distribute at all.[192] Sangiovanni emphasises that within this picture the role of taxation itself is crucial: 'Without their contributions paid in the coin of compliance, trust, resources, and participation, we would lack the individual capabilities to function as citizens, producers, and biological beings'.[193]

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[187] Arash Abizadeh 'Cooperation, Pervasive Impact, and Coercion: On the Scope (Not Site) of Distributive Justice' (2007) 35 Philosophy & Public Affairs 318, 348-349.
[188] Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs 113, 140.
[189] Joshua Cohen and Charles Sabel, 'Extra Rempublicam Nulla Justitia?' (2006) 34 Philosophy & Public Affairs 147, 168.
[190] Sangiovanni (n 178) 19.
[191] ibid.
[192] Freeman, *Justice and the Social Contract* (n 182) 269.
[193] ibid 20.

Rawls illuminates the relation between reciprocity and distributive justice in this way:

> The least advantaged are not, if all goes well, the unfortunate and unlucky—objects of our charity and compassion, much less our pity— but those to whom reciprocity is owed as a matter of political justice among those who are free and equal citizens along with everyone else. Although they control fewer resources, they are doing their full share on terms recognized by all as mutually advantageous and consistent with everyone's self-respect.[194]

While it may be true that the country of one's birth is as arbitrary a distinction as the capacities they are born with, the need to address such inequalities lies not in an appeal to mitigate the effects of bad luck ('there but for the grace of God go I'), but in the shared responsibility citizens have for each other, recognising a mutual reliance on society as a cooperative endeavour which allows everyone to realize their rights and goals for a fulfilling life.[195]

2.2.2 A dual account of the basic structure

Thomas Nagel stands out among statists for rejecting the relevance of *any* claims of justice outside the basic structure, but his argument is also notable for bringing the qualities of coercion and reciprocity together; 'What creates the link between justice and sovereignty is... they all depend on the coordinated conduct of large numbers of people, which cannot be achieved without law backed up by a monopoly of force.'[196] Coercion and reciprocity are both essential but also interdependent features - social cooperation is made possible through coercive rule and coercive capacity relies on the shared responsibility citizens have for creating and supporting the basic structure. These joint facts create a scenario in which the state becomes normatively constrained; if its actions are justified as speaking in the name of its citizens then all must be given equal consideration in ways which can be justified to the 'joint authors' of such actions.[197]

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[194] John Rawls, *Justice as Fairness: A Restatement* (Harvard UP) 139.
[195] ibid 25-26.
[196] Nagel (n 188) 115.
[197] Cohen and Sabel (n 189) 160.

The connection between these key features of the basic structure and distributive justice finds particular meaning in the context of taxation. As Tsilly Dagan summarizes:

> On the domestic level, tax is a central sphere in which the sometimes conflicting normative goals underlying our collective lives in the state intersect…They are, furthermore, significant to the shaping of taxpayers' identities and the kinds of communities we live in, as well as innately linked to our sense of belonging to and solidarity with the state. The state, we would like to believe, designs tax rules that are compatible with the fundamental normative values shared by its constituents: seeking to maximize the welfare pie and distribute it justly while reinforcing citizens' identity, supporting their communities, and representing their democratically pronounced collective will.[198]

For Nagel the active engagement of the will of citizens as part of the reciprocal exchange is critical in engaging the demands of distributive justice; it is not enough for people outside that relationship to claim that the policies of other states impose material burdens on them since such rules are not imposed in their name.[199] There is no requisite duty to seek out or enter into such a relationship with new participants, and so 'The requirements of justice themselves do not, on this view, apply to the world as a whole, unless and until, as a result of historical developments not required by justice, the world comes to be governed by a unified sovereign power'.[200]

Thus, while some elements of these factors may exist at the global level - shared economic activity and rules, international law-making and authority - it is not sufficient to trigger demands of egalitarian distributive justice. While it becomes increasingly more challenging to argue that the global order does not effectively coerce, or that participation is fully voluntary, it remains harder still to argue that the same conditions of reciprocity hold, or that people are mutually joint authors of the global order. While such conditions in isolation may not be necessary for demands of justice to exist, it may be that together they are jointly sufficient.[201]

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[198] Dagan, *International Tax Policy* (n 19) 12.
[199] Nagel (n 188) 129.
[200] ibid 121.
[201] Risse (n 161) 47.

2.2.3 The duty of assistance

Charles Beitz points out that part of Rawls' explicit project in *The Law of Peoples* is to make a case for statism that is progressive, more attractive than corresponding cosmopolitan theories, and a more accurate account of the world as it exists where relations are not governed by a basic structure.[202] To achieve this he argues that distributive justice at the global level is not only normatively unjustified but also unsuitable for ensuring just relations between states, instead formulating a duty of assistance as a better practical response to the problems of global justice.[203]

Rawls begins with a point of commonality, agreeing that some obligations do exist at the global level to achieve basic freedoms, human rights and living standards across all nations. He writes, 'Well-ordered peoples have a duty to assist burdened societies.'[204] Rawls takes an analogous approach, reasoning from the original position, to determine what principles 'free and democratic peoples' would choose to govern their relations.[205] In this scenario, he argues that they would reasonably choose a duty to assist other peoples 'living under unfavourable conditions that prevent their having a just or decent political and social regime', but not a global difference principle.[206] A duty of assistance is inherently defined by its limited scope – it extends as far as is necessary to make a burdened society unburdened, and to have the requisite level of material, political and cultural resources to achieve this. Conversely, he argues, distributive justice has no such cut-off point and would in fact lead to unjust outcomes.[207] To make this case, he gives an example where two states might have different levels of wealth resulting not from a lack of internal resources or just institutions, but due to variant policy choices based on a differing emphasis on freely chosen political values:

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[202] Charles R. Beitz, 'Rawls's Law of Peoples' (2000) 110 Journal of Ethics 669, 678.
[203] Rawls, *The Law of Peoples* (n 20).
[204] ibid 106.
[205] ibid 35-37.
[206] ibid.
[207] ibid 117.

> Given that both societies are liberal or decent, and their peoples free and responsible, and able to make their own decisions, the duty of assistance does not require taxes from the first, now wealthier society, while the global egalitarian principle without target would. Again, this latter position seems unacceptable.[208]

The duty of assistance is one of transition, as Rawls puts it, and is justified to the extent it means nations can exist as full members of the Society of Peoples and make its decisions freely, uncorrupted and democratically.[209] The question that inevitably follows is whether such an account of fundamentally independent and self-sufficient states is accurate. It also begs the question as to what obliges well-ordered states to help burdened societies at all. Without an explicit answer, it can be inferred from Rawls' argument that the duty arises out of self-interest; there is an obvious benefit to liberal societies to live in a world with fewer burdened states.[210]

2.3 TWO ACCOUNTS OF THE DUTY OF ASSISTANCE IN GLOBAL TAX JUSTICE

Within normative discussion on global tax justice, a number of writers have sought to find a more demanding account of global justice that is still grounded in the relational and statist premises of Rawls' account. The reason for focusing assessment within the Rawlsian framework is not only due to its prominence within the general discourse but also because it is more closely aligned with the international tax system as it currently exists, being based on similar statist premises.[211] The goal in *The Law of Peoples* of securing political autonomy for states to pursue justice internally is naturally aligned with the underlying principles of sovereignty-preservation of the current framework, and reflects the OECD's focus in reform on resecuring the capacity of states to tax which is 'at the core of countries' sovereignty'.[212] One account of global tax justice focuses on the challenges within tax governance in securing such autonomy for all states, proposing that for Rawls' account to be fully realized a greater commitment to just allocation of tax rights is required of the cooperative regime.[213] Another argument turns to the role tax competition plays in

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[208] ibid 118.
[209] ibid.
[210] Beitz, 'Rawls's Law of Peoples' (n 202) 689.
[211] Stark (n 4) 143.
[212] OECD, 'Action Plan on Base Erosion and Profit Shifting' (n 11) 9.
[213] Christians and Apeldoorn, *Tax Cooperation in an Unjust World* (n 131).

threatening not only political autonomy but the legitimacy of states within the account of the basic structure.[214] These two perspectives are considered in turn.

2.3.1 Sharing the products of cooperation

Allison Christians and Laurens van Apeldoorn give an account of global justice within international taxation that goes beyond the types of measures Rawls discusses explicitly, but the principles they formulate are committed to the normative premises and goals of the duty of assistance.[215] Their point of departure, as it were, arises from the insight that the level of economic integration within the globalized world and the benefits created out of the scheme of cooperation do require just allocation, which requires in practice some redistribution of wealth at the global level.[216]

They make this argument by offering two principles to govern tax cooperation: the equal benefit principle and the entitlement principle.[217] The entitlement principle is founded on Rawls' conception of states as politically autonomous, and holds that states are entitled to the wealth of their territory, defined as their 'national endowment'.[218] The equal benefit principle builds on this by including in this entitlement an 'equal share in the (net) benefits produced by [global] cooperation'.[219] The justification for this latter principle rests on Rawls' account of the Society of Peoples, in which cooperative organizations would commit to standards of fairness for trade as well as correcting for any unjustified distributive effects.[220] Similarly, as Aaron James argues, even absent a centralised political authority, where an institutional system is responsible for distributing its benefits and burdens across peoples it ought to be subject to assessment about whether it does so fairly.[221]

States who choose to cooperate for mutual advantage must structure their cooperation in light of these principles, which would require the means for redistribution to ensure states

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[214] Dagan, *International Tax Policy* (n 19).
[215] Christians and Apeldoorn, *Tax Cooperation in an Unjust World* (n 131) 16.
[216] ibid.
[217] ibid 12-16.
[218] ibid 14.
[219] ibid 12.
[220] Rawls, *The Law of Peoples* (n 20) 115.
[221] Aaron James, 'Distributive Justice without Sovereign Rule: The Case of Trade' (2005) 31 Social Theory and Practice 533, 535.

receive their share of the cooperative surplus.[222] While Rawls does explicitly exclude distributive measures to address the relative inequalities between states as a matter of global justice, they argue, he does not reject the relevance of distributive justice defined as a demand of just allocation of the global benefits and burdens between cooperating states.[223] The essential insight is that, contrary to the fragmented approach undertaken by the current tax framework which assigns income to specific jurisdictions, such surplus is fundamentally a product of the cooperation itself. As Christians writes:

> The presence of this surplus is evident in the very decision of parties to transact with each other: they do so expressly to mutually benefit from their cooperation. Any attempt to reverse engineer the transaction—to trace a good or service through its various stages of concept, production and delivery—has accordingly always been recognized as a theoretical idea rather than a functionally operative task.[224]

2.3.2 Tax competition and the threat to state legitimacy

Miriam Ronzoni argues it is 'intuitively problematic' from a normative standpoint that tax competition forces domestic tax policy to be increasingly responsive to global markets and the choices of other states.[225] As Tsilly Dagan argues, the nature of an ideal tax system is intrinsically tied to Nagel's account of state legitimacy which requires both coercion and co-authorship.[226] With tax competition, both these features are undermined. The state's coercive power to tax as it sees fit is reduced as citizens are not only able to exercise exit power, but can transfer wealth to foreign jurisdictions while retaining the benefits of public services by remaining resident.[227] Domestic policymaking must be sensitive to the reactions of a mobile tax base, by creating incentives to lower corporate tax rates, which has the effect of either reducing the amount available for public-good provision or creating a higher tax burden onto labour or consumption tax bases.[228] The critical point, highlighted

