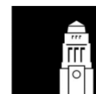

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Profit shifting and tax competition policy: a global justice perspective

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Abstract

Purpose - This paper argues that the endogenous processes of profit shifting by MNEs and tax competition lead not just to inequality, but constitute a case of global injustice. The provisions of the planned 'two-pillar' reforms to global corporate taxation are then considered relative to the minimum conditions for background justice in taxation.

Design/methodology/approach – The paper is partly conceptual, based on relevant theoretical work in philosophy, and partly policy-focussed, based on an assessment of the OECD/G20 'two-pillar solution'.

Findings - The normative case for considering international tax competition as a global justice issue is developed, contrasting the cosmopolitan and non-cosmopolitan ('internationalist') approaches. Three key minimum conditions for background justice in term of international taxation are established. The paper concludes that the two-pillar solution is likely to fail in global justice terms not because of its principles, which are sound, but because its redistributive scope is insufficiently great to have a major effect in correcting the inequality arising from tax competition.

Originality – The paper applies the philosophical concept of global justice to a specific issue in international business: MNE profit shifting and tax competition policy.

Key words: Profit shifting; Tax competition; Global justice; Inequality; Two-pillar solution

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Profit shifting and tax competition policy: a global justice perspective

> The study of justice has been concerned with what we owe one another, what obligations we might have to treat each other fairly in a range of domains, including over distributive and recognitional matters. (Brock 2022 §1.1)

In the years since Doh et al (2010) highlighted the lack of crossover between business ethics and international business, inequality has been identified as one of the 'grand challenges' in global business that ought to be tackled by IB scholars (Buckley et al 2017). Since then there have been several attempts to address inequality from an IB perspective, notably Giuliani (2019), Doh (2019) , Pearce and Tang (2021), and Narula and van der Straaten (2021). However, despite these recent efforts, in a comprehensive review Rygh (2021: 73) argues that international business has remained conspicuously absent from the debate on inequality and the gains and losses from international business, and almost entirely absent in considering the related issue of global justice. In arguing for more IB involvement in both areas Rygh concludes:

> Distributive justice is a complex issue… and such a research agenda would inevitably also imply an excursion into business ethics. … the IB context could be particularly instructive for studies of ethical implications of business in terms of economic inequality, given that MNEs may have specific implications for both within-country inequality and global inequality. (Rygh 2021: 92)

The present paper deals with issues arising from *global* inequality and injustice. One reason for the failure of IB to engage fully with these issues is because some feel uncomfortable moving into 'normative territory' (Rygh 2021: 92). This paper adopts an explicitly normative approach, and argues that there is merit in considering IB issues from the perspective of global justice. In particular, the paper identifies the issues arising from profit shifting and tax competition from a global justice perspective, and considers whether a planned international policy response will address these issues.

The ethics literature examining profit shifting by MNEs falls into two distinct types. The 'business ethics' literature is principally concerned with issues of personal morality and the ethical choices made by managers, accountants and tax advisers employed in MNEs (e.g. Lenz 2020; Payne and Raiborn 2018; West 2018), and is concerned principally with the *processes* of profit shifting and tax avoidance. Meanwhile the 'global justice' literature is more concerned with the detrimental *outcomes* of profit shifting and its links to tax competition, and especially the results of tax competition on a global scale (e.g. Dietsch 2015; Ronzoni 2016). This article takes the latter view. This involves the case for regarding MNE profit shifting and tax competition as an issue of global justice, developing a normative

framework for considering this issue, and assessing whether a recently proposed new tax regime will address the identified global justice concerns.

The profit shifting activities of MNEs have very marked effects on the distribution of profits – and so on taxable revenue – worldwide. Tørsløv et al (2023) demonstrate that, on average globally, affiliates of foreign multinationals are markedly more profitable than local firms in low-tax countries, while affiliates of foreign multinationals are consistently less profitable than local firms in high-tax countries – precisely what one would expect if profit shifting is widespread. They also estimate that 36% of MNE profits are shifted to tax havens globally. 'Aggressive' profit shifting measures such as transfer pricing and other forms of tax avoidance are not illegal, but have substantial economic consequences. This includes reducing the tax revenue of countries in which MNE activity is located. The amounts involved are substantial: Garcia-Bernardo and Janský (2024) estimate that multinational corporations worldwide shifted over $850 billion in profits in 2017, primarily to countries with effective tax rates below 10%. They also find that countries with lower incomes lose a larger share of their total tax revenue due to profit shifting. Not only do poor countries lose much needed tax revenue, but they become trapped in a process of tax competition, in which they feel obliged to match the low and reducing corporate tax rates set by wealthy countries in order to keep attracting beneficial foreign direct investment (FDI) (Sikka and Willmott, 2010). Because the detrimental effects of profit shifting and tax competition disproportionately affect poorer countries, this raises ethical concerns: both interlinked processes can lead to greater global inequalities and to the weakening of fiscal self-determination in poor countries, and therefore represent a case of global injustice (Dietsch and Rixen 2014).

One consequence of tax competition is a perpetual cat-and-mouse game between major corporations and tax authorities: for example, numerous MNEs including Starbucks, Amazon, Google and Fiat-Chrysler have had their profit shifting arrangements challenged by the European Commission[1]. However, in 2021 a major reform of the international corporate tax system was agreed by 136 countries, designed specifically to address the issues of profit shifting and tax competition globally. A key contribution of the present paper is to consider whether this 'two-pillar solution' will alleviate the identified issues of global injustice induced by tax competition.

As the opening quotation from Brock (2022) suggests, inequality can be a key part of global justice concerns. However, inequality need not automatically constitute an injustice: the reasons for the inequality, who (if anyone) is responsible for it and what can be reasonably done to alleviate it are also relevant. Brock (2022 §1.3) identifies that a global justice problem exists when one (or more) of the following conditions obtain:

[1] https://www.bbc.co.uk/news/business-34591476

1. Actions stemming from an agent, institution, practice, activity (and so on) that can be traced to one (or more) states negatively affect residents in another state.

2. Institutions, practices, policies, activities (and so on) in one (or more) states could bring about a benefit or reduction in harm to those resident in another state.

3. There are normative considerations that require agents in one state to take certain actions with respect to agents or entities in another. Such actions might be mediated through institutions, policies, or norms.

4. We cannot solve a problem that affects residents of one or more states without co-operation from other states.

Issues relating to profit shifting and tax competition fulfil all four conditions. First, the essence of profit shifting is that the actions of MNEs in one country affect not only the government and population in that country, but can help induce a process of tax competition which affects residents of other countries. Second, the curtailment of tax competition could help reduce the harm brought about by the endogenous process of profit shifting and tax competition. Third, as demonstrated in section 3, there are normative considerations requiring agents in one state to take actions with respect to entities in other states in order to provide appropriate conditions of background justice. Finally, as demonstrated in sections 3 and 4, co-operation between states is essential to solve the problem of injustice that affects the residents of states adversely affected by profit shifting and tax competition.

In considering issues of global justice philosophical thought broadly divides into two camps: cosmopolitan and non-cosmopolitan. Cosmopolitans essentially take the view that principles of distributive justice should be applied universally: all human beings should be afforded the privilege, without reference to where they are born or live. Non-cosmopolitans take the view that distributive justice is, to a greater or lesser extent, delimited by the boundaries of the state. With respect to the global justice implications of tax competition the dominant ‘internationalist’ approach is a form of non-cosmopolitanism, but one which is does not take the extreme ‘statist’ view that all obligations of justice end at the state’s boundaries. Thus what distinguishes the internationalist approach to tax competition is the belief that obligations of justice beyond borders do exist, but these differ from intra-state obligations. In developing a suitable normative framework for the analysis below, both the cosmopolitan and internationalist positions are considered.

