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Taxation in Times of Austerity: A Question of Political Economy

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Abstract: Even though fiscal sovereignty still counts as a fundamental principle of government, global and regional economic integration as well as increasing levels of sovereign debt severely limit governments' tax policy choices. In particular the redistributive function of taxation has suffered in the pursuit of economic competitiveness. As inequality rises and attention is directed again at taxation as a means for redistribution, international cooperation appears as an avenue to enable redistribution through taxation. Yet, one of the predominant international institutions dealing with tax matters – the OECD – with its focus on economic growth and competitiveness and resulting tax policy advice prevents rather than promotes national and international debates on taxation as a question of social justice. The paper argues that questions of taxation need to be perceived as questions of social justice and thus as questions of politics, and not merely of economics. Only if taxation is not considered a mere economic instrument can a 'political economy' be maintained. The paper addresses the three objectives of taxation – revenue generation, redistribution and regulation -- and how they are affected as governments aim for fiscal consolidation to conclude that governments' power to freely pursue and calibrate these objectives has come to appear rather as a myth than the core of sovereignty. It then demonstrates how the OECD's tax policy advice and cooperation in tax matters react to the constraints on governmental taxation powers; how they aim at economic growth and competitiveness to the detriment of (other) ideas of social justice. The paper concludes with a call for (re)integrating social and global justice concerns into debates on taxation.

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A. Introduction: taxation in times of austerity

Taxation – as the main source of public revenue in market economies – plays (next to expenditure cuts) a crucial role in the reduction of sovereign debt.¹ The revenue raising function of taxation is, however, only the most obvious link between taxation and sovereign debt. The two other functions of taxation – namely redistribution and regulation² – are also affected by rising amounts of sovereign debt and, more specifically, the accompanying austerity programmes and economic reforms. In the modern welfare state, taxation has long served as an instrument of redistribution to address different degrees of societal inequality arising in capitalist economies. With the progression of global economic integration after ‘embedded liberalism’³, we have come to believe that this redistributive function had lost its centrality. Yet, recently, redistribution has resurfaced as a central focus in taxation debates due to new and persistent concerns over social inequality⁴ and its destabilising effects. Such concerns are often voiced today in the context of debates on (global) justice and ethics, at the centre of which we find widespread discontent given that the main burden of fiscal consolidation and public crisis management appears to be falling on middle- and low-income groups.⁵

The final objective of taxation is the steering of behaviour through corrective or regulatory taxation. The reason why regulatory taxation figures prominently in current discourses on fiscal consolidation and taxation is that it can be presented as a win–win option from an economic point of view: the right type of regulatory taxation, it is argued, can stimulate economic growth while raising

¹ See e.g. *Memorandum of Economic and Financial Policies*, attached to Greece’s Letter of Intent to the IMF of 21 December 2012, www.imf.org/external/country/grc/index.htm?type=9998#23, at 17; *Memorandum of Economic and Financial Policies*, attached to Ireland’s Letter of Intent to the IMF of 29 November 2012, www.imf.org/external/country/irl/index.htm?type=9998#23, at 6.

² See R.S. Avi-Yonah, ‘The Three Goals of Taxation’, *N.Y.U. Tax Law Review* 60:2 (2006), 1.

³ J.G. Ruggie, ‘International Regimes, Transactions, and Change’, *International Organization* 36:2 (1982), 379.

⁴ P. Olinto and J. Saavedra, The World Bank, *Inequality in Focus* 1:1 (2012) (explaining how despite falling international income inequality, global income inequality has remained relatively stable since the 1980s).