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[222] Christians and Apeldoorn, *Tax Cooperation in an Unjust World* (n 131) 33.
[223] ibid 15-16.
[224] Christians, 'Taxing According to Value Creation' (n 138)
[225] Ronzoni, 'Tax Competition: A Problem of Global or Domestic Justice?' (n 160) 201.
[226] Dagan, *International Tax Policy* (n 19) 201-03.
[227] ibid 199.
[228] Kimberly A Clausing, 'The Nature and Practice of Tax Competition' in Peter Dietsch and Thomas Rixen (eds), *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016) 28.

by several authors, is that those competitive pressures force states to makes choices which are not *legitimate*.[229] Dagan sums it up thus:

> If the state can no longer use its coercive power to assure its constituents' mutual responsibility, can it still legitimately impose duties of justice? If it no longer equally implicates the will of its constituents in a political dialogue among themselves, but rather caters to their relative market value (most significantly their mobility), can it genuinely speak in the name of them at all? And if the state allows (some of) them to pick and choose among its various functions, does it still constitute the political institution envisioned by statists when they designate it the exclusive political institution where socioeconomic justice can and should prevail?[230]

For Dietsch and Rixen, the loss of fiscal self-determination requires cooperative governance to constrain the range of fiscal options open to states (*de-jure* sovereignty) in order to restore their capacity to use these options meaningfully to ensure domestic justice and pursue their redistributive and other policy goals (*de-facto* sovereignty).[231] A significant argument that Dagan makes in light of these threats to the integrity of the basic structure is that, to the extent that any efforts at global cooperation on tax issues is required to restore the state's coercive power, the cooperative regime is duty-bound to ensure all states are able to meet the demands of domestic justice.[232] Unlike other examples of international agreement, she argues, global tax governance is based on more than simply the expression of states' preferences or voluntary agreement to pursue mutual aims, and its legitimacy is grounded on more than consent.[233] States submit to global cooperation because without it they cannot fulfil the obligations of justice that justify their existence, and the weight of this demand effectively constrains their choices within such agreement – they have a duty as a matter of justice to protect and promote every state's capacity to be internally just.[234]

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[229] Peter Dietsch and Thomas Rixen, 'Tax Competition and Global Background Justice' (2014) 22 Journal of Political Philosophy 150, 152.
[230] Dagan, *International Tax Policy* (n 19) 200.
[231] Dietsch and Rixen, 'Tax Competition and Global Background Justice' (n 229) 150.
[232] ibid 210.
[233] Dagan, 'International Tax and Global Justice' (2017) 18 Theo Inq L 1, 31.
[234] Dagan, *International Tax Policy* (n 19) 211.

What is interesting about Dagan's account is that it is fully grounded in a Rawlsian model of distributive justice within states, using Nagel's conception of the state as the unique site of the basic structure, and yet offers an ambitious argument that states have an effective duty to ensure distributive justice abroad.[235] Additionally, she offers an account of the global duty of assistance that also incorporates elements of the domestic account of social cooperation, since the multilateral regime can only be just if its improves the welfare of the least well-off states.[236]

2.4 ACCOUNTING FOR RELATIVE INEQUALITY AND RELATIONAL POWER

Throughout such accounts there is often an argument, rooted in very practical considerations, that it is preferable to rely on statist grounds as they are less demanding and more attentive to the limited nature of global governance as it exists, and so are more likely to offer effective solutions. Miriam Ronzoni adopts this view in taking a conciliatory approach to the normative debate; both statists and cosmopolitans have cause to be concerned with tax competition even if it is for different reasons, she argues, and to the extent the statist framework can account for its harms it can offer solutions which are both substantial and demand much of the global order, and would likely have positive ancillary effects on global inequality which concerns cosmopolitans.[237]

There is an apparent contradiction in this argument which suggests that statist theories can offer similarly ambitious solutions. The very point is that cosmopolitan duties of global justice are more demanding, they require a greater level of sacrifice on those more affluent, and are aimed not simply at reducing the harmful effects of institutional organisation as it exists, but rather questioning how such institutions should be designed so that they satisfy those duties.[238] The other crucial distinction is that distributive justice is concerned with the value of equity, 'with the relations between the conditions of different classes of people, and the causes of inequality between them.'[239]

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[235] Laurens van Apeldoorn, 'A Sceptic's Guide to Justice in International Tax Policy' (2019) 32 CJLJ 499, 500.
[236] Dagan, *International Tax Policy* (n 19) 211.
[237] Ronzoni, 'Tax Competition: A Problem of Global or Domestic Justice?' (n 160) 202.
[238] Kok-Chor Tan, *Justice without Borders: Cosmopolitanism: Nationalism, and Patriotism* (CUP 2009) 21.
[239] Nagel (n 188) 119.

The reliance on statist framing both obscures the opportunity to challenge some of its fundamental assumptions and fully account for the central problems of the current tax framework. As explored in chapter one, viewing global justice solely through the lens of sovereignty-preservation has in many ways created the conditions which are both fundamentally unjust but also serve to inhibit the agency of many states. It is argued here that while the more comprehensive accounts of Rawls' duty of assistance may address a lot of these problems, by committing to the sovereignty-preservation model in statism they miss the deeper implications of cosmopolitan arguments about the nature of global cooperation.

2.4.1 The surplus of global cooperation

When Christians and Apeldoorn discuss the equal benefit principle, they make the distinction between distributive justice as a demand of just allocation, and a demand to regulate distributive inequalities.[240] They argue that their account is consistent with Rawls' theory as it only requires redistribution to the extent required to realize the political autonomy of all states, since the cooperative shares owed are part of a countries' own entitlement, and only apply to the 'surplus' amount of the net benefits of cooperation.[241] But this distinction is not immediately obvious.

In material terms this distinction applies to the 'surplus' portion of global profits which represents the product of cooperation, and which can be subject to redistribution separate from the income which is owed domestically.[242] Christians and Apeldoorn acknowledge that measuring what amounts to the 'surplus' of cooperative efforts would encounter practical difficulties.[243] Mitchell Kane puts it more bluntly – even if the relevant factors are determinable at a conceptual level, it is 'crazily ambitious' to assess empirically.[244] For Kane the relevant takeaway is that once we accept the idea of surplus gains, we commit at some level to the understanding that in a cooperative framework 'where most or almost all

[240] Christians and Apeldoorn, *Tax Cooperation in an Unjust World* (n 131) 15.
[241] ibid 12-15.
[242] ibid.
[243] ibid 18.
[244] Kane (n 140) 109.

states are trading simultaneously, then substantial gains from trade belong to nobody. But if they belong to nobody, we might as well say they belong to everybody.'[245]

Christians acknowledges this profound complexity and the impossibility of its accurate division when discussing the efforts of the experts at the League of Nations to determine best principles for allocating global income:

> It was obvious to the economists, and it is still obvious today, that a dollar earned in the global economy is the product not of the effort of one person or group of persons – and not of one nation or a handful of nations – but rather of the entirety of the global economic community. It relies then, as it does now, on the enforcement of rights, the ability to exchange currency, the existence of uniform weights and measures standards, contract and property protections, the ability to assess creditworthiness and impose accountability on all those involved in trading across borders, the ability of individuals to exchange their labor for compensation in multiple nations, the physical, financial, and legal infrastructure built in multiple nations, and on and on. The greater economic interdependence achieved through regional and global trade and finance agreements, the less possible it is to use economic principles to explain or justify any primary, let alone sole, claim of right to the global income tax base.[246]

Where within this can the clear distinction of a surplus in the product of cooperation be identified, or measured? The deeper implication of Christians' insight finds its analogue in Murphy and Nagel's account of the 'myth of ownership,' where they point out the incoherence in attempting to claim an entitlement to pretax income given the vast and complex interaction of factors within the basic structure that make the creation of such wealth possible.[247] The point here is not that acknowledging the extent of interdependence within the global order determines the case for global distributive justice, but rather that attempting to offer a measure for the just distribution of global tax income within the framework of sovereign entitlements cannot account for the complexity of cooperative benefits in a meaningful way.

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[245] ibid 110.
[246] Christians, 'BEPS and the Power to Tax' (n 29) 10.
[247] Murphy and Nagel (n 12) 32-33.

2.4.2 Are we all cosmopolitans?

Andrea Sangiovanni frames his account of global justice in a way which assumes acceptance of cosmopolitan premises, while concluding different principles of justice apply to the global order and domestic.[248] Mathias Risse makes the point more strongly, arguing that the cosmopolitan position is no longer useful in distinguishing arguments about global justice since most would share its basic assumptions: 'We have learned the basic cosmopolitan lesson: moral equality is an essential part of any credible theory of global justice.'[249] For Thomas Pogge this assessment misses the point; the implications of cosmopolitanism do not begin and end with an agreement about common humanity but instead impose onerous demands on everyone within the global order, which he likens to the impartiality demanded of public agents within states to give no greater weight to their own interests:

> Cosmopolitanism is best understood as involving the idea that there is also an analogous global Impartiality Requirement. Insofar as human agents are involved in the design or administration of global rules, practices, or organizations, they ought to disregard their private and local, including national, commitments and loyalties to give equal consideration to the needs and interests of every human being on this planet. In these special contexts, agents ought to be guided exclusively by agent-neutral considerations. If this is what cosmopolitanism involves...it is certainly not true that we are all cosmopolitans now. In fact, cosmopolitans in the sense proposed are few and far between; and the supranational analogue of nepotism is so widely taken for granted that there is not even a word for it. [250]

The spirit of this commitment can be found all the way back in the idealism of the negotiating experts at the League of Nations, but they struggled in practice to approach problems without consideration of national interests in their position as government representatives, thus their approach sought compromise rather than impartiality.[251] A century on little has changed, and if anything global governance has only entrenched the

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[248] Sangiovanni (n 178) 3.
[249] Risse (n 161) 10.
[250] Pogge, 'Concluding Remarks' (n 173) 298.
[251] Jogarajan (n 31) 29.

model of providing a negotiating forum for states to advance their own interests.[252] Given the extent of the problems within this current model, and more importantly the perverse outcomes the commitment to sovereignty-preservation has produced in reducing the sovereignty, agency and wealth of many states, it may well be appropriate to explore the implications of the cosmopolitan demand for global impartiality.

In Rawls' account there is no justifiable ground for addressing any relative inequalities in circumstances where 'each of two societies satisfies internally the two principles of justice' he espouses.[253] Yet both accounts of global tax justice that expand Rawls' duty of assistance identify that meeting this commitment in a meaningful way requires ongoing and substantial cooperation between states, which can provide both a just allocation of tax rights and an institutional framework that can prevent unjustified interference on national autonomy. Apeldoorn himself argues that securing the means for all states to ensure domestic distributive justice within global taxation may require a 'continuous' need for global redistribution as well as requiring a 'just distribution of fiscal self-determination'.[254] While this likely refers to ensuring all states meet the minimum requirements within the duty of assistance, it implicitly suggests the idea of sovereignty as a common and divisible good that requires equitable distribution.