The article proceeds as follows. Section two presents evidence on the nature and effects of profit shifting by MNEs, and its links to tax competition. This process is shown to have detrimental effects which particularly disadvantage poor countries, and leads to a prima

facie case of global injustice. Section three develops the normative case for considering international tax competition as a global justice issue, contrasting the cosmopolitan and non-cosmopolitan ('internationalist') approaches. The section concludes with three key minimum conditions for background justice in term of international taxation. Section four considers the provisions of the planned 'two-pillar solution' reforms to global corporate taxation, and asks whether they will satisfy the minimum provisions for background justice in taxation specified by the normative analysis of the previous section. Section five summarises and concludes.

2. Profit Shifting and Tax Competition: inequality and injustice

Transfer pricing and other profit shifting measures can be problematic because they can undermine the 'tax base' of countries, that is the total amount of economic activity on which tax may legitimately be levied. Where MNEs can shift apparent profits simply by manipulating internal (transfer) pricing or altering the charges made for 'headquarter intellectual property', it is difficult for individual national governments to ensure that corporate taxes levied on MNEs are in any way related to the activity actually taking place within the country's borders. This in turn means that the government has less fiscal control than might be hoped for an autonomous nation: fiscal control requires that a government not only knows how much real economic activity is occurring within its borders, but that it is able to monitor, record and tax this activity at a level it sees fit. As a result of transfer pricing and other profit shifting activity it possible that an MNE has a substantial presence in a country, with thousands of employees, yet as a result of profit-shifting activities pay very little or even no corporation tax. Ultimately, where this practice is widespread, this can undermine the fiscal sovereignty of a state, especially where internationally mobile capital forms an important element of the tax base.

The problem for individual national governments is how to respond to this issue: many countries are keen to encourage MNEs to locate in their borders because they provide employment and – more importantly – significant 'spillover' benefits in terms of technology and ultimately productivity growth (Driffield and Love 2007). Where states are dependent on continuing inflows of foreign direct investment from MNEs there is therefore a reluctance to levy high corporation taxes for fear of becoming uncompetitive in the worldwide market for globally mobile capital. This in turn has resulted in a process of corporate tax competition between nation states (Devereux *et al.*, 2008), a situation in which governments use their tax systems strategically and "design their tax systems to attract new investment and tax bases of other countries." (Rixen 2011: 449). This possibility of a 'race to the bottom' is supported by evidence that corporate taxes have been falling among countries of all incomes since the mid-1980s, a trend characterised by a 'paradigmatic shift' in international taxation, in which the tendency has been consistently away from high and steep marginal income tax rates and toward relatively low, fairly flat

rate taxes, focussed on labour rather than capital, and (particularly) on consumption (Swank 2016: 202). While there is evidence that the decline in corporate tax rates has levelled off since 2010, it remains the case that average corporate tax rates are around half the level of forty years ago (UNCTAD 2022, ch 3).

Of more importance, however, is what transfer pricing and other profit-shifting behaviour means for the countries involved, and for their residents. Are the effects of transfer pricing and profit shifting different for different types of countries and income groups? And what does this mean in terms of ethical behaviour and global justice?

One of the most comprehensive accounts of the effects of MNE profit shifting is by Janský and Palanský (2019), who provide evidence on the extent of tax revenue losses incurred through profit shifting by MNEs over the period 2009-2016 for 79 countries. They conclude that tax revenue losses from profit shifting are relatively high across countries in all income groups, collectively amounting to $125 billion per annum for the studied countries, and representing an average tax revenue loss of 0.25% of GDP annually. However, the losses are not evenly distributed: "while OECD countries lose the least, low- and lower-middle-income countries lose the most corporate tax revenue both relative to their GDP and relative to their corporate and total tax revenue" (2019: 1074).

This echoes a consistent theme in the literature: that poorer countries (and people) have most to lose from profit shifting and the related process of tax competition between nations. Transfer pricing and profit shifting can be a particular problem for developing economies, which are typically more dependent on revenue from corporate tax and MNEs than first world countries (because they have limited options to shift taxation to labour or consumption, as do rich countries), but often lack the infrastructure and resources to collect corporate taxes effectively or to deal with abuses of profit shifting by MNEs (Swank 2016). This in turn can lead to problems within developing economies where tax receipts are generally more dependent on corporate taxation than on personal or consumption taxes. For example, UNCTAD estimates that, on average, corporate taxes represent around 4% of developing countries' GDP compared to half that level in developed countries, while personal income taxes represent 2% and 8% of GDP in developing and developed respectively (UNCTAD 2015: 181).

It may therefore seem surprising that low-income and developing economies have also actively engaged in corporate tax competition to virtually the same extent as their high-income counterparts (Swank 2016). This in turn raises one of the key puzzles of tax competition. Since it appears to produce lots of losers and few winners, why does it persist? Why don't the numerous losers (e.g. labour versus capital, poor countries versus rich countries) 'gang up' against the (relatively few) winners and change things? There appear to be two issues at work here. The first is the issue of international power relationships. For example, Rixen (2011) argues that there has been little effort to deal collectively with transfer pricing manipulation and profit shifting behaviour for two reasons. First, because

large and small economies tend to differ on what action should be taken: essentially, those countries which find (or believe) that they benefit from tax competition have little incentive to agree to international cooperation in order to mitigate against its effects. And second, because the governments of richer countries are reluctant to put restraints on MNEs' ability to shift paper profits because of the strong lobbying pressure exerted on them by corporate capital.

The second issue is that the realities of tax competition are somewhat more complex than generally recognised: the winners and losers do not simply accord to the 'labour versus capital ' dichotomy generally assumed. In a detailed empirical analysis Genschel and Seelkopf (2016) demonstrate that while capital wins from tax competition in all types of countries, other winners from tax competition include the governments and workers of small, well governed democracies. By contrast, the main losers are governments and workers of large countries, and especially of the least developed countries, largely because they are poorly governed. Therefore, despite their analysis revealing a more complex and heterogeneous effect of tax competition than is often assumed, Genschel and Seelkopf's findings concur with those of Janský and Palanský (2019) that the effects of tax competition are unambiguously negative for the least developed countries of the world (LDCs):

> In summary, there is evidence to suggest that LDCs are seriously constrained by tax competition… these constraints are unambiguously negative for revenue-raising capacity and redistribution. Due to their weak governance capacity, LDCs can neither profit from tax competition nor effectively compensate competition-induced revenue shortfalls in capital taxation from other sources. (Genschel and Seelkopf 2016: 71)

The evidence discussed above suggests there are ethical concerns arising from transfer pricing, profit shifting and tax competition, with a strong *prima facie* case that such behaviour and outcomes can lead to a situation of global injustice. This arises from an endogenous spiral of profit shifting and tax competition and the decline of average corporate tax rates described above: the causal chain between profit shifting and tax competition runs both ways (Mintz and Smart 2004; Ida 2014). There is also a coordination problem arising from this. Because there are winners and losers from tax competition, there is little incentive for states collectively to solve the problem: someone always thinks they can win from the process.

For poorer, developing countries the outcome of tax competition is particularly acute. As indicated from the evidence reviewed above, they are the major losers from tax competition in terms of tax revenue, and so there is an immediate concern in terms of global justice arising from this – tax competition makes the gap between rich and poor countries greater. But poorer countries lose in another way. Unlike wealthy countries, they

are unlikely to have the option to make up for a decline in tax revenues from capital (as corporate tax rates decline) by increasing taxes on consumption or labour, because they frequently lack the administrative resources to broaden their tax base in this way. Low-income countries typically have non-urbanised economies with an extensive informal sector, making efficient tax collection costly or even impossible (Schneider and Enste 2000; van Apeldoorn 2018), especially as tax compliance tends to be low in countries which have relatively weak political institutions (Besley and Person 2014). And even if low-income economies do succeed in shifting the tax burden from capital to labour, it simply results in the reduced level of redistribution described above, but one which harms some of the poorest people on the planet. In addition, declining tax revenues faced by governments in poor countries can lead to increased inequalities in opportunity if it compromises the governments' ability to invest in key public infrastructure investments including health and education. Therefore in terms of the distribution of tax revenues between affluent and non-affluent states and of poorer states being less able to fulfil the basic entitlements of their citizens, there is a prima facie case of global injustice resulting from the endogenous process of transfer pricing, profit shifting and tax competition.