⁵ On the economic effects of inequality in the United States and calling for increased progressivity in taxation: U. Dadush, K. Derviş, S. Puritz Milsom and B. Stancil, *Inequality in America*. (Washington, DC: Brookings Institution Press, 2012); J. Stiglitz, *The Price of Inequality* (New York, NY: Norton, 2012); On inequality in the G20 and recommending progressive taxation: R. Gower, C. Pearce and K. Raworth, ‘Left Behind the G20?’, 157 *Oxfam Briefing Paper*, 19 January 2012, www.oxfam.org.

public revenue and steering behaviour in desirable directions.⁶ Yet, the use of taxation to set incentives for businesses also raises concerns, namely when it affects the competition between jurisdictions to attract economic activities. This phenomenon is usually denoted as ‘harmful tax competition.’⁷

Whereas most tax systems attempt to integrate all three objectives – revenue generation, redistribution and regulation – these objectives frequently conflict. Taxes aimed at increasing competitiveness and productivity, for example, may clash with the redistributive aim of taxation. To calibrate the objectives of taxation is a function of governments which still regard taxation as one of the last vestiges of national sovereignty.⁸ Yet, governments are cognisant of the limitations concerning their tax policy choices and tax collection capacity that result from regional and global economic integration. In particular, with the liberalisation of capital flows, the promise of embedded liberalism, as formulated by John Ruggie,⁹ has come under pressure. Ruggie interpreted the international economic system that had emerged from the Bretton Woods Conference as aiming for global economic integration while maintaining the freedom and capacity of states to intervene domestically in the distribution of the costs and benefits of the capitalist economy.¹⁰ In recent decades this freedom has been shrinking, the area of taxation being one where governments’ power to intervene in order to address the social costs of economic globalisation and to realise a society’s own vision of social justice appears restricted by the threat of loss of competitiveness in the global economy.¹¹ One reaction to the diminishing ‘policy space’ of governments takes the form of restrictions on transnational economic activity to restore domestic policy space, another is the turn to international institutions and intergovernmental cooperation in order to integrate or balance economic integration with other societal concerns at the international level.¹²

⁶ See section C.I.2. below; on regulatory taxes, see R.S. Avi-Yonah, ‘Carbon Tax, Health Care Tax, Bank Tax and other Regulatory Taxes’, *Public Law and Legal Theory Research Paper Series*, Paper No. 281 (Ann Arbor: University of Michigan Law School, July 2012).

⁷ OECD, *Harmful Tax Competition* (Paris: OECD, 1998); see section C.II.2. below.

⁸ See section B.IV. below.

⁹ See, *supra*, note 3.

¹⁰ *Ibid.*

¹¹ R.S. Avi-Yonah, ‘Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State’, *Harvard Law Review* 113 (2000) 1573.

¹² Cf. D. Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997).

In the realm of taxation the Organisation for Economic Co-operation and Development (OECD) appears to be the most important international institution to tackle the effects of globalization: first through the generation of policy advice and, second, through intergovernmental cooperation on tax matters. Yet, in neither of these two fields of activity the organisation has served to save the idea of embedded liberalism. From the policy advice given by the OECD Secretariat on tax matters, it is clear that the organisation has fully embraced the rationality of global economic integration. In the OECD debates among government representatives on international cooperation in the face of increasing competition between different tax systems, concerns about policy space for the pursuit of societal ideas of (redistributive) justice figure more prominently than in the policy papers of the OECD Secretariat. Here too, however, the dominant language is economic: cooperation aims to ensure 'good competition' and combat 'bad (or harmful) competition'. These debates largely sideline the question of how ideas of social justice may be realised through political action at the national level – in this case taxation. Moreover, they hardly address questions of global justice that are equally implicated in the developments that the OECD denotes as harmful tax competition, including the question of how to react to the observation that tax evasion and avoidance hit developing countries much harder than developed countries.¹³

This chapter puts forward the argument that questions of social and global justice are being excluded from the policy advice given by the OECD on taxation as well as from the international cooperation against harmful tax competition as conducted within the framework of the OECD. It calls for acknowledging that decisions about tax policy are expressive of ideas about justice and – more specifically – the distribution of the costs and benefits of economic activity within society and across societies. Consequently, debates and policy advice on taxation cannot or should not attempt to neatly separate questions of economic efficiency and competitiveness from social concerns (as the OECD proposes it should). Only