This latter conception is counter-intuitive, but it speaks to the problem of just cooperation in global tax governance requiring the burdens of relinquishing sovereignty to be fairly shared. As Ronzoni notes, the current framework enables states to 'use tax competition to increase their fiscal self-determination at the expenses of that of other states'.[255] The distinction Dietsch and Rixen make between *de-jure* and *de-facto* sovereignty is used to resolve the fact that global cooperation requires sacrificing fiscal autonomy, but it also suggests that sovereignty is only valuable to the extent it enables states to implement their distributive goals.[256] To frame the goal of global tax justice as sovereignty-preservation for all, in this context, obfuscates the fundamental point that cooperation is not a project of

[252] Pogge, 'Concluding Remarks' (n 173) 298.
[253] Rawls, *The Law of Peoples* (n 20) 120.
[254] Laurens van Apeldoorn, 'BEPS, tax sovereignty and global justice' (2018) 21 Critical Review of International Social and Political Philosophy 478, 479.
[255] Miriam Ronzoni, 'Global Tax Governance: The Bullets Internationalists Must Bite – And Those They Must Not' 1 Moral Philosophy and Politics 37, 44.
[256] Dietsch and Rixen, 'Tax Competition and Global Background Justice' (n 229) 156.

protecting sovereignty as an absolute good, but the very opposite - it demands the mutual sacrifice of sovereignty to achieve a more valuable aim.

In conclusion, an effective normative model for global tax justice must allow for a more fundamental departure from Rawls' view of global justice solely as a duty to protect the sovereignty and internal justice of states. The two accounts of global tax justice provide a richer and more coherent understanding of the implications of Rawls' theory, and construct a more demanding interpretation of the duty of assistance that is responsive to many of the central problems facing global taxation. The accounts are ambitious in scope, and would if implemented go a long way to secure fairer cooperation and reduce inequalities both within and between states. Rather than limiting such a project to reforming the sovereignty-preservation model, it would be better to direct such normative assessment to challenging it.

3 BUILDING A NORMATIVE MODEL FOR GLOBAL TAX JUSTICE

For Charles Beitz the project of focusing on the prior existence of a global basic structure was to miss the central importance of abstraction in the formulation of Rawls' theory.[257] When Rawls considered the principles for fair cooperation that would be chosen by people he removed the realities of their social position or wealth by considering the rational choice of 'equal moral persons.'[258] The account did not begin with assessment of an existing basic structure and determine appropriate principles, but engaged with the relevant conditions that give rise to its necessity.[259]

Beitz identified such conditions within Rawls' account in the system of social cooperation that produced 'significant aggregate benefits and costs that would not exist if states were economically autarkic'.[260] If statists contend that reciprocity and coercion are also essential conditions, Beitz would argue that the central question is not whether such features exist globally, but whether they are necessary facts within the context of social cooperation. Arash Abizadeh puts it another way; to what extent are the different features of the basic structure existence conditions which limit the *scope* of justice, or instrumental conditions required to fully realize pre-existing demands and thus describe the *site* of justice?[261] Reframing the debate in this way offers a new approach to understanding the nature and the normative demands of the basic structure, and a starting point to building an account of global tax governance as a form of cooperation undertaken by states that give rise to distinct obligations of distributive justice.

It is worth noting at this juncture why the preferred model remains embedded in Rawls' relational account of social cooperation, given the critiques of the statist account, and lest the argument appear unnecessarily circular or artificially restricted. The central point is that there is something normatively valuable in viewing distributive justice as a relational obligation and ideal. Appealing to a type of abstract cosmopolitanism offers little to

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[257] Beitz, *Political Theory and International Relations* (n 171) 203.
[258] John Rawls, *Political Liberalism: Expanded Edition* (Columbia UP 2005) 277.
[259] Beitz, *Political Theory and International Relations* (n 171) 203.
[260] ibid 152.
[261] Abizadeh (n 187) 320-21.

determine which agents are obligated to act and why.[262] As Aaron James points out, cosmopolitan arguments which extend the scope of Rawls' account of social cooperation necessarily accept that distributive justice can only apply where there is an appropriate form of organizational control – they cannot simply be claims against the universe.[263] The particular strength of the relational account provided by Rawls is that it ties the obligations institutions have within the basic structure to account for relational inequalities to their very purpose – to ensure fair terms of cooperation.[264]

3.1 THE BASIC STRUCTURE AND BACKGROUND JUSTICE

Returning to the statist account, it is important to draw attention to the two distinct claims that are required to refute the relevance of distributive justice globally: that the relevant features of the basic structure exist uniquely within states, and that the basic structure is an *existence* condition of the demands of justice.[265] If it is argued that the stronger statist position relies on both features of coercion and reciprocity, the risk is that while this indeed strengthens the former claim, it exposes a weakness in the latter. Mathias Risse points out the obvious difficulty; if the statist account deems both coercion and reciprocity jointly sufficient, it becomes more difficult to isolate either one as necessary.[266] Arash Abizadeh offers a useful example of this problem within Nagel's account, in which he excludes the exercise of state coercion on foreign citizens in areas like immigration from the demands of justice, because its lacks the reciprocity which would generate demands for equitable concern, implying that legitimate coercion can exist outside the framework of justice.[267]

Yet within domestic contexts, examples of such forms of governance historically such as colonial nations or slave states were condemned not only for their lack of pre-institutional human rights but for the very lack of representation, joint authorship, and distributive concerns for those whom the state ruled, framing the need for reciprocity as instrumental to make an unjust situation just.[268] If such circumstances within domestic contexts can exist,

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[262] Onora O'Neill, 'Global Justice: Whose Obligations?' in Deen K Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (CUP 2004) 245.
[263] James (n 221) 535.
[264] Kevin KW Ip, *Egalitarianism and Global Justice: From a Relational Perspective* (Palgrave Macmillan 2016) 33-34.
[265] Miram Ronzoni, 'The Global Order: A Case of Background Injustice? A Practice-Dependent Account' (2009) 37 Philosophy & Public Affairs 229, 234.
[266] Risse (n 161) 47.
[267] Nagel (n 188) 129-30; Abizadeh (n 187) 352.
[268] Abizadeh (n 187) 352.

where coercive rule is imposed without co-authorship, Nagel's account would imply that it stood outside the scope of justice.[269] Instead one would more reasonably conclude that even absent those qualities that establish the normative peculiarity of the state there existed some pre-existing commitment to justice, pointing to the value of the basic structure not as an existence condition, but rather an instrumental one required to fully meet the demands of justice.[270] This idea can be explored further as it relates to both coercion and reciprocity.

3.1.1 Coercion and freedom

There is a notable conflict that needs to be resolved in the account of coercion, which is the dual role it plays in inhibiting and enabling individual agency. This apparently dichotomous relationship in Blake's assessment is resolved through duties of distributive justice – coercion serves to both restrict autonomy and to facilitate it within a complex society, and since it cannot be eliminated, it must be justified by the state's obligations to meet the relative material needs of those coerced.[271] Nagel also frames this relationship as a form of exchange - the state makes unique demands upon its citizens, 'and those exceptional demands bring with them exceptional obligations'.[272] However, there is another way to resolve the apparent dichotomy, utilizing a conception of the purpose of the state in realizing agency which has been explored prominently within republican theory, which is to secure freedom from domination.[273]

Philip Pettit, in developing this argument, makes a fundamental distinction between 'freedom from interference' and 'freedom from domination', and argues that the latter more meaningfully expresses the value of freedom.[274] Understood as interference, any intentional form of obstruction or restriction on the choices of another interferes with their freedom, which includes the coercive powers of the state – 'if freedom is non-interference, then all law is pro tanto an offence against freedom'.[275] The conception of freedom as non-domination interrupts this conclusion by focusing on the relevance of power in the

[269] ibid.
[270] ibid 329.
[271] ibid 346.
[272] Nagel (n 188) 130.
[273] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999) 52.
[274] Philip Pettit, 'Republican Freedom and Contestatory Democratization' in *Democracy's Value*, Ian Shapiro and Casiano Hacker-Cordon (eds.) (Cambridge, 1999) 170.
[275] ibid 168.

relationship, so that a person is free to the extent that no party has 'the capacity to interfere on an arbitrary basis in certain choices that the other is in a position to make'.[276]

There are two noteworthy ways the republican conception better captures our intuitions about what is valuable in freedom. The first is that it accounts for situations where people are subject to the arbitrary power of another, even if that power is not exercised. As Pettit argues, even if a slave is subject to a benevolent slaveowner who rarely interferes with their agency, such a slave is no freer than one subject to regular interference - the power remains to exercise control over their capacity for reasoned choice, and the existence of this power defines the relationship.[277] The second is that this emphasis on interference being arbitrary makes a meaningful distinction between the interferences suffered by a citizen subject to the laws of a state compared to those suffered by the subject of a despotic regime. Coercive law may function as an interference on people's choices, but when they are imposed to fulfil the state's duties to its citizens and thus constrained by their relevant interests they are not arbitrary, and thus do not constitute an infringement on freedom as non-domination.[278]

This account of the basic structure is significant, not only because it places coercion as an instrumental condition to realize justice, but because it argues that institutional governance is *necessary* to enable agency. The state's institutions and functioning within the basic structure, including its coercive powers, are essential to give freedom meaning and application. Pettit captures the point concisely; it is possible to act unilaterally to escape interference, but 'I cannot escape domination without the presence of protective institutions that testify to my non-domination'.[279] Within this conception the value of just governance lies in more than the protection of rights or assets, but in its necessity to enable the flourishing and realization of human agency.[280]

3.1.2 Reciprocity, social cooperation and background justice

Statist discussion of reciprocity focuses on the unique way the basic structure enables the enterprise of social cooperation. As Samuel Freeman emphasises, distributive justice in this

[276] Pettit, *Republicanism* (n 273) 52.
[277] Pettit, 'Republican Freedom and Contestatory Democratization' (n 274) 165.
[278] ibid 169.
[279] Philip Pettit, 'A Republican Law of Peoples' (2010) 9 European Journal of Political Theory 70, 72.
[280] Frank Lovett, 'Republican global distributive justice' (2010) 24 Diacrítica 13, 15.

context is not relevant merely due to the existence of goods to be distributed, but rather because it becomes normatively essential in 'fairly designing the system of basic legal institutions and social norms that make production, exchange, distribution, and consumption possible'.[281] Rawls explains why a complex system of social cooperation gives rise to the basic structure to secure 'just background conditions':

> While these conditions may be fair at an earlier time, the accumulated results of many separate and ostensibly fair agreements, together with social trends and historical contingencies, are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for free and fair agreements no longer hold. The role of institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and adjusted, an initially just social process will eventually cease to be just, however free and fair particular transactions may look when viewed by themselves.[282]

Miriam Ronzoni raises the point that what Rawls is doing here is justifying the *need* for a basic structure, rather than giving an account of the obligations of justice that derive from its existence.[283] When social coordination is sufficiently large and complex as it is in any society, background justice cannot be guaranteed without the institutions which can regulate its terms. In these circumstances the type of background justice that Rawls is discussing focuses on conditions for 'free and fair agreements' which, Ronzoni argues, require more than rules of procedural fairness, but regard for the overall circumstances people live in; whether people have their basic material needs met, have real agency, and also crucially how they stand in relation to every other party. [284] In this, she points out, the discussion is already engaged with the substantive principles of justice that Rawls espouses as governing the basic structure.[285]

Statist perspectives may argue that whatever concerns for background justice justify the need for the basic structure, the specific demands of distributive justice still only arise out

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[281] Samuel Freeman, 'Distributive Justice and The Law of Peoples' in Rex Martin and David A. Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell Publishing 2008), 245.
[282] Rawls, *Political Liberalism* (n 258) 266.
[283] Miriam Ronzoni, 'The Global Order' (n 265) 240.
[284] ibid 239.
[285] ibid 238.

of its establishment. However, Ronzoni has drawn the key insight that the substantive claims of distributive justice become relevant prior to its existence, as part of an understanding of what background justice requires.[286] The features she identifies as essential to ensure the ongoing guarantee of 'free and fair agreements' provide a remarkably familiar set of considerations. Namely, they can be conceptualized as the institutional conditions necessary to ensure freedom from domination.