3 Profit Shifting, Tax Competition and Global Justice: a Normative Approach

The evidence of the previous section suggested that tax competition – which both arises from and contributes to profit shifting by MNEs – compromises the ability of states to generate tax revenue from capital. Relatively wealthy countries have the option of shifting the tax burden towards less internationally mobile sources of revenue, notably labour. By contrast, poorer countries, which tend to be more dependent than rich countries on the tax revenue of (international) capital, have less discretion to simply shift the tax burden to labour or consumption, and may have little option but to shrink their fiscal budget, with consequences for their ability to invest in public goods such as health programmes, education and key infrastructure. Clearly this may exacerbate inequality: but does this represent a form of *injustice*?

3.1 Comopolitan and non-cosmopolitan approaches to justice in international taxation

Normative theorists differ as to whether the problems induced by tax competition can be considered a form of injustice. Broadly, cosmopolitans take the view that principles of distributive justice should be applied universally: all human beings should be afforded the privilege, without reference to where they are born, or live, or earn their living. The scope of distributive justice must be global, they argue, because an individual's cultural identity is irrelevant to their entitlement to the distribution of resources (Caney 2001). While there are many flavours of cosmopolitanism[2], in general the role of taxation, even where its

[2] Caney (2001) summarises a number of these, including radical and mild cosmopolitanism, as well as institutional global justice and 'interactive institutionalism'.

collection and distribution is ceded to the state, is to help eliminate or at least reduce *global* inequality.

Others – non-cosmopolitans – take the view that distributive justice is, to a greater or lesser extent, delimited by the boundaries of the state. Some, such as Blake (2001) and Nagel (2005), regard state boundaries a central in terms of distributive justice. For Blake, the key issue is the positive aspects of coercion, which constrains our actions it also provides us with the space in which to exercise autonomy. State coercion is necessary for autonomy to occur, and only the state can provide such (legal) coercion: no international institution can afford this coercion and autonomy. Nagel (2005) also develops a strongly statist view of the boundaries of distributive justice, but unlike Blake, argues that we each have a dual relationship with the state. We are both subject to coercion by the state, but we are also 'joint authors' of the state's actions, but without having any say in the matter. While Sangiovanni (2007) agrees with Nagel and Blake that equality is a demand of justice only among citizens of a state, in his analysis what matters for egalitarian distributive justice is not coercion but relations of *reciprocity* in the provision of important collective goods, specifically those which "protect us from physical attack and … maintain and reproduce a stable system of property rights and entitlements." (2007: 19-20). These collective goods are provided and guaranteed by fellow citizens and residents in the state, and not by those outside the state, and so obligations of egalitarian reciprocity are owed to the former, but not the latter

Until relatively recently political philosophers – cosmopolitan and non-cosmopolitan alike – gave relatively little attention to the global justice implications of tax competition and the international tax system generally. However, more recently a significant development of the area has occurred, designed to provide a normative case for why tax competition is problematic from both cosmopolitan and non-cosmopolitan theories of justice. While approaches differ, the dominant strand of literature is broadly *internationalist*[3]. This differs from cosmopolitanism to the extent that the scope of distributive justice between individuals is regarded as limited to the domestic context, but without being strongly statist. What distinguishes the internationalist approach to tax competition is the belief that obligations of justice beyond borders do exist, but these differ from intra-state obligations: "For internationalists, demanding inter-individual obligations of social justice only hold within a self-contained polity. Obligations of justice beyond borders are both less demanding in content, and are obligations which states, rather than individuals, have towards one another" (Ronzoni 2014: 38): Therefore, for internationalists, international tax competition is problematic for two reasons: first, it has the capacity to undermine the effective fiscal self-determination of states; and second, it can give rise to "a level of

[3] The term 'internationalist' to describe this strand of literature appears to begin with Sangiovanni (2007). While 'liberal nationalist' may be more accurate, I will use the term which has become standard in the literature.

inequality between states that is incompatible with fair international relations" (Cassee 2019: 243).

Many internationalists are concerned principally with issues of *background justice* (Rawls 1977, 1996), and specifically the background conditions that must apply for individuals – and states – to have confidence in their dealings and transactions with each other. Starting from a Rawlesian concern with background justice, for Ronzoni (2009) the key background conditions for states are those that allow them to both to exercise sovereignty over their territory, and " interact as free and equals with one another." (2009: 247).

Ronzoni (2009, 2014, 2016) goes on to examine whether tax competition represents a problem of global or domestic justice, and therefore what implications it has for cosmopolitans and non-cosmopolitans alike. Specifically, Ronzoni poses the question whether tax competition harms the internal functioning of self-determining *polities*, or patterns of distributive justice among *individuals* worldwide (2016: 201). So do we need to worry about tax competition regardless of which vision of global justice we prefer? She concludes that both cosmopolitans (for whom the scope of demanding principles of distributive justice is global) and their critics (i.e. statists or 'internationalists') should both be concerned, but in different ways.

For cosmopolitans, global inequalities between individuals are issues of justice, even if they can be justified in some cases. So the harmful outcomes of tax competition – and especially the fact that these harms weigh most heavily on poor countries – are issues of global justice to the extent that they exacerbate inequalities in resources or opportunities between individuals, regardless of location. Non-cosmopolitans (i.e. 'internationalists') regard justice as being restricted in scope in some way; typically, only domestic social justice is distributive in nature. For Ronzoni, cosmopolitans should worry about tax competition in terms of how it can exacerbate global inequalities between people, while non-cosmopolitans ought to be concerned about the capacity for tax competition to undermine the capacities of the state, which they regard as the principal justice-providing institution. So they have different grounds for concern, with different implications for institutional design. Ronzoni (2016) argues that tax competition puts pressure on internationalists to accept a more demanding account of inter-state obligations than they might otherwise choose, while still being non-cosmopolitan.

Protecting against the undesirable outcomes of tax competition is clearly an issue for cosmopolitans, because tax competition worsens inequalities between individuals. But the problems induced by tax competition fall within the scope of obligations of justice even in a non-cosmopolitan framework, because it has an impact on the demandingness of internationalist obligations of justice. However, the cosmopolitan and non-cosmopolitan policy response will be different. For cosmopolitans, since the concern is to prevent the worsening of inequality between individuals there is a clear normative case for developing global institutions which can collect and distribute taxes in a way that eliminates tax

competition. There may be issues of feasibility or efficiency in doing so – for example, developing some form of global tax authority would require a remarkable degree of international agreement and cooperation, and it is not guaranteed that its efficiency outcomes would necessarily be better than those achieved by individual states acting in *ad hoc* cooperation with each other. Nevertheless, for Ronzoni "the cosmopolitan approach to global justice has no *principled* reason against the argument that that global tax governance must be a system of global fiscal authority." (2016: 209, original emphasis).

For non-cosmopolitans, however, the issue is the extent to which tax competition can undermine the fiscal sovereignty of the state. Merely granting fiscal powers to some supranational body will do little to enhance fiscal self-determination, and may actually weaken it. Instead, Ronzoni argues that non-cosmopolitans should embrace a more complex system that tries to strike a balance between regulating sufficiently to mitigate the worst effects of tax competition, while not interfering unduly with the state's capacity to enjoy fiscal self-determination. This involves three elements. First, allow a (limited) degree of fiscal power shift from individual states towards the supranational level. Clearly this would have to be limited in scope, since non-cosmopolitans view the distributive elements of fiscal policy as being firmly the remit of the polity. So while this would fall short of having a 'global tax authority' setting tax rates everywhere, Ronzoni nevertheless argues some limited forms of global regulation on the tax affairs of MNEs, and of international financial transactions, would be compatible with the non-cosmopolitan perspective, especially as individual territorial tax authorities find it impossible to adequately regulate these areas of activity. Second, while non-cosmopolitans would balk at the idea of transnational fiscal harmonisation, Ronzoni argues there is scope for considering a universal minimum rate of both individual and corporate taxation as a means of limiting the scope for tax competition. As we shall see in the next section, precisely this idea is now under active consideration, at least for corporate taxation. Finally, she advocates allowing supranational authorities the power to punish undesirable fiscal behaviour, which could be decoupled from the actual power to set taxes. For example, individual states would be responsible for *collecting* taxes at the global minimum tax rate, but would cede the power to *sanction* malpractice in taxation to an agreed supranational body.

Others share some of Ronzoni's arguments on the normative case for tax competition as an issue of background global justice, but suggest that her arguments do not go far enough. For example, Dagan (2017) argues that globalisation, and in particular tax competition, means that the state's coercive power in terms of taxation is undermined, as is the ability of state citizens to co-author its collective will in the way envisaged by non-cosmopolitans such as Nagel (2005). The basis for her argument is that under globalization the coercion and joint authorship on which Nagel's (2005) and Blake's (2001) versions of statism depend are themselves dependent on entities and events beyond the state's borders. The (tax-based) coercive power of the state is therefore reliant on the cooperation of other states, and tax rules cannot simply be determined by the 'co-authored collective will of its constituents'

(2017: 13), but depend on cooperation among states. If the coercive power of taxation does not apply to all residents or citizens, the state (alone) can no longer be regarded as the source of the public goods which depend on taxation, and thus duties of distributive justice can no longer be said to be exclusively the domain of the state.

Dagan's normative approach leads to conclusions that go beyond those of Ronzoni. The latter (Ronzoni 2009, 2014) argues that if states want to restore their capacity to tax appropriately, the way forward is to engage in some cooperative, structured, and international institutional approach. For Ronzoni this is required not merely to increase the effectiveness of taxation, but rather the notion of background justice requires that justice in (international) taxation is established to render international cooperation legitimate. However, Dagan contends that mere cooperation between states is not sufficient to ensure global justice in taxation, and favours a more demanding condition: "A multilateral regime established through cooperation is just, I contend, if and only if it improves (or at least does not worsen) the welfare of the least well-off constituents in all the cooperating states" (2017: 26). Dagan's is a substantial normative claim that goes far beyond the analysis of Ronzoni. However, Dagan's analysis is entirely conceptual and she makes no specific suggestions on the types of institutions or policies that would ensure that her vision of global justice would obtain in taxation.

By contrast, much more specific proposals are made by Dietsch and Rixen (2014) who consider precisely how the conditions of background justice can be met in a way that ensures the rules of the international tax system are free of unjust bias. Like Ronzoni (2009, 2014) and Dagan (2017) they argue that competitive pressures which lead to tax competition in turns undermines the capacity of states to achieve fiscal self-determination, and that this effect tends to be particularly apparent in poorer economies. Ultimately, therefore," tax competition increases existing inequalities between countries of the global North and South. For these reasons, we consider international tax competition in its present form to be a case of background injustice." (2014: 156) However, Dietsch and Rixen are clearer on the precise types of tax competition which cause harm, and on the remedies for these.

Dietsch and Rixen differentiate between 'poaching' and 'luring' in terms of tax competition: in a similar vein, Rixen (2016) discusses 'virtual' versus 'real' tax competition. The former relates to the shifting of paper profits while the source of the profit or tax base – be it capital or a private individual – remains in another country. Clearly transfer pricing and other 'base erosion' forms of profit shifting fall into this category. By contrast, 'luring' or real tax competition involves attempts by states to *physically* shift capital (typically via foreign direct investment) or labour (i.e. individuals) from one tax jurisdiction to another by offering low tax rates or other tax-based inducements, such as tax breaks or holidays. Both poaching and luring can result in tax competition, and thus both can have the effect of lowering the state's capacity for fiscal self-determination: but the principles of global

background tax justice which need to be protected differ somewhat in the two cases. They establish two principles for background justice, which would recognise the required constraints on *de jure* sovereignty and would, if put into practice, safeguard nation-states' *de facto* sovereignty (Rixen 2016).

The first principle is 'membership'. This simply means that "individuals and companies should be viewed as members in those countries where they benefit from the public services and infrastructure." (2014: 158), and should be liable to pay tax in the state of which they are a member. Membership in turn depends on what public resources are used by the enterprise. Thus if a company produces a product or service in one country it uses some infrastructure, human capital or other services paid for from taxation levied on the residents of the state. If profits are then diverted via, for example, transfer pricing, the corporation is effectively free-riding on the taxes of those citizens by not contributing fully for the costs of public goods consumed. Dietsch and Rixen argue that the membership principle would effectively eliminate 'poaching' or 'virtual' tax competition, as tax would be levied in the states in which economic activity occurs and infrastructure is used.

However, by eliminating or markedly reducing virtual tax competition, it may make the competition for 'real' international investment more intense, as companies switch from profit shifting to switching real capital investment in order to reduce their tax payments. So Dietsch and Rixen propose a second principle which involves a constraint on the design of fiscal policy at state level. This is designed to deal with 'luring' or real tax competition, in which states try to encourage capital to move from one state to another via manipulation of tax rates. Unlike virtual tax competition, this involves the actual movement of internationally mobile capital, typically through FDI. Dietsch and Rixen favour a 'mixed contraint', which is a combination of constraints that are outcome based and intentions based. Putting a constraint on states' enacting their own fiscal policy to prevent luring is only justified, they argue, if each of two conditions applies. First, there must be evidence that such luring results in 'collectively suboptimal outcomes' in which the aggregate extent of fiscal self-determination by states globally is compromised. This is the outcome-based element and is vital to the internationalist perspective, as fiscal self-determination is central to their approach (as discussed above). However, recognising the danger that such an approach could, if implemented in isolation, impose overly drastic limits on the fiscal policy of individual states, a second condition applies: there must be evidence that the state in question is *deliberately* using its fiscal policy in order to lure foreign capital, rather than attracting FDI simply being a positive result of fiscal policy settings which would have occurred anyway. This is the intentions-based element. Clearly this involves establishing a suitable counterfactual by establishing both the motivations for tax setting at the state level, and the extent to which tax rates actually determine location choice by MNEs, neither of which is simple in practice.

Dietsch and Rixen go beyond both Ronzoni and Dagan by sketching out how their principles might be implemented in practice. They also explicitly acknowledge that they are attempting to substantiate Ronzoni's (2009) idea of a set of supranational institutions that have authority to set rules for the conduct of taxation internationally. This involves the establishment of an International Tax Office (ITO), which would both provide a forum for states to negotiate the rules of international taxation, and be a body for enforcement. To implement the membership principle requires some method of allocating the rights to tax shares of MNE profits among different member jurisdictions, in a way that prevents MNEs from exploiting tax competition to lower their tax bills. One option, favoured by Dietsch and Rixen is unitary taxation with formula apportionment (UT+FA). Rather than each MNE subsidiary making individual profits and losses in individual jurisdictions, the UT+FA system involves MNEs having a single set of consolidated accounts which include profits and losses made in different countries. The worldwide profit would then be apportioned to the respective countries in which the MNE operates on the basis of a predetermined formula, based on some objective measure of actual economic activity in those countries (e.g. sales or employment). Tax would then be levied by the individual jurisdictions as normal on the apportioned profits.

Implementing the fiscal policy constraint is somewhat more problematic, as it requires that a state demonstrates not only that it has in some way lost part of its tax base to another jurisdiction, but that this was done by manipulating tax rates deliberately in order to achieve such an outcome. Here Dietsch and Rixen say little concrete, except that such adjudications are made using objectively available data by, i*ntra alia,* the World Trade Organisation (WTO) when deciding on cases of disputes between member states on trade issues, and that by implication the ITO could do the same. They also suggest that the ITO could implement a dispute resolution procedure that mirrors that of the WTO.