The implications of this assessment offer an opening to an argument for global distributive justice in a way which is prescriptive; if global society and governance can be assessed as a complex enough form of social interaction that requires means to secure background justice then perhaps there is a need for a basic structure in some form.

3.2 GLOBAL JUSTICE AS FREEDOM FROM DOMINATION

What is useful in the republican theory of freedom as non-domination is that it provides a distinctly relational and institutional account of what justice *is*, and thus closely connects to Rawls' account of justice within forms of social cooperation. What can be proposed here is it offers one answer to the kind of prescriptive model that could be built from understanding his account of the basic structure as instrumental in ensuring just background conditions. Ronzoni frames this model as existing firmly within a 'practice-dependent' account of justice, which argues that 'the appropriate principles of justice for specific practices depend on the nature of those very practices'.[287] The question of global justice is not limited by this principle, however, since a coherent practice-dependent account can also be prescriptive in its demands for just practices where problems of background justice occur.[288]

Aaron James argues that the types of social practices which generate the demands of background justice exist when, effectively, the regard for the moral assessment of those transactions alone are not enough to guarantee just background conditions, and so there is a need to engage distinctively with the 'morality of practices' i.e., the duties which apply to the collective governance of the social practice.[289] Within the republican account, justice is

[286] ibid 240.
[287] ibid 231.
[288] ibid.
[289] James (n 221) 537.

fundamentally *about* institutions and practices, as the constitutive elements of realizing non-domination - how they are to function and be supported so as to be just, and identifying where their absence is enabling forms of domination that can and ought to be tackled.[290] This is not to say that utilizing a republican conception of justice is the 'correct' or only way to provide a framework for global distributive justice. The assertion here is that there is instrumental value in pursuing it through a republican lens because it offers an account which is directly responsive to the contentions that set apart statist and cosmopolitan perspectives. The next three sections will explore some of these features in turn.

3.2.1 Republicanism and global justice

If freedom from domination is both a non-instrumental political good and a universal one, then the value of securing non-domination counts equally across all peoples.[291] While the nature of domestic and international obligations might be different, there is no stronger associational obligation to non-domination that arises simply out of the existence of the citizen relation.[292] The reason guaranteeing freedom from domination has become a necessary consideration at the global level, Pettit argues, is that globalization has offered new arenas for states themselves to be dominated.[293] This also provides a specific lens through which global injustice, and the problems of global tax governance, can be understood:

> For republicanism, the problem is instantly recognisable: some states are not free under the current global political circumstances; and all states are exposed, to varying degrees, to avoidable forms of domination. The international order is unjust because it leaves polities exposed to arbitrary interference.[294]

While the global order places states on a formal equal footing of sovereignty, it can serve to actually mask and enable a framework in which powerful states can exert power over

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[290] Lovett, 'Republican global distributive justice' (n 280) 17-18.
[291] ibid 19.
[292] ibid.
[293] Pettit, 'A Republican Law of Peoples' (n 279) 77.
[294] Cecile Laborde and Miriam Ronzoni, 'What is a Free State? Republican Internationalism and Globalisation' (2016) 64 Political Studies 279, 284.

others.[295] Against the backdrop of formal equality, global governance acts as a conduit for the exercise of domination, as cooperation is demanded on equal terms with no differential consideration between powerful states which shape its rules and weaker states which have limited agency.[296] The enormous influence multinationals can exert on state policy and decision-making,[297] the harmful effects of global poverty and inequality, as well as the deficits of equal participation and influence in global institutions, can be viewed as constitutive features of the same framework of the domination of states.[298] And within this framework, Pettit emphasises, the ways in which states can be subject to the alien control of other states, private actors or global institutions is not exhausted by instances of actual interference, and includes the presence of threats or invigilation within relations of unequal power.[299]

3.2.2 States as global actors

Rawls describes how his account of global justice 'conceives of liberal democratic peoples (and decent peoples) as the actors in the Society of Peoples, just as citizens are actors in domestic society'.[300] Whether states can be conceptualised in this way invokes important discussion on issues of collective agency and group rights, which cannot adequately be explored here in full.[301] However, there is a relevant point that needs addressing. As Stark points out, most cosmopolitans arguments ground duties of global justice on the basis of rights that individual people have as equal moral agents.[302] The argument for its global application is based on the claim that national boundaries are an arbitrary limit to draw for a universal ground, but this gives no normative reason why the relations between *states* are governed by the same principles.[303] Conceiving of states as group agents representing the collective rights of their members, while possibly bridging this gap, does not align well

[295] ibid 281.
[296] ibid.
[297] Pettit, 'A Republican Law of Peoples' (n 279) 78.
[298] Laborde and Ronzoni (n 294) 279.
[299] Pettit, 'A Republican Law of Peoples' (n 279) 78-79.
[300] Rawls, *The Law of Peoples* (n 20) 23.
[301] For a comprehensive account, see Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (OUP 2011).
[302] Stark (n 4) 153.
[303] ibid.

with the cosmopolitan primacy of individuals as autonomous agents and risks an 'oppressive potential' in protecting their individual rights.[304]

Pettit's discussion of the disvalue of domination as it relates to states offers useful insight to this issue.[305] At one level there is no distinct conception of such rights beyond a concern for the agency of individual people; it is the freedom of people that matters.[306] The fundamental concern embraces a normative individualism, so that the disvalue of dominated states is only relevant to the extent it results in a difference in value for the people within it.[307] At the same time, within the conception of states as constitutive elements of non-domination, Pettit argues that a dominated state will necessarily result in the domination of its peoples.[308] If guaranteeing individual freedom requires a state to be itself undominated, this gives rise to a distinct duty that is owed to the state itself.[309]

If global tax governance is to be assessed as a scheme of social cooperation subject to distributive principles, it would be difficult to conceive of it as anything other than an account of states as actors engaging in cooperative efforts. Stark argues that tax rights do not fit within an appropriate conception of group rights, which is limited to non-rivalrous public goods.[310] Within tax governance, however, it is only states which are entitled to a just share of the tax rights of global profits, a right which cannot be meaningfully conceived as an aggregate of individual entitlements given it is for states to determine its distribution domestically.

3.2.3 Reframing 'cooperation for mutual advantage'

A question that arises in the account of a global basic structure is the relevance of its definition as a 'cooperative venture for mutual advantage'.[311] Brian Barry argued that placing global distributive duties within this framework is implausible given the demands it would place on rich countries to give up wealth.[312] Charles Beitz points out that Rawls

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[304] ibid 152.
[305] Pettit, 'A Republican Law of Peoples' (n 279) 76.
[306] ibid.
[307] ibid 76.
[308] ibid.
[309] ibid 77.
[310] Stark (n 4) 153-54.
[311] Rawls, *A Theory of Justice* (n 165) 4.
[312] Brian Barry, 'Humanity and Justice in Global Perspective' (1982) 24 Ethics, Economics and the Law 219, 233.

does not treat it as a literal requirement, but he also reflects that 'mutual advantage' offers little normative sense in explaining why people ought to submit to the cooperative regime.[313] Martha Nussbaum takes this point further, arguing that the account of cooperation as a contract for mutual advantage cannot ground obligations between states who are neither substantively equal in practice nor can be conceived as such.[314]

For Nussbaum this exposes a critical failure in the social contractualism of Rawls account, and she adopts a capabilities approach to the demands of global justice based on securing universal fundamental entitlements.[315] While the model being pursued here takes a less fundamental departure from Rawls' relational account, there is good reason to adopt a similar scepticism towards the framing of global cooperation as undertaken for 'mutual advantage'. As Nussbaum points out, even if it is not intended as a literal description, the framing of social cooperation as 'the idea we ought to expect to profit from cooperation' has an enormous impact on public discourse'.[316] Within global tax governance, where states are afforded formal equality with no regard to their substantive inequalities, this influence is profound and harmful, as it means equal weight is given to every state's claim to securing national sovereignty as the 'product' of tax cooperation.

What is useful about the republican account is that it does not conceive of cooperation as something undertaken purely for mutual benefits or on a voluntary basis, for two related reasons. The first is that submitting to the cooperative scheme of governance, as a constitutive element of securing non-domination, is primarily done not to secure cooperative benefits but to *make freedom possible*, understood as a condition which can only be achieved in relation to others.[317] This relational quality, Fabian Schuppert argues, also necessarily implies that it can only be achieved when both parties are sensitive to each other's freedom, and thus constrained in the exercise of their agency.[318] In this way freedom is also a *reciprocal* condition, and so any conception of mutual advantage, in the

[313] Beitz, *Political Theory and International Relations* (n 171) 203.
[314] Martha Nussbaum, 'Beyond the social contract: capabilities and global justice' in Gillian Brock and Harry Brighouse (eds) *The Political Philosophy of Cosmopolitanism* (CUP 2005) 197-201.
[315] ibid 197.
[316] ibid 198.
[317] Fabian Schuppert, 'Collective Agency and Global Non-Domination' in Gillian Brock (ed), C*osmopolitanism versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations* (OUP 2013) 258.
[318] ibid 264.

form of national sovereignty, can only be understood as a collective good that can only be realized if it is enjoyed by everyone.

3.3 IMPLICATIONS FOR GLOBAL TAX GOVERNANCE

The responsibilities that follow from this reciprocal commitment to freedom from domination have numerous profound implications, not only for establishing the conditions of just governance within tax cooperation, but also for resolving the central conflict between the demands of national tax sovereignty and global justice. The following four sections will examine key aspects of such implications.

3.3.1 The demands of distributive justice in securing non-domination

Pettit claims that ensuring states are free from domination falls short of the 'utopian' ideal of cosmopolitan global distributive justice - which requires the 'saintly' state to be willing to openly give up wealth to lift up poorer nations.[319] Similarly, Cecile Laborde makes a distinction between the 'optimal' non-domination that requires state sovereignty to be established domestically, in which the closer ties of citizenship justifies stronger redistributive duties to secure social equality, and 'basic' non-domination in the global arena, which is required as a fundamental institutional prerequisite.[320] Global non-domination is primarily concerned with ensuring all states are capable in this regard, but she also contends that some global inequalities must be addressed to the extent that they inhibit equitable participation, arguing there is a relevant application of Jean-Jacques Rousseau's belief that 'no republic can be founded if inequalities are too large, and the poor can be bought by the rich'.[321] What matters is the extent to which material poverty and inequality makes people more susceptible to domination, as the conditions that follow from extreme destitution are 'functionally equivalent to tyranny.'[322]

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[319] Pettit, 'A Republican Law of Peoples' (n 279) 86.
[320] Cecile Laborde, 'Republicanism and Global Justice: A Sketch' (2010) 9 European Journal of Political Theory 48, 51.
[321] ibid 52.
[322] James Bohman, 'The Democratic Minimum: Is Democracy a Means to Global Justice?' (2005) Ethics and International Affairs 19:1 101, 106.