3.2 Assessment: requirements for background justice

While the analyses of Ronzoni, Dagan, and Dietsch and Rixen differ somewhat, collectively they attempt to provide a normative case for why "unhampered tax competition is problematic from the perspective of both cosmopolitan and internationalist theories of justice." (Cassee 2019: 247). They are also agnostic – or claim to be – on which theoretical approach they employ and argue that their normative positions are tenable by cosmopolitans and non-cosmopolitans alike. Each is more concerned with changing the 'rules of the game' with respect to international taxation in order to avoid undue bias rather than fixing the outcomes of international tax competition with individual policy changes. With regard to the minimum conditions for background justice in term of international taxation, three key points can be made.

First, a key dilemma for the internationalist account of global justice in taxation arises from the need to preserve fiscal self-determination. This is a central element of the non-cosmopolitan approach, and is generally taken to mean having choices regarding two key

aspects of the economy: the size and composition of the public sector, and the distribution of burdens and benefits among individuals within the country. However, in each case discussed above the response to the danger of tax competition undermining the fiscal freedom of (poor) states is to impose some limits on the very same fiscal self-determination. For example, both Ronzoni and Dietsch and Rixen favour establishing some supranational tax authority which would assume some of the responsibilities of national tax bodies. Squaring this circle is at the heart of the internationalists claim to be setting the basis for background justice in taxation. While proposals vary, the key to the process lies in replacing a process of tax competition and 'race to the bottom' governed by the market for sovereignty (in Dagan's case) with some form of collective, negotiated process which involves states voluntarily giving up some degree of fiscal autonomy to supranational agreements or institutions, but without doing so to an unacceptable degree. For internationalists, therefore, the key is to what extent they are willing to give up *de jure* sovereignty to enhance a country's *de facto* economic sovereignty.

This also involves being clear on the criteria used to judge changes in fiscal self-determination. As Cassee (2019) points out, internationalists can defend several different principles for a just distribution of effective fiscal self-determination among states, and it is important to know which is being endorsed. There are three plausible interpretations of Dietsch and Rixen's (2014) position on judging changes to fiscal self-determination. The first is broadly egalitarian, involving "the greatest amount of fiscal self-determination consistent with equal fiscal self-determination for others" (Van Apeldoorn 2018: 487-8). The second, 'baseline', interpretation is more sufficientarian in character, in which each jurisdiction should enjoy a certain minimum level of effective self-determination. By contrast, Cassee (2019) argues that Dietsch and Rixen seem to endorse a different, 'sum-maximizing' view (i.e. we should maximize the total amount of effective fiscal self-determination enjoyed by all states), when arguing that strategically motivated tax policies should be prohibited if they reduce the aggregate extent of fiscal self-determination internationally. These differences of opinion illustrate the point that – surprisingly – none of the internationalist normative theorists is explicit on which distribution principle affords an appropriate level of background justice. This becomes an issue in the next section, because the choice of distribution principle affects whether the recent proposed changes to international tax policy fulfil the conditions for background justice in taxation.

Second, the distinction drawn by Dietsch and Rixen (2014) between virtual and real tax competition is a key development, recognising that any attempt to eliminate virtual tax competition is likely to make the competition for 'real' international investment more intense, as companies switch from profit shifting to switching real capital investment in order to reduce their tax payments. By contrast, Ronzoni and Dagan conflate the issues of virtual and real tax competition, which makes their practical policy suggestions at best incomplete. As we shall see later, this distinction has real consequences in terms of recent proposals to mitigate the problems induced by tax competition.

Third, in any multilateral system the issue of (potential or real) compensation for loss incurred as a result of policy changes has to be addressed. The issue involves deciding who wins and losses from ending tax competition, and who may need to compensate whom. Perhaps the most contentious issue is Dagan's contention that any multilateral regime on taxation is just "if and only if it improves (or at least does not worsen) the welfare of the least well-off constituents in all the cooperating states" (2017: 26). Clearly this goes far beyond the requirements of other internationalists: indeed, it seems to be an almost cosmopolitan claim, being couched in terms of global inequalities between individuals rather than between states. However, in expressing her principle in welfare terms Dagan has to be specific on the criteria used to determine welfare improvement. In welfare terms the 'gold standard' is a Pareto improvement, which occurs if at least one person is made better off and nobody is made worse off. This can lead to undesirable outcomes, and may unduly favour the status quo. Consider a change in social or economic policy which renders many people much better off but marginally reduces the welfare of one person: this would not be welfare enhancing in Pareto terms. In Dagan's case, any change in international tax policy that improved the welfare of the poorest (as she requires) but marginally reduced the welfare of rich people in another country would not be Pareto welfare-enhancing. The deficiencies in the Pareto criterion *inter alia* means that in practice the less demanding Kaldor-Hicks criteria is often used, in which some policy change leading to a re-allocation is an improvement if those that are made better off could, hypothetically, compensate those that are made worse off, while still resulting in a Pareto-improving outcome. In a Kaldor-Hicks world the compensation need not actually take place and therefore, a Kaldor–Hicks improvement may leave at least some people worse off: this allows policy shifts to occur which can improve the lot of the least advantaged at the expense of arbitrarily advantaged others. In the case of tax competition, changes to the multilateral tax regime are unlikely to be Pareto-improving and therefore some form of Kaldor-Hicks criteria would have to be used. In the case outlined above, this raises the prospect of (hypothetical) compensation being due from the poorest people on earth to residents of richer countries in order to fulfil Dagan's demanding principle.

However, the compensation issue is not merely hypothetical. Dietsch and Rixen (2014: 166) raise the prospect of tax havens being paid compensation in order to abandon their internationally harmful taxation policies, implicitly drawing on a Kaldor-Hicks framework. This may be thought reasonable for relatively poor tax havens which genuinely use low corporate tax rates as a way of attracting foreign capital because they could see no other way of jump-starting economic development – but would such a compensation criteria be considered just in the case of wealthy tax havens such as Bermuda or Jersey, where low tax rates are entirely strategic in nature? And who compensates whom? Should residents in tax havens be compensated by residents in poorer nations if some method is found of eliminating tax competition? Without clearly grasping the nettle of compensation criteria – both real and hypothetical – the internationalist analysis remains incomplete.

The next section considers the provisions of a major planned reform in international taxation, and ask whether they will satisfy these three conditions for background justice in taxation.

4. The OECD Global Tax Deal and Global Justice

In 2021 a major reform of the international corporate tax system was agreed by 136 countries representing more than 90% of global GDP, designed specifically to address the issues of profit shifting and tax competition. The provisions of the reform have not yet been implemented, and the details of the planned reform remain under active discussion: but the OECD, which was prominent in devising the changes, has remained confident that the tax changes will be implemented by 2025[4] and will ensure that MNEs subject to its provisions will pay a fair share of tax wherever they operate and generate profits (OECD 2021a), thus limiting the scope of profit shifting and tax competition.

This section considers the provisions of the planned reform, and ask whether they will satisfy the minimum provisions for background justice in taxation specified by the 'internationalist' normative analysis of the previous section.

4.1 The Two-Pillar Solution (TPS)

The proposed new regime originates from the OECD's tax base erosion and profit shifting (BEPS) project, a longstanding programme designed to encourage international cooperation in order to eliminate tax planning strategies by MNEs that exploit gaps in tax rules to artificially shift profits to low- tax (or zero-tax) locations where there is little or no economic activity. In 2015, OECD and G20 members jointly established 'an inclusive framework' designed to allow interested countries and jurisdictions to work on an equal footing with OECD and G20 members to advance the BEPS Project. The first major outcome of the OECD/G20 Inclusive Framework is the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*. As its name suggests, this new global tax deal was designed to deal with the fact that a great deal of international economic activity occurs digitally, and as a result MNEs can generate significant income and profits in foreign markets without those markets having any 'real' economic activity located. This in turn leads to the issues of tax base erosion and tax competition discussed in previous sections. The TPS has two core elements.

Pillar 1 is designed to deal with profit shifting an consequent tax avoidance. It provides governments with new rights to tax MNE *activity* (i.e. sales) in their jurisdiction, whether or not the MNE has any *physical presence* in that country. This is designed to deal with the issue that under current tax rules the profits of a foreign company can generally only be taxed in another country where the foreign company has a physical presence. Practices such

[4] Given the recent activity of the United Nations in the area of global tax rules this seems increasingly optimistic. See conclusions section.

as transfer pricing, especially where intangibles such as patents and brand names are involved, coupled with profit shifting, breaks the link between physical presence and profits which can be taxed in any given location. The rules are detailed and complex, but the key elements are as follows:

- For companies with global revenues of more than €20 billion and profitability above 10 %, 25% of profits above the 10 % threshold ('residual profits') are to be reallocated to the market jurisdictions where the MNE's users and customers are located, according to a new formula. Companies in the extractives and regulated financial services sectors are excluded on the grounds that they typically have operations in the locations in which their income is earned.

- A simplified and streamlined approach to the application of the 'arm's length' principle in transfer pricing. This is designed to help 'low capacity countries', mainly developing countries which find it cumbersome to apply the current transfer-pricing regulations, and would benefit from a simpler and more formulaic approach.

- A binding dispute prevention and resolution system in order to address any risk of double taxation, but with an elective mechanism for some low-capacity countries.

- The removal of existing Digital Services Taxes (DST) and similar relevant measures levied by individual countries, to prevent harmful trade disputes arising from these measures.

Pillar 2 is designed to deal with tax competition and tax havens. There are two key elements:

- A minimum 15% tax on corporate profits, designed to put a floor on tax competition. The minimum rate will apply to any company with an annual revenue of over €750 million. This involves governments agreeing to allow additional taxes on the foreign profits of MNEs headquartered in their jurisdiction, *at least* to the agreed minimum rate (individual jurisdictions can tax at a higher rate if they wish).

- A 'carve-out' (effectively an exemption) allows countries to continue to offer tax incentives to promote "business activity with real substance, like building a hotel or investing in a factory." (OECD 2021b: 15)

As indicated above, 136 of the 140 members of the OECD/G20 Inclusive Framework on BEPS have agreed to the two-pillar solution in principle, including all OECD and G20 countries: only Kenya, Nigeria, Pakistan and Sri Lanka have so far refused to join. At the time of agreement (July 2021) the OECD estimated that under Pillar 1 taxing rights on more than $125 billion of profit would be reallocated to market jurisdictions each year. And under Pillar 2, the global minimum tax rate of 15% would generate around $150 billion in additional global tax revenues per year (OECD 2021b).

4.2 Global Justice Assessment

The internationalist accounts of background global justice in taxation outlined in the previous section are all concerned with fundamentally changing the 'rules of the game' with respect to international taxation rather than fixing the outcomes of international tax competition with individual policy changes. The OECD TPS adopts a similar approach, seeking to achieve internationally agreed changes both in the way in which MNES are taxed and tax revenues allocated, and in the minimum level of corporate tax levied on their activities, rather than simply rectifying the deficiencies of the existing system by imposing additional rules.

The TPS certainly has elements which internationalists would find attractive. Pillar 1 resembles a version of Dietsch and Rixen's (2014) membership principle, in which corporations are liable to pay tax in the state in which economic activity is located and in turn public resources are used by the enterprise. In the TPS case, this is done by allocating tax rights on 'residual profits' to the market jurisdictions in which customers and users are located, preventing the easy profit-shifting through the digital economy that is now so prevalent. It is also compatible with the suggestion by Ronzoni (2009, 2016) of allowing a (limited) degree of fiscal power shift from individual states towards the supranational level. In the case of TPS this involves jurisdictions in which MNEs are headquartered (typically large Western economies) voluntarily ceding some of their rights to tax the profits of these corporations to other jurisdictions in which the MNEs have their final customers (also, as shown below, mainly large Western economies). This would be done using the rules of a system yet to be decided. If implemented fully, it would certainly have the capacity to markedly reduce the amount of 'virtual' tax competition – or rather, it would reduce the amount of virtual profit shifting that gives rise to and is in turn encouraged by the endogenous process of tax competition described in section 2. Finally, the binding dispute resolution process is a step towards Ronzoni's (2009) suggestion of having individual states responsible for collecting taxes, but with the power to sanction malpractice in taxation ceded to an agreed supranational body, albeit well short of the full International Tax Organization proposed by Dietsch and Rixen (2014).

Pillar 2 also represents a major step forward in rectifying the problems arising from tax competition. The intention is to end aggressive tax planning and tax competition: an internationally agreed minimum tax rate (at an appropriate level) will largely achieve this, and is thus favoured by internationalists such as Ronzoni (2014) and Cassee (2019). By having a 'carve-out' that permits tax exemptions for FDI that has real economic benefit, Pillar 2 also acknowledges two key elements of the Dietsch and Rixen (2014) approach. First, both virtual and real tax competition (i.e. 'poaching' and 'luring') have to be jointly considered in any system designed to promote global justice: the proposals recognise that any attempt to eliminate virtual tax competition is likely to make the competition for 'real' international investment more intense, as companies switch from profit shifting to

switching real capital investment in order to reduce their tax liability. Second, the TPS has a version of Dietsch and Rixen's 'intentions-based' test (via the carve-out), needed to prevent any tax realignment imposing excessive curbs on the fiscal autonomy of any individual jurisdiction. The OECD is acutely aware of the possible effects of a minimum tax rate on reducing levels of real international investment, and has carefully modelled the likely effects of Pillar 2 and the carve-out to ensure that it is unlikely to excessively diminish global flows of economically valuable foreign direct investment (UNCTAD 2022, chapter 3).

In principle, therefore, the TPS appears to show great promise in (internationalist) global justice terms: it is consistent both with the membership principle and other crucial aspects of Dietsch and Rixen's analysis, and with Ronzoni's (2009, 2016) criteria of regulating sufficiently to mitigate the worst effects of tax competition while not interfering unduly with states' capacity to enjoy fiscal self-determination. In practice, however there may be concerns about the effects of TPS in terms of global justice. Recall that, for internationalists, international tax competition is problematic for two reasons: first, it can give rise to a level of inequality between states that is incompatible with fair international relations (Cassee 2019: 243); and second, it has the capacity to undermine the effective fiscal self-determination of states. Two key questions remain, therefore. First, is the redistributive scope of the TPS sufficiently great to have a major effect in correcting the perceived inequality arising from tax competition? And second, in practice what does it mean in terms of fiscal self-determination (and hence background justice), especially of poor countries?