Lovett contends that freedom from domination requires a stronger commitment to the cosmopolitan demands of global distributive justice.[323] The direct effects of global inequality and poverty have powerful negative impacts on people's freedom, he argues, and perhaps in some cases this impact will be more acute than the negative impacts that flow from living within a state whose basic capacities are hindered.[324] There is no unique distinction given to particular forms of domination, and 'There is nothing sacred from the republican point of view about the state or about the state's sovereignty'.[325] Similarly, it may be that states are not the only way to secure 'optimal' non-domination. Pettit considers the idea that in some circumstances the optimal arrangement might be context dependent – given that there are different benefits in being subject to governance from closer agents, who are indeed more likely to be better informed and have greater capacity to effectively intervene, but more distant agents may also be more able to offer greater impartiality.[326]

Crucially, while republicanism assigns enormous importance to state sovereignty in establishing justice, it does not share the normative primacy it is given within statism, which necessarily grants states full sovereign entitlement to the wealth they create.[327] It is also true that, as a relational view, it does not share the cosmopolitan priorities of global equity or the stringent commitment to securing it through the cross-border transfer of wealth.[328] Yet, it is argued here, it perhaps offers something even more significant, because in assigning normative priority to non-domination it allows for the possibility of a situation where the harm of global domination outweighs the risk of domination in requiring a state to relinquish its sovereign entitlements. Whether such circumstances exist is no less controversial, but as Lovett points out, however complex answering that question is, there is value in offering an approach to resolving the conflicting demands of sovereignty and global justice which allows normative priorities to change depending on the context.[329]

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[323] Frank Lovett, 'Should Republicans be Cosmopolitans?' (2016) 9 Global Justice: Theory Practice Rhetoric 28.
[324] ibid 43-44.
[325] Pettit, *Republicanism: A Theory of Freedom and Government* (n 273) 152.
[326] ibid 153.
[327] Christians and Apeldoorn, *Tax Cooperation in an Unjust World* (n 131) 166.
[328] ibid.
[329] Lovett 'Should Republicans be Cosmopolitans?' (n 323) 41.

3.3.2 Promoting effective and representative states

Any conflicts between the demands of justice at the domestic and global level are thus fundamentally a pragmatic concern for republicans rather than a normative one.[330] This requires that they are attentive to both the interdependence between domestic and global justice, and to the agency and capacity of states within tax cooperation, since the more capacity a state has the more objectionable it might be for global institutions to assume direct responsibility.[331] In presenting this spectrum of capacity, Pettit distinguishes between ideal and non-ideal states, focusing on the extent to which states can be realized as effective, by fulfilling their capacity to provide for basic services, and representative, by giving effective control to citizens through institutional resources so that states speak in their name.[332]

In the same way that republican freedom creates a normative distinction between the coercive power of the rule of law and the domination of tyranny, its instrumental view of sovereignty offers a distinction between different exercises of that sovereignty. Shuppert presents this argument through the view of states as group agents making claims to 'collective self-determination', in which such claims can only be justified within the reciprocal account of freedom if it does not constitute arbitrary interference against other states.[333] Thus, it ought to be understood that within global governance the normative demands of sovereignty, as a conditional relational right, may not in all circumstances be equally legitimate if the scope for domination is more present.

3.3.3 Accounting for inequalities of power

In this context, giving requisite attention to relationships of domination within tax governance can justify adopting a more differential approach to account for inequalities of power.[334] Differential approaches within international law are generally concerned with creating non-reciprocal arrangements in which deviation from formal sovereign equality is

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[330] Lovett 'Republican global distributive justice' (n 280) 19.
[331] ibid 72.
[332] Pettit, 'A Republican Law of Peoples' (n 279) 71.
[333] Schuppert (n 317) 264-65.
[334] Ozai I, 'Global justice, differentiation and the taxation of the digital economy' (*GLOBALTAXGOV*, 5 October 2020) <www.globtaxgov.weblog.leidenuniv.nl/2020/10/05/global-justice-differentiation-and-the-taxation-of-the-digital-economy/> accessed 6 January 2022.

justified in order to foster the goal of more substantive equality.[335] This is of particular relevance considering the way the global tax regime currently operates. A problem which has been repeatedly identified is the universal application of policies without considering their impact on diverse states with different tax systems, capacities and resources, which is exemplified by the application of reciprocal treaty rules to DTAs between developed and developing countries.[336] Similar dynamics have played out in the pursuit of global reform within the BEPS project while being led by the specific concerns and reform priorities of OECD members.[337] The goal of a corporate minimum tax may well be laudable and essential to OECD members, Afton Titus points out, but applied to developing countries it is less likely to produce the same benefits to prevent profit shifting and more likely to harm their ability to attract legitimate investment and secure greater corporate income.[338]

More broadly, there is a need to consider the problem of power inequalities within the cooperative forum. Pettit argues that 'in order for a deliberative mode of exchange to be genuinely deliberative and respectful, there are pre-conditions of equalized power that must first be realized amongst those states.'[339] For domination is not only present due to the direct actions of states but within the design of the institutional framework itself, in which the principles for tax right allocation were determined by the exercise of power but treated as sacrosanct and universal, and thus requires all cooperating countries to agree to the same approach.[340] Martti Koskenniemi argues this type of cynical appeal to guiding principles to pretend that 'one's position of power is also supported by (suspect) legal arguments'[341] only serves to justify and conceal what is actually domination. A similar mindset plays out in the pursuit of sovereignty-preservation for all, which perceives the position of powerful countries who can freely exercise power as the ideal to aspire to for everyone. Instead, Ypi points out, the task of achieving a more just distribution of power

[335] Philippe Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' (1999) 10 EJIL 549, 551.
[336] Brooks and Krever (n 45) 164.
[337] Afton Titus, 'Global Minimum Corporate Tax: A Death Knell For African Country Tax Policies?' (2022) 50 Intertax 414, 423.
[338] ibid.
[339] Pettit, 'A Republican Law of Peoples' (n 279) 86.
[340] Christians, 'BEPS and the Power to Tax' (n 29) 12.
[341] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2004) 499.

should be meaningfully directed to a 'levelling down' of power, in which inequalities are accounted for by limiting its exercise by more powerful countries.[342]

3.3.4 The project of securing global freedom

With these principles in mind, there is greater scope for envisioning effective reform which is explicitly concerned with the redistributive demands of global justice, to the extent that they enable real freedom. Pettit acknowledges that the project of securing equalized power between states so as to avoid domination throws up a significant contingent difficulty regarding the capacity of global governance to achieve this goal:

> The forms whereby more powerful states can control less powerful states are so various that no form of central regulation, and certainly not the sort that is associated with currently existing bodies, could effectively prevent state–state domination. It might illegalize and inhibit intervention or infiltration by one state in the affairs of another but how could it inhibit the sort of control exercised on the basis of greater economic power, wider diplomatic clout, or the enjoyment of some strategic advantage?...In the international sphere, the forms of state–state domination that would escape the policing of any central authority include the most important forms of domination that are possible outside of conditions of war.[343]

The enormity of this problem reveals the need for discussion of just global governance to be concerned with more than the principles which determine its purpose or the design and functioning of its institutional structures. Such measures may only be fruitful to the extent their development is commensurate with a growing and uncoerced commitment to the deliberative process states must engage in to realize global freedom, brought together by common purpose and mutual respect. The goal of political empowerment becomes essential, represented in part by a commitment to important elements of procedural justice, promoting equal participation and democratic accountability.[344] Achieving the republican ideal of freedom, Pettit concludes, 'directs us to a dispensation in which representative

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[342] Lea Ypi, *Global Justice and Avant-Garde Political Agency* (OUP 2011) 125.
[343] Philip Pettit, 'A Republican Law of Peoples' (n 279) 82.
[344] Laborde (n 320) 62.

regimes come to deserve the old name of 'free state', not just because of how they treat their members, but also because of how they treat one another.'[345]

[345] Pettit, 'A Republican Law of Peoples' (n 279) 88.

4 DISTRIBUTIVE JUSTICE AND EQUITABLE REFORM IN GLOBAL TAX GOVERNANCE

The central project of the previous two chapters has been to build a normative account of distributive justice in global tax governance, out of the understanding that effective reform must be concerned with the inescapable issues of global inequality and relational power at play. Engaging in this project has offered more than simply making a case for distributive justice beyond state borders, however, but has brought into clearer focus the value and necessity of centring assessment on the normative questions at the heart of global tax justice. Exploring these various accounts has offered a richer lens through which to view the central problems facing global tax governance, and importantly the solutions required to address them. One particular insight which guides the focus of this chapter is that the goal of realizing global freedom from domination creates an inextricable connection between the pursuit of distributive justice in global tax governance, and creating the 'pre-conditions of equalized power' that make such freedom possible.[346]

There are two interrelated aspects to meeting these aims. The first is reforming the substantive rules and principles which govern the allocation of tax rights to be more explicitly concerned with just distributive outcomes. The second concerns the institutional framework that creates, reforms and administers these rules, and focuses on the necessary reform that might enable a more just distribution of power within the cooperative scheme. Ivan Ozai has drawn attention to the important interplay between these substantive and procedural considerations in the arena of global tax justice, and argues that lack of regard for their interconnectedness risks subsuming them into each other, missing the fundamental conclusion that one cannot exist without the other.[347] As Cecile Laborde argues, addressing the ills of capability-denying domination must necessarily be concerned with the question of fair process, and how the institutions of governance might serve to constrain power and can also serve as seats of domination themselves if they are procedurally unjust.[348]

Assessment of the OECD's reform efforts offers a useful example of this interplay. As Rita de la Feria points out, concerns about procedural justice become more pronounced when

[346] Pettit, 'A Republican Law of Peoples' (n 279) 82.
[347] Ivan Ozai, 'Two Accounts of International Tax Justice' (2020) 33 CJLJ 317, 338.
[348] Laborde (n 320) 62.

outcomes are perceived as unfair in relative terms.[349] This dynamic has been starkly expressed in criticism of the GMT agreement, which highlight the concern that benefits will mostly accrue to developed nations, and consider such outcomes predictable due to the exclusion of developing countries in creating the deal even within the Inclusive Framework.[350] As one representative argued, 'We feel that everything is predetermined from the G20 and the OECD…They say it is on an equal footing, but that is not true'.[351] Feria highlights the conclusion that the mere fact of increased participation cannot itself guarantee fair outcomes when the realities of power asymmetry arising from background inequalities, technical knowledge and general bargaining position are still in play.[352]

4.1 DISTRIBUTIVE JUSTICE IN ALLOCATING TAX RIGHTS

In what ways, then, can principles of global distributive justice be incorporated and prioritized in the rules governing the allocation of tax rights? Offering a comprehensive answer is a difficult task, particularly since there has been a general reluctance within tax justice literature, with some notable exceptions explored below, to explore the explicit application of the normative aims of distributive justice to the global tax framework.[353] However, assessment of international taxation broadly has long been sensitive to the question of how it can better serve the interests of developing countries, particularly to the extent that current rules systematically disadvantage them.[354]

Within academic discussion of these issues, the principle of inter-nation equity stands out for its approach to allocate the international tax base in a way that considers its distributive implications.[355] Developed by Peggy and Richard Musgrave, their comprehensive account of inter-nation equity in 1974 argued ultimately for 'the taxation of such income on an international basis with subsequent allocation of proceeds on an apportionment basis among the participating countries, making allowance for distributional considerations.'[356] This consideration informs a number of their arguments, such as prioritizing the right to