Pillar 1 is restricted to MNEs with global revenues of more than €20 billion, and then only applies to a quarter of profits above a threshold of 10% profitability. This means that only about 100 of the largest MNEs are in scope, and that most MNEs therefore avoid its provision (OECD 2021b). The OECD argues that expanding the scope of Pillar 1 to include more companies would increase complexity without significantly increasing the amount of re-allocated profits (OECD 2021b: 18), although there is provision to expand the scope after seven years, by reducing the turnover threshold to €10 billion. Nevertheless, there are concerns that the Pillar 1 proposals disproportionately favour high-income countries. Out of a total of $125 billion of profit which OECD expects to be reallocated to market jurisdictions each year, only $140 million and $8 billion in annual revenue is expected to accrue to low-income and middle-income countries respectively (Oxfam 2021), because relatively little of the sales of the largest 100 global MNEs occurs in poorer economies. This is equivalent to just 0.03% of the respective GDP of these countries, suggesting that Pillar 1 is falls short of the fundamental structural reform promised, and for small developing nations may not even be worth the implementation costs (Global Financial Integrity 2022). OECD counters this conclusion, arguing that while high-income countries will indeed benefit from most of the revenue gains as a result of Pillar 1 in absolute terms, these gains would be expected to be larger as a share of current corporate income tax revenues for low- and middle-income countries. Thus in (one account of) relative terms, low-and middle-income countries are the main beneficiaries (OECD 2021b). However, this still raises the issue of the gap in global tax

revenues between rich and poor countries growing in *absolute* terms as a result of Pillar 1. Some African countries, notably Nigeria, have also expressed particular concern that MNEs in the extractive industries, including oil, are excluded from the provisions of Pillar 1, because mining and oil MNEs have a major presence in Africa. Coupled with the fact that financial services are excluded from the provisions of TPS, even though the membership principle is being applied it seems that the redistributive effect of TPS as currently envisaged is likely to be modest

The second issue is fiscal self-determination. Some developing countries have also questioned whether the TPS requires them to give up important existing areas of tax sovereignty. The first area is the requirement of Pillar 1 to remove all existing digital services taxes (DSTs). These are measures introduced by individual governments to deter profit shifting by taxing the digital services provided by companies lacking any physical presence in that country. Pillar 1 is designed to replace these ad hoc measures with an international framework, and to prevent harmful trade disputes arising from the continuance of these measures: this could happen where MNEs complain of being subject to double taxation (i.e. Pillar 1 plus a DST). However, DSTs typically apply to all MNEs operating in a country, whereas Pillar 1 applies only to c100 in-scope MNEs. For example, Kenya's current DST covers 89 companies but only eleven companies in Kenya would fall within the scope of Pillar 1, which was a key reason for Kenya rejecting being part of the TPS[5]: Kenya would be giving up both guaranteed tax revenue and a key area of self-determination in taxation for the promise of greater tax revenue in the future.

The other sovereignty concern arises from the mandatory and binding dispute prevention and resolution mechanism. This is designed to give MNEs tax certainty, that is assurance that they will not be subject to double taxation. However, some countries – notably Kenya and Nigeria – are unhappy at having a system in which taxing countries lose certain aspects of their sovereignty by having tax issues resolved in the home countries of the major MNEs, feeling that the dispute resolution process does not take the requirements of African and low-income countries sufficiently into account. The TPS does have provision for an alternative, elective binding dispute process which the OECD argues "will help ensure that countries which have no or only very small numbers of disputes do not get tied up in mandatory dispute resolution processes" (OECD 2021: 19). This is principally aimed at developing countries, but its provisions have not yet convinced some African countries of their concerns over sovereignty. For example, because Nigeria has concerns about Pillar 1, it has felt unable to sign up to the whole package despite its support for Pillar 2: this is because TPS requires that Pillars 1 and 2 must be taken together (Global Financial Integrity 2022).

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[5] https://financialpost.com/pmn/business-pmn/kenya-spurns-global-tax-deal-saying-numbers-need-interrogation

However, before concluding on the issue of fiscal self-determination, we must be clear on which criteria are being used. Does the TPS helps fulfil any of the three possible principles advocated by internationalists for a just distribution of effective fiscal self-determination among states: egalitarian, sufficientarian (i.e. baseline), and sum-maximizing? Recall first that the key internationalist issue of fiscal self-determination involves the extent to which a government has the ability to affect two key aspects of the economy: the size and composition of the public sector, and the distribution of burdens and benefits among individuals within the country (see section 3). Both aspects of fiscal self-determination are positively correlated with GDP: richer countries tend to have more fiscal self-determination. This is because the size of the available public sector depends on tax revenue as a share of GDP: states with a larger range of options on which tax-revenue/GDP ratios to select from have greater fiscal self-determination (Van Apeldoorn 2018). There is a positive correlation between per capita GDP and the tax revenue to GDP ratio (Besley and Persson 2014: 102): on average, this ratio is 13% for low-income countries and 35% for high income countries (Moore 2013), giving richer countries greater options on the size of their public sector while poor countries are typically restricted to smaller government sectors. In seeking a just distribution of effective fiscal self-determination, it follows that any tax revenue gains arising from curbing tax competition should predominantly accrue to low-income countries: this would have a redistributive effect which would increase the fiscal self-determination of the poorest countries and so increase international background justice (van Apeldoorn 2018: 492), while being consistent with the membership principle.

However, the evidence presented above suggests that TPS as envisaged will fulfil none of criteria for increasing international background justice. The egalitarian criterion involves raising the fiscal self-determination of low-income countries in order to bring them to the level of high-income countries. As indicated above, in absolute terms, TPS tax gains are likely to be fairly modest and will accrue mainly to rich countries: this is unlikely to produce equality in fiscal self-determination, and may actually make it less equal. The baseline criterion means increasing the number of countries that reach the minimum acceptable level of self-determination, again involving principally helping low-income (hence low self-determination) countries reach the baseline. This crucially depends on how low the baseline is set: conceivably the (modest) increase in tax revenues envisaged for the poorest countries might increase their tax-revenue/GDP ratios enough to exceed some minimum. But this would require an extremely low baseline, especially as some poorer countries are concerned that the loss of DSTs and the planned dispute resolution procedure involves their *giving up* some tax sovereignty. Even on the 'sum-maximizing' approach to background justice (i.e. maximize the total amount of effective fiscal self-determination enjoyed by all states), the requirement would seem to be prioritising the self-determination of the poorest countries – which means a clear and substantial redistributive effect from curbing tax competition and profit shifting that TPS seems ill-equipped to deliver.

The conclusion therefore is that TPS will not markedly increase the fiscal self-determination of the poorest countries. Coupled with its relatively modest redistributive effects, this suggests that TPS is unlikely to markedly improve global justice, given that assuring fiscal self-determination and correcting the perceived inequality arising from tax competition are the key planks of the internationalist approach. Note, however, this is largely a result of the precise *implementation* of Pillar 1, not of its *principles*, which, as argued above, do accord closely with core elements of the internationalist normative approach. If Pillar 1 were done differently – for example, by having more MNEs in scope, or allowing at least some national DSTs, or having a lower minimum tax rate – the outcome in terms of global justice could be different. The OECD recognises some of these concerns, pointing out that the threshold at which developing countries would see an allocation under Pillar 1 from an in-scope MNE is set at a low level (€1 million, reduced to €250 000 for the smallest countries) so as to maximise the number of countries that will see revenue benefits, and that 'low-capacity' countries benefit from certain exemptions in the TPS. Nevertheless, as things stand at least some developing countries clearly feel they are being asked to give up some of their real tax self-determination today for the promise of possibly increased tax revenues and fiscal self-determination tomorrow: and not all of them are convinced by the trade-off.

The final consideration of background justice highlighted in section 3 is whether TPS satisfies Dagan's condition that any multilateral regime on taxation is just "if and only if it improves (or at least does not worsen) the welfare of the least well-off constituents in all the cooperating states" (2017: 26). This is a demanding condition because it seemingly requires not only that the poorest *countries* do no worse because of TPS, but that the poorest *individuals* in every country in the agreement are made no worse off. However, Dagan subsequently makes the claim less demanding by saying that justice merely demands that the " the multilateral regime must set terms that ensure the welfare of the weakest segments in poor countries that might otherwise be harmed by this cooperation." (2017: 30).

Being clear on the criteria used to determine welfare improvement is crucial here. It seems unlikely that any international policy that respects the domestic policy self-determination of states could ever guarantee Dagan's principle, which is understood in individual citizen terms. Certainly, Pareto improvement is unlikely: as a minimum, residents of tax havens and stockholders of profit-shifting MNEs are likely to be disadvantaged by TPS. Since they receive arbitrary advantage from the existing system, we may not cavil at this outcome in terms of global justice: but we then have to abandon the Pareto criterion.