[349] Feria (n 105) 3.
[350] Hearson, *Imposing Standards* (n 54) 158
[351] ibid.
[352] Feria (n 105) 11.
[353] Martin Hearson, 'The Challenges for Developing Countries in International Tax Justice' (2018) 54 Journal of Development Studies 1932, 1936
[354] Dagan, *International Tax Policy* (n 19) 173-4.
[355] Ivan Ozai, 'Inter-nation Equity Revisited' (2020) 12 Columbia Journal of Tax Law 58, 59.
[356] Musgrave and Musgrave (n 71) 131.

source taxation over residence explicitly due to its preferential outcomes for low-income countries,[357] or their suggestion to pursue the use of multilateral instruments over purely bilateral treaties to better facilitate distributional goals.[358]

4.1.1 Inter-nation equity and global distributive justice

The status the Musgraves give to the distributive effects of revenue allocation, and their consideration of specific measures such as implementing non-reciprocal withholding taxes, invites the interpretation of an explicitly differential approach.[359] Ivan Ozai adopts the same conclusion to consider the distributive considerations of inter-nation equity as a foundation to build a 'differential model' of tax allocation. [360] Ozai contrasts the 'differential' model to 'origin' models of tax allocation, which encompass the traditional principles of source and residence taxation that determine allocation based on economic nexus factors, and which prioritize the goal of protecting state sovereignty.[361] Differential approaches demand a separate moral consideration regarding the question of achieving a fair distribution of taxable income based on the normative goals of global distributive justice and substantive equity.[362]

4.1.2 Sketches for a differential model

In building a differential model, it needs to be borne in mind that central to the task is establishing a suitable normative compromise between differential and origin-based approaches, the latter of which is still essential given its protection of sovereign entitlements to tax income.[363] With this in mind Ozai proposes focusing on areas where either origin-based models fail to provide a full account for tax allocation because they cannot accurately determine which factors contributed to the relevant income, or areas

[357] ibid 122.
[358] ibid 124.
[359] Hongler (n 5) 408.
[360] Ozai, 'Inter-nation Equity Revisited' (n 355) 67.
[361] ibid.
[362] Ivan Ozai 'Origin and Differentiation in International Income Allocation' (2021) 44 Dalhousie Law Journal 129, 139
[363] ibid 135.

where policy-making gives higher priority to the distributional outcomes of allocation rules, justifying the need for distributive normative principles to guide policy design.[364]

One relevant area is the question of profit apportionment for MNEs, reflected in the proposal for unitary taxation with formulary apportionment (UT+FA). A shift towards unitary taxation, it is argued, would minimize opportunity for transfer-pricing schemes which proliferated under application of the arm's length standard, which treats MNE subsidiaries as separate entities for tax purposes.[365]. Proponents for UT+FA offer various principles and economic factors which would be included in the formula for allocating the profits of the corporation when treated as one entity. While such reform may offer reduced scope for multinationals to minimize their global tax liabilities, the variety of formulas offered to allocate such taxes reflect the degree of normative arbitrariness to determining the relevance of different economic factors.[366] Combined with the significance of the distributional implications at stake, this limitation of origin-based criteria to provide an 'objective, single answer'[367] provides both opportunity and justification for also applying differential criteria.[368]

Emphasis on distributive goals in tax rules might also be applied more indirectly through reform of origin-based principles to have regard for more equitable distribution or to explicitly benefit developing countries. To this end the Musgraves proposed setting internationally agreed differential rates for corporate taxes, related inversely to per capita income in capital-importing countries and directly to per capita income in capital exporting countries.[369] Anthony Infanti argues for an expansion of inter-nation equity principles to embrace a wider focus on human development, moving differential allocation beyond purely economic measures to include criteria such as the Human Development Index.[370] On a more conceptual level, Reuven Avi-Yonah has invoked the idea of inter-nation equity

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[364] ibid at 141

[365] Reuven S Avi Yonah, 'A Proposal for Unitary Taxation and Formulary Apportionment (UT+FA) to Tax Multinational Enterprises' in Peter Dietsch and Thomas Rixen, *Global Tax Governance: What is wrong with it and how to fix it* (ECPR Press 2016)

[366] Ozai, 'Origin and Differentiation' (n 362) 144

[367] Peggy B Musgrave, 'Interjurisdictional Equity in Company Taxation: Principles and Applications to the European Union' in Sijbren Cnossen (ed), *Taxing Capital Income in the European Union: Issues and Options for Reform* (OUP 2000)

[368] Ozai, 'Origin and Differentiation' (n 362) 144

[369] Musgrave and Musgrave (n 71) 117.

[370] Anthony C Infanti, 'Internation Equity and Human Development' in Miranda Stewart and Yariv Brauner (eds), *Tax Law and Development* (Edward Elgar 2012).

in a more practical way to promote redistributive goals in tax allocation, using it to decide 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'.[371]

4.1.3 Creating scope for reform

There are a number of areas within the two-pillar framework where there is opportunity to depart from traditional origin-based approaches. Despite long-term resistance, the OECD has made incremental steps to adopting UT+FA measures, specifically through the Pillar One blueprint to allocate residual profits to market jurisdictions.[372] As Ozai notes, such profits (which are defined as profits in excess of the estimated market return or 'routine income') by definition cannot be attributed to any specific economic factor, providing a promising avenue for the application of differential principles.[373] One notable feature within the GMT agreement is the inclusion of the novel UTPR mechanism, which enables states hosting constituent entities of an MNE to levy top-up taxes, departing from the arm's length principle and providing scope for countries to tax foreign companies *outside* their jurisdiction.[374] While designed primarily as a backstop to incentivise resident countries to secure a minimum tax rate this measure has significant implications, reflected in its controversy among global tax experts, with some arguing it constitutes an unjustified departure from fundamental principles of international tax law.[375] As Christians and Magalhães note, the very arbitrariness in the doctrines of economic allegiance or value creation make them poor candidates for accepted legal norms, and also reveal why such initiatives are essential to challenge this perception of economic nexus rules as universally accepted and normatively grounded.[376]

Critical responses which condemn the OECD tax deal for failing to live up to its stated goals serve in part to demonstrate Ozai's argument that the increased attention given to

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[371] Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (n 30) 1650.
[372] OECD, 'Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint' (October 2020) <https://doi.org/10.1787/beba0634-en> accessed 31 August 2023.
[373] Ozai, 'Origin and Differentiation' (n 362) 146.
[374] Allison Christians and Tarcisio Diniz Magalhães, 'Undertaxed Profits and the Use-It-or-Lose-It Principle' (2022) 108 Tax Notes International 705, 706.
[375] Allison Christians and Tarcisio Diniz Magalhães, 'UTPR, Normative Principles, and the Law: A Rejoinder to Nikolakakis and Li' (2023) 109 Tax Notes International 1137, 1137.
[376] ibid 1139.

distributive concerns in global taxation requires explicit normative grounding if it is to effect meaningful change.[377] Finding appropriate spaces to utilise differential approaches would help close this gap and identify a normative home for those principles of distributive justice which are already prevalent at the level of discourse, even if only implicitly.[378] In similar fashion, the proposals made by Christians and Apeldoorn for implementing an 'equal benefit' principle would offer space to normatively ground the idea of just shares in the common benefits of global cooperation, directing reform to more equitable outcomes.[379] It would also serve to strengthen the OECD's rhetorical claims of aiming to achieve a realignment of allocation rules to assign tax rights 'where value is created', providing a more definitive meaning which encompasses both commitments to protecting the entitlements to created wealth and to its just distribution.[380] Offering a fuller account of inter-nation equity which prioritises distributive principles, Ozai similarly argues, reduces the arbitrariness of current origin-based rationales and thus strengthens the normative application of state sovereignty.[381]

4.2 INSTITUTIONAL REFORM AND PROCEDURAL JUSTICE

The question that naturally follows, especially given the barriers provided by continued resistance to such reform, is how to find a way forward in promoting the application of such principles within the global arena. There needs to be practical consideration for how developing countries can challenge the features of institutional governance which provide continued scope for domination, and find space to gain effective power and influence to promote their interests. Two features are centrally relevant: the dominance of the OECD as the institutional source of global tax governance, and the framework which governs the creation of tax treaties.

4.2.1 The institutional source of rulemaking

Central to the question of pursuing equitable reform is whether the OECD's continued hegemony remains viable, and if not, whether an alternative institutional setting would offer a better framework for developing countries to guide policy making and promote

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[377] ibid.
[378] Ozai, 'Global justice, differentiation and the taxation of the digital economy' (n 334).
[379] Christians and Apeldoorn, *Tax Cooperation in an Unjust World* (n 131) 12-16.
[380] ibid 165-66.
[381] Ozai 'Origin and Differentiation' (n 362) 149.

their interests. The sources of concern are well understood at this point, and centre around both the perceived and real biases that result from the organisation's founding aims, which include achieving the 'highest sustainable economic growth' for its 38 member countries, representing the richest and most powerful economies.[382] This bias is borne out in the tax regime's continued preference for allocation principles which benefit them, and the framework for governance is largely technocratic and expert-dominated, serving to amplify the dominant position enjoyed by major powers to lead standard-setting and reform.[383] It is clear that the OECD have at least been responsive to these concerns by inviting wider participation from non-members in the creation of the Inclusive Framework, but questions remain as to its effectiveness and whether such efforts offer scope in the long-term for more equitable cooperation. For some, the dominance of OECD members in decision-making is inescapable and ultimately fatal to reform efforts, and so focus is better spent on moving towards an alternative institutional setting.

The mixed response to these questions from academics, policymakers and those participating in the Inclusive Framework is understandable when reviewing reform to date. Its creation was explicitly intended by the OECD to engage non-member states in an inclusive dialogue 'on equal footing' to directly shape BEPS reform.[384] Without expressly defining what such an outcome would look like or require in practice, however, it becomes more difficult to assess the approaches and measures the OECD have adopted to achieve it.[385] The institutional obscurity and lack of transparency that still dominates its decision-making processes also contributes to this difficulty.[386] Analyses that have been made make it clear that developing countries have still been locked-out of important development stages of reform proposals, and so it becomes unsurprising that the priorities and focus remain on meeting the concerns of OECD nations.[387] Meaningful participation is also limited due to the lack of financial and human resources available to them, with overall

[382] Christians and Apeldoorn, 'The OECD Inclusive Framework' (n 94) 228.
[383] Christensen, Hearson and Randriamanalina, 'Developing influence' (n 119) 846
[384] OECD, 'All interested countries and jurisdictions to be invited to join global efforts' (23 February 2016) <https://www.oecd.org/ctp/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm> accessed 21 July 2023
[385] Christians and Apeldoorn, 'The OECD Inclusive Framework' (n 94) 226.
[386] ibid.
[387] Brauner, 'Agreement? What Agreement?' (n 110) 2.

conclusions emphasising the continued high barriers met by developing countries to achieve concessions which would benefit them.[388]

4.2.2 Assessing alternatives

While proposals to bring global governance under the auspices of the UN are not new, growing momentum in recent years has been amplified by the increasingly critical responses to the limitations of reform efforts. The Tax Justice Network has prioritized advocacy efforts on moving leadership to the UN as a more 'globally inclusive' setting,[389] a prospect which has become more tangible following the 2022 resolution to pursue intergovernmental discussions on global tax reform.[390] There have also been a number of proposals for the creation of an International Tax Organisation to offer a new forum for negotiated agreements between states on global tax rules, and entrusted with the enforcement of such rules.[391]