However, on the Kaldor-Hicks criterion reductions in the welfare of such relatively wealthy individuals would be permissible if their loss could, hypothetically, be compensated by those that are made better off. This raises the much larger and thorny issue of who compensates whom for any detrimental effects of TPS. The 'poorest' people in wealthy tax havens such as Bermuda or Jersey are likely to be high-income in absolute terms: should we be

concerned to ensure that such individuals are made no worse off, as Dagan's (initial) principle requires? In Kaldor-Hicks terms, as long as the compensation is merely hypothetical this may not matter: but the issue may not merely be hypothetical. For example, in a small tax haven such as Jersey in which 90% of government revenue comes from the financial sector, if it loses its tax haven status (e.g. as a result of TPS), "those outside its financial sector are at risk of having to pick up the social losses after not having participated in the private gains" (Dietsch 2015: 212), and would appear to have an ethical claim to compensation.

But why should compensation only be considered for the *post-change* international tax regime? What about compensation for the decades of injustice caused by tax competition which was 'forced' on low-income countries before the planned OECD reforms? Poor countries would surely have reasons to feel that considerations of justice in the transitional period should not allow rich countries to get off the hook for the effects of a lengthy period of global injustice before reform, and which disproportionately affected poor people. Dietsch (2015: 214) briefly addresses this by suggesting that any unitary tax system such as his favoured UT+FA system (see previous section) could be adjusted so that its distributive effect is weighted not by sales, which tends to favour high-consumption, rich countries, and more on payroll and employment, which typically leans towards low-income countries. This could certainly be done within the structure of Pillar 1, by appropriately deciding how MNE 'activity' is defined and adjusting it accordingly towards employment rather than sales. This would mean more of the redistributed tax revenues going to low-income countries. Whether this would provide appropriate compensation for past injustice is uncertain; however, it would certainly make this aspect of TPS more attractive the countries such as Nigeria which are concerned about Pillar 1's fiscal sovereignty implications, and make it more likely that TPS could help provide international background justice in the future by improving the fiscal self-determination of low-income countries.

5. Conclusions

Profit shifting and tax competition have the capacity to give rise to a form of global injustice. For cosmopolitans this concern takes the form of exacerbating global inequalities between individuals. Non-cosmopolitans are principally concerned about the capacity for tax competition to undermine the capacities of the state, which they regard as the principal justice-providing institution. Profit shifting and tax competition can exacerbate global injustice on both counts.

In order to satisfy the internationalist approach to background justice in international taxation, any tax regime needs to fulfil a number of criteria. First, it must eliminate or markedly reduce both the incidence of tax competition and its detrimental effects, without unduly compromising fiscal autonomy, especially that of low-income countries. Second, it must recognise and deal with the difference between real and virtual tax competition. Finally (as per Dagan) it should improve (or at least not worsen) the welfare of the least

well-off constituents in all the cooperating states. This also requires that we be clear on what form of criteria and compensation mechanism would have to be used to ensure this.

The analysis above suggests that the TPS is an imperfect response to the issue of global justice in international taxation, but a potentially useful one. Pillar 1 implicitly adopts a version of Dietsch and Rixen's 'membership principle' as well as aspects of their 'intentions-based' test, recognising the links between virtual and real tax competition. Pillar 2 has the capacity to markedly reduce tax competition. However, TPS lacks the massively redistributive effect in terms of tax revenues to eliminate or markedly rectify the global injustice arising from profit shifting and tax competition. As discussed above, the amounts involved are too small and their distribution too restricted to either correct imbalances in the effective fiscal self-determination of signatory states, or rectify a level of inequality in income that is incompatible with fair relations between states. Nevertheless, by having an underlying set of principles in place that accord with much of the internationalist normative approach, TPS is an important step forward in consciously acknowledging and rectifying the detrimental effects of tax competition, and one which could, if pushed further in the future, represent a real step forward in terms of global justice.

This would require much greater scope in terms of redistribution of global tax revenues, for example by including financial services, and/or extending markedly the proportion of MNE profits that would be subject to the 'residual profits' criterion of Pillar 1. This would be necessary both to help reduce the level of inequality between states that internationalist principles demand, but also to convince poorer countries that giving up some aspects of their fiscal sovereignty (such as ending local digital services taxes) is worthwhile in terms of anticipated redistributive gains.

As indicated earlier, Dagan's welfare condition is individual-based, and so unlikely to be fulfilled by any international policy that respects domestic fiscal policy self-determination. This leaves compensation as the great unresolved issue. While the The Kaldor-Hicks criterion provides a mechanism for *hypothetical* compensation in welfare terms, expecting TPS to incorporate *actual* compensation is another matter, especially where it involves compensation for previous injustice accrued pre-reform. This is simply beyond the scope of the TPS as an international tax regime, and would involve some other kind of substantial fiscal transfer from rich to poor countries agreed internationally. In the absence of this first-best solution, perhaps the most promising way of dealing with previous decades of injustice might be to widen the scope of Pillar 2's carve-out, to permit the poorest countries to engage in tax-related measures to attract FDI in ways denied to richer signatories to TPS. This would be an ad-hoc, second-best solution in welfare terms, but a realistic one for the TPS to deliver.

Like its predecessors, the TPS is not designed specifically to correct global injustice. In some ways it is therefore surprising how well the TPS has the potential to perform in this respect. Many of the provisions of TPS match the internationalist criteria for global background

justice, such as a version of the membership principle, an international minimum tax rate, and an agreed dispute resolution mechanism. If the TPS 'fails' in global justice terms it will not be because of its principles, but because of the way it is implemented, and the fact that many of its redistributive features have been watered down during the process of negotiation between 140 different nations. For example, some critics argue that is the minimum tax rate is set too low to be truly effective in preventing tax competition and profit shifting (Global Financial Integrity 2022), and (as discussed in section 4) some developing countries are concerned about the implications of the TPS for their tax sovereignty. Perhaps the major failing of the current global tax system, however, lies in not having clear compensation criteria between gainers and losers from profit shifting and tax competition, or even acknowledging that this is an issue. Arguably this is beyond the scope of any single initiative, even one as far reaching as TPS. Ultimately, however, if tax competition is to be not merely eliminated but its global justice effects mitigated, this nettle will have to be grasped.

While the TPS is the most advanced manifestation of the process of international policy development, it is not the most recent. There is a new, and potentially highly significant, player on the scene. In 2023 The United Nations began the process of establishing a framework convention on international tax cooperation, which, if implemented, would see a shift of the decision-making agenda on global tax rules from the OECD to the UN. While a clear majority of UN member countries voted in favour of the draft terms of reference for the framework convention, it continues to be opposed by some major Western economies, including the United States, United Kingdom, Japan, Australia and Canada[6]. Nevertheless, this is a potentially significant shift of regulatory focus away from the OECD, often seen as a club of rich countries, to the UN. A second vote in favour of the convention in August 2024 means that all 193 UN Member States could vote on a finalised UN global tax treaty in 2027 or 2028. What the precise terms would be of any finalised framework, and how it relates to the OECD's proposed TPS, remains to be seen. At present, the objectives and principles of the convention are worthy but vague[7]. However, the fact that the UN framework is being driven by the Global South rather than by the world's richest nations suggests it may have the potential for addressing the issues of global inequality induced by profit shifting and tax competition.

[6] Why the world needs a UN global tax convention | UN News.
Between the votes of November 2023 and August 2024 EU countries moved from voting against the framework convention to abstaining.
[7] https://financing.desa.un.org/sites/default/files/2024-08/Chair%27s%20proposal%20draft%20ToR_L.4_15%20Aug%202024_____.pdf?_gl=1*gj3abq*_ga*MTIzNDk0NzY3Ni4xNzI1NTM3Njkz*_ga_TK9BQL5X7Z*MTcyNTYzOTkwNS40LjAuMTcyNTYzOTkwNS4wLjAuMA..*_ga_S5EKZKSB78*MTcyNTYzOTkwNS4zLjAuMTcyNTYzOTkwOS41Ni4wLjA.

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