Former OECD staff member Frances Horner notably argued that any such move 'will make a significant, non-redundant contribution to global governance if – and only if – it gives a full and true voice to the fiscal concerns and needs of developing countries.'[392] There are important differences to the formal mandates and governance structures at the UN that would support the prospects for more equitable participation. For example, the UN Tax Committee makes decisions by adopting a majority vote as opposed to the OECD's approach of achieving negotiated consensus.[393] There is also evidence that these differences have contributed to policy outcomes with transformative impact, such as the inclusion of Article 12A into the UN Tax Convention which offered formal provision for source states to tax technical service fees, reflecting measures developing countries had unilaterally adopted to address needs neglected by the BEPS agenda.[394] Absent the

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[388] Christensen, Hearson and Randriamanalina (n 40) 849.
[389] Tax Justice Network (n 126) 18.
[390] The Economist, 'Developing countries take tax talks to the UN' (1 December 2022) <www.economist.com/finance-and-economics/2022/12/01/developing-countries-take-tax-talks-to-the-un> accessed 16 July 2023.
[391] Dietsch and Rixen, 'Tax Competition and Global Background Justice' (n 229) 166.
[392] Frances M Horner, 'Do We Need an International Tax Organization?' (2001) 24 Tax Notes International 179.
[393] Rasmus Corlin Christensen, Martin Hearson and Tovony Randriamanalina, 'At the Table, Off the Menu? Assessing the Participation of Lower-income Countries in Global Tax Negotiations' (2020) ICTD Working Paper 115 <https://www.ictd.ac/publication/at-table-off-menu-assessing-participation-lower-income-countries-global-tax-negotiations/> accessed 28 July 2023, 12.
[394] ibid 22.

requirement to meet consensus such outcomes are more possible, and importantly are won out of a process which is informed by the experience and preferences of developing countries rather than a top-down discussion.[395]

At the same time, there is reason for hesitancy in concluding that changing governance leadership will wholesale solve the problems of dominance and inequitable power distribution within the current framework. There are a number of ways in which the functioning of the UN Tax Committee closely resembles that of the OECD, particularly in its reliance on expert capacity, and in fact there is stark practical overlap as many tax committee members are also active members of OECD working parties.[396] It is not clear whether the structural barriers created by such reliance would be addressed, and more generally the UN, without comprehensive reform, is subject to much of the same political legitimacy deficits.[397] Christensen argues that the benefits of the UN's policy outputs are possible because it is positioned as an addition and counter to the OECD's leadership, and such benefits may well be lost if the UN inherits the geopolitical hierarchies and politicization that necessarily comes with a global mandate.[398]

The issues highlighted here do not indicate that the goal of escaping the OECD's hegemony is misguided or ought to be abandoned, but rather reveal the need to be conscious of and responsive to the forces which enable those relationships of dominance. The problem with solely focusing on the question of 'which' supranational body should lead governance, Magalhães argues, is that it risks ignoring the scope for dominance that inevitably arises when attempting to build universality and consensus out of diverse interests, to develop principles from the top-down.[399] A better objective, in his view, would be to focus on building counterhegemonic projects which can provide growing scope and capacity for developing countries to exercise power in tax governance and to challenge the status quo.[400] Out of the interaction of a variety of multilateral forums greater experience and knowledge can be gained and shared, and powerful coalitions can form to advocate for shared interests and 'recalibrate the global paradigm'.[401] Breaking the hegemonic power of

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[395] ibid 22-23.
[396] ibid 11.
[397] Magalhães (n 153) 533.
[398] Christensen RC, 'UN-doing the OECD's global tax dominance?' (25 November 2021) <https://phdskat.org/2021/11/25/un-doing-the-oecds-global-tax-dominance/> accessed 28 July 2023.
[399] Magalhães (n 153) 528-529.
[400] ibid 533.
[401] ibid.

the OECD, at least for now, should take a pragmatic approach which is open to both the ways such spaces can develop further within the OECD and can be achieved at the UN or elsewhere.

4.2.3 The governance framework for treaty making

The extensive network of bilateral treaties, governed by the OECD Model Tax Convention, continues to provide the framework for allocating tax rights globally. The very fact of its dominance and proliferation may be the biggest source of concern for those focused on the distribution of power and wealth within global governance, given that the successful expansion of the treaty network has come at the cost of developing countries ceding tax income to wealthier nations.[402] Commitment to distributive justice requires fair distribution of both the benefits and costs of social cooperation, and the problem with tax treaties is that developing countries are unfairly burdened with the costs of treaty-making both in terms of process and outcome.

A notable phenomenon that both Dagan and Hearson have drawn attention to is that many discussions of global tax justice focus on the need for closer cooperation to solve tax competition, without considering that such efforts to date have tended to produce worse outcomes for developing countries.[403] The 'tax-treaty myth', Dagan argues, has for decades informed the decision-making of states and the OECD out of the assumption that DTAs are required to prevent double-taxation and so universally benefit countries by reducing trade barriers and increasing foreign direct investment (FDI).[404] The reality, she argues, is that the problem of double taxation can be resolved through unilateral action by residence states, and so countries are sacrificing potential tax revenues unnecessarily while bearing the costs of alleviating double taxation.[405] Tax-treaties ought to be assessed primarily then as instruments for the redistribution of tax revenues, and ones which for the most part promote regressive redistribution at the expense of developing countries.[406]

The problem with prioritizing cooperation within this framework is that it has served to incentivise and encourage countries to sign tax treaties even when it does not benefit them

[402] Brooks and Krever (n 45) 160.
[403] Dagan, *International Tax Policy* (n 19); Hearson, Imposing Standards (n 54).
[404] Dagan, *International Tax Policy* (n 19) 74-76.
[405] ibid 98.
[406] ibid 73.

to do so. Consensus on the positive investment outcomes provided by DTAs dominate the policy considerations of lower-income countries, which is harder to resist than conform to, evidenced by the fact that countries were more likely to sign treaties if their competitors for foreign investment had done so too.[407] Among those tax treaty specialists who engage in the technical negotiation process, it is difficult to break the assumptions and principles built into the OECD model, as well as the overarching belief that it is the continued convergence on OECD standards which will open up greater opportunities for cross-border investment.[408] While acknowledging the difficulty in assessing the economic evidence required to conduct cost-benefit analyses for lower-income countries, there is growing grounds to challenge these assumptions, with research indicating limited increases to FDI compared to concrete revenue losses following treaty enactment.[409]

4.2.4 Addressing the costs of cooperation

This consensus on the value of DTAs is beginning to lose its strength in global tax discourse. A number of authors and international organisations have argued that developing countries should be highly sceptical of entering into new treaties, and there is increased, if modest, examples of countries cancelling or attempting to renegotiate treaties to better protect their interests.[410] Reform efforts should focus on a move away from bilateral agreements to multilateral treaties, Brooks and Krever argue, which will enable a shift from residence to source-based taxation if informed by equitable negotiation.[411] Even with the amendments made in recent years as a result of the BEPS project it is unlikely that the OECD model treaty will undergo reform to fundamentally change its allocation rules; despite such issues being continually raised by developing countries during regional consultations.[412]

There is an ongoing question about whether tax governance can escape the barriers to participation that comes from its complexity and reliance on narrow expertise.

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[407] Hearson, *Imposing Standards* (n 54) 5.
[408] ibid 6.
[409] Sebastian Beer and Jan Loeprick, 'Too high a price? Tax treaties with investment hubs in Sub-Saharan Africa' (2021) 28 International Tax and Public Finance 113.
[410] Brooks and Krever (n 45) 160-161.
[411] ibid 178.
[412] Oladiwura Ayeyemi Eyitayo-Oyesode, 'Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform' (2020) 12 Law and Development Review 193, 212.

Improvements to multilateral instruments might offer limited benefit if such inequalities in negotiation are not addressed, as even where the UN model treaty offers alternative rules which allocate greater tax rights to developing countries they often only appear in a minority of signed treaties.[413] Opportunities for lower-income countries to build knowledge and expertise outside of these institutional settings 'on their own terms' may provide more promising prospects.[414] Martin Hearson cites the example of Cambodia, which has developed its institutional knowledge and capacities in the last decade, resulting in a treaty network which is comparably more sovereignty-preserving and allows for greater retention of taxing rights.[415] There is also opportunity for lower-income countries to find success in multilateral settings to the extent that they offer additional forums to organise caucuses and work together.[416] Notable here is the participation and contribution of the ATAF to standard-setting at the OECD, which has provided increased scope for African countries to collaborate to achieve specific goals in negotiation but also to build socio-technical resources in the form of expertise and strengthened networks.[417]

4.3 BUILDING A REALISTIC PATH TO REFORM

Part of the difficulty in identifying concrete recommendations for effective reform is the extent to which the problems are above all political in nature. That is not to dismiss the complexities inherent in the task of coordination. As Murphy and Nagel point out, domestic tax debates can be especially contentious not only because they engender strong morally loaded conflicts over what tax policies are fair, but also involve large uncertainties in determining the economic and social consequences of any chosen policy.[418] Their policy aims are thus battled out in the political arena, while the complex, technical questions of their implementation are left to economic experts.[419]

The problem is there is no equivalent political space within global taxation. Instead, Hearson argues, the technocratic and consensus-driven approach taken discourages the politicization of policy discussion for fear of instability.[420] Within a deeply unequal

[413] Hearson, *Imposing Standards* (n 54) 16.
[414] ibid.
[415] ibid 160.
[416] ibid 158-159.
[417] Christensen, Hearson and Randriamanalina, 'Developing Influence' (n 40) 854.
[418] Murphy and Nagel (n 12) 3-4.
[419] ibid.
[420] Hearson, *Imposing Standards* (n 54) 159-60.

framework in which political power is determinative, Magalhães points out, this only serves to conceal the 'deep-seated conflicts of interest and power struggles that are so dominant in the international scene'.[421] Dominated countries are prevented from engaging with global taxation's political or normative demands within a framework that is precisely built on the exercise of political power. This inequality also plays out in limiting the scope for challenging any of the framework's underlying principles, where there is a resistance to consider principles like inter-nation equity because its application demands explicit value judgements, both moral and political.[422]

4.3.1 Feasibility and normative ambition

Pettit gives voice to the importance of feasibility in normative assessment, arguing that even within the ambitious project of global freedom from domination it cannot be a 'utopian and unrealistic ideal'.[423] This is of course essential if reform is to be effective in actually challenging the current distribution of power, and there must be regard for what is possible, timely, and which accounts for the scale of barriers in place. Yet, similar to the argument made within statist accounts for rejecting global equity principles, there is a risk of mistaking normative ambition for utopian or unrealistic assessment. As Ypi points out, where statism places normative limits on concern for relative inequalities globally, there is an implicit logic that because its obligations are more onerous than meeting absolute needs it must sit lower in the normative hierarchy, and thus fails to adequately consider the claim that they might have equal weight.[424] In the question of addressing power inequalities, it is precisely the interaction of states with relative power over others that enables domination, to the extent that it might be more utopian to imagine non-domination being achieved by ensuring all states have a 'sufficient' level of power.[425]

The value of normative ambition is that it can guide an approach to reform that focuses on the best practical steps to reducing the scope for domination, while creating the space in discourse to explore and extend understanding of normative principles. As the discussion

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[421] Magalhães (n 153) 528.
[422] Kim Brooks, 'Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value' in John G Head and Richard E Krever (eds), *Tax Reform in the 21st Century* (Kluwer Law International 2009) 22.
[423] Pettit, 'A Republican Law of Peoples' (n 279) 86.
[424] Ypi (n 342) 118-19.
[425] ibid 127-28.

of inter-nation equity informing tax allocation rules shows, when there is scope to challenge the status quo, even in small areas, more equitable normative principles can find room to grow. Similarly within multilateral negotiations, the greater involvement of developing countries is creating spaces for discourse outside the hegemonic consensus, and there is power to challenge that consensus as such countries unite in exploring the demands of justice in the context of a regime that treats them unfairly.[426]

4.3.2 The cooperative project

At the time of writing much remains uncertain about both the prospects for the OECD tax deal, and where the discussions at the UN will lead. In August 2023, the Secretary-General released a report which reviewed the central issues around securing effective and inclusive reform, presenting a range of proposals to be voted on at the next General Assembly, including establishing a multilateral convention for tax cooperation.[427] The OECD in response noted their disappointment that the report had failed to consider the impact and significance of the changes that their reform has delivered.[428] Both parties have discouraged framing the issue as competitive, but such rhetoric may be inevitable, and indeed there has been concern this may stunt progress which can only be made through 'a true consensus', and that the UN may well struggle to 'find a compromise between advanced and developing economies too'.[429]

These exchanges speak to a more fundamental question: how valuable is it to continue pursuing solutions through the cooperative framework, and how legitimate is the goal of consensus? The problem is that there is no escaping the need for cooperation if there is to be any possibility of an effective and just global tax regime, and the theories explored here have stressed its normative value as well, but within relationships defined by domination consensus approaches serve largely to entrench injustice. Given the extent to which such

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[426] Hearson, *Imposing Standards* (n 54) 159.
[427] 'Promotion of inclusive and effective international tax cooperation at the United Nations' (A/78/235, 08 August 2023) <https://financing.desa.un.org/document/promotion-inclusive-and-effective-international-tax-cooperation-united-nations-a78235> accessed 27 August 2023
[428] Emma Agyemang, 'OECD and UN tussle for control over international tax affairs' *Financial Times* (London, 29 August 2023) <https://www.ft.com/content/e05b0767-cab5-44de-9fbf-af5ce841a026> accessed 30 August 2023
[429] ibid.

approaches are embedded into the current institutional framework, it appears doubtful there is any scope within it for realizing non-domination.

While Hearson's overall account of the struggles developing countries face to escape this dominance is similarly grim, he notes the important fact that the influence they can have, while limited, is not pre-determined.[430] And beyond winning concessions or policy achievements, Pettit stresses there is value in the cooperative project for the very fact it offers space to explore the normative, political and practical questions.[431] Even though such discussions can never lead to consensus if there is equitable regard for all countries, he argues, it can encourage mutual respect for them, and 'establish a currency of considerations that all sides recognize as relevant to global organization'.[432] If the reality of cooperation within conditions of equalized power is to be made more possible, then, it might be necessary for now to focus on abandoning the goal of consensus. Instead, Pettit argues, weaker states in the current scheme of unequal power should pursue spaces to 'unite in common cause' and provide more powerful challenges to the status quo, and to resist domination.[433]

4.3.3 The benefits of breaking consensus

Many assessing the history of global tax governance would identify the present as a 'critical juncture', where moments of crisis or increased political mobilisation have provided a window of opportunity to create meaningful change.[434] Whether from the financial crisis, increased public concern for tax avoidance, or the challenges thrown up by tax competition or the growth of the digital economy, there is an underlying sense of urgency to capitalize on the momentum built from these interruptions to the status quo, out of the concern perhaps that this opportunity will be short-lived.[435]

If the momentum that has been built has relied primarily on the scope for greater consensus, its peak has likely come and gone. The OECD faces ongoing crises as it can no

[430] Hearson, *Imposing Standards* (n 54) 159.
[431] Pettit, 'A Republican Law of Peoples' (n 279) 82.
[432] ibid.
[433] ibid 84.
[434] Hearson M, 'Have we reached a critical juncture for global tax governance?' (*ICTD*, 30 May 2023) <https://www.ictd.ac/blog/critical-juncture-global-tax-governance/> accessed 31 July 2023.
[435] ibid.

longer rely on the traditional coalitions that united its founding members, given the divergent interests of the US and Europe on digital service taxation.[436] Conflicts of interest continue to threaten consensus on global reform as an increasing number of countries are driven to pursue unilateral measures to tax digital giants.[437] The growth of emerging markets such as China provide new opportunities to determine policy autonomously, capacities which can potentially allow for disproportionate influence in the international tax regime.[438] What is not certain at this stage is to what extent the interests of such emerging markets will align with lower-income countries, who must continue to pursue diverse avenues to become agenda-setters themselves. The difficulty for the OECD is that securing legitimacy through increasing participation may well come at the expense of achieving effective and timely reform, as the scope for decision-making through consensus becomes less feasible.[439]

Ultimately the trend towards more equitable participation is irreversible, Hearson argues, and if those goals are to be achieved, the ambition of multilateralism needs to be adapted to one of managed pluralism.[440] Rejecting the possibility and desirability of universal consensus does not entail a rejection of the project of cooperation, but rather recognition that without the truly equitable distribution of power, promoting consensus towards global standards will inevitably result in promoting the inbuilt biases of those who created those standards.[441] Managing the complexity of a pluralist framework which reflects the diverse interests, values and approaches of different countries provides a new host of challenges that, at least in the short term, institutions of global governance may well be ill-equipped to meet. The benefit of such challenges may similarly lie in the opportunities it creates to explore what becomes possible when all countries are empowered to participate on equal terms.

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[436] Christensen and Hearson (n 10) 1082.
[437] Emma Agyemang, 'OECD tax plan targeting multinationals beset by clashes' *Financial Times* (London, 11 July 2023) <www.ft.com/content/630464b0-c3c0-4f60-8a9e-c43cea54285b> accessed 11 July 2023.
[438] Martin Hearson and Wilson Prichard, 'China's challenge to international tax rules and the implications for global economic governance' (2018) 94 International Affairs 1287, 1295-6.
[439] Christensen and Hearson (n 10) 1078.
[440] Hearson, 'Have we reached a critical juncture for global tax governance?' (n76).
[441] ibid.

CONCLUSION

While this thesis set out to consider the central conflict in global tax justice as one between sovereignty and the demands of just cooperation, its conclusion is left to consider a different conflict that is more relevant but also more challenging. As Magalhães relates, the problem of consensus building within relationships of inequitable power is that it enables states to dominate others not only by their imposition of practices but also of norms, justifying this imposition through a claim to universality.[442] Exploring the motivating force of this logic within the project of imperialism, Koskenniemi reveals the problem: 'Universalizability in theory leads automatically to expansion as practice. If my principle is valid because it is universal, then I not only may but perhaps must try to make others accept it as well.'[443] It is crucial to be attentive to this risk of domination within the claim to universality, because it is relevant to both practitioners of tax policy but also of philosophy.[444]

Global tax governance has been defined by a consistent approach to global cooperation which is aimed at reaching consensus by helping developing countries, as economist Nicholas Kaldor put it, to 'learn to tax'.[445] Christians points out that 'He might have done better to direct his inquiry toward the wealthy nations of the world',[446] identifying the fundamental flaw in the view that cooperation involves the political and social exporting of 'best practice', an attitude which inherits the same pernicious mindset of the imperialist project.[447] The longevity of this view is apparent in the OECDs approach to reform, whether by framing harmful tax practices as something done by other states rather than confronting the failings in their own practices, or by promoting the Inclusive Framework as a means by which developing countries can support its agenda and learn its methods. As Christians suggests, cooperation should be viewed as a pluralist enterprise in which all participants 'learn to tax'. The benefits of widening participation are not found in achieving closer consensus on existing principles through a claim to universality, but in its opportunities to challenge and improve the limitations of singular perspectives.

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[442] Magalhães (n 153) 505-06.
[443] Koskenniemi (n 341) 490.
[444] Magalhães (n 153) 520-21.
[445] Nicholas Kaldor, 'Will Underdeveloped Countries Learn to Tax?' (1963) 41 Foreign Affairs 410.
[446] Christians 'BEPS and the Power to Tax' (n 29) 13.
[447] Magalhães and Ozai (n 69) 1-2.

The question then becomes, if rejecting the appeal to universality as it is found in the project of consensus-building, on what normative grounds can the necessity of global tax cooperation be meaningfully justified? It is noted that accepting universal grounds within a particular model does not mean committing to it as solely relevant, as one can accept a plurality of grounds of global justice.[448] Similarly, if the central proposition is that just governance requires an equitable forum to reassess its underlying normative foundations, its pursuit may well challenge the building blocks of the particular account presented in this thesis. What is strongly defended here is this very argument about the normative value of just cooperation: that when undertaken not for mutual benefits but in the necessity of reciprocal equitable duties to realize global freedom, it enables a richer discourse, and the creation of more than the sum of its parts, giving greater meaning to the pursuit of our desired goals and the exercise of our agency.

The apparent dichotomy between the claim that 'we are all cosmopolitans now'[449] and the hesitancy to adopt the ambition in the normative demands of cosmopolitan justice begins to make more sense once the scale of its implications is understood in the context of global tax cooperation. Consensus is easier when the relevant participants are few and relatively similar, or when the duties of equity are ignored, but by committing to realizing the demands of global equity and distributive justice, it becomes not only very onerous but requires the balance of so many important considerations that it appears outside the scope of possibility. Given that it remains necessary to tackle global problems, perhaps there is more to be gained from the view of cooperation's value, and perhaps even its complexity, as an opportunity to learn more and help inform domestic challenges as well.

Koskenniemi offers a similar sentiment in exploring how to avoid the trap of using universalizability to exercise domination. He notes that the project of imperialism uses the appeal to universality to demand exclusion; if one's reasoned and concluded principles are universal, then they enjoy moral force over the preferences of others, whose claim to opposing principles must be rejected.[450] It follows then that he conceptualises a non-imperialist universality as one which demands inclusion – a universality that is not a fixed conclusion but an ideal that can be advanced but never fully achieved, the pursuit of which

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[448] Risse (n 161) 2.
[449] Michael Blake, 'We Are All Cosmopolitans Now' in Gillian Brock (ed), C*osmopolitanism versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations* (OUP 2013) 35.
[450] Koskenniemi (n 341) 489-490.

requires and is enriched by the clashing of diverse perspectives that attempt to give voice to its meaning in the particularities.[451] 'Universality here is neither a fixed principle nor a process but a *horizon of possibility* that opens up the particular identities in the very process where they make their claims of identity'.[452] That is, using the call to universality to justify exporting a particular conviction of the good is to misunderstand the open-ended nature of universality; its invocation should be understood as an invitation to participate, to question and challenge those claims, acknowledging it is only through this process that there can be any possibility of approaching the ideal.[453]

The value of global tax governance, as an essential cooperative pursuit subject to the demands of justice and grounded in universal claims, thus ought to be seen in the very conflict that it creates by pursuing agreement within universal participation. If justice is to be realized as a universal ideal, then the challenge of global justice should not be feared as an irreconcilable conflict of opposing beliefs that limit justice's scope, but welcomed as an opportunity to expand the horizon of its possibilities.

[451] ibid 505-06
[452] ibid 506.
[453] ibid.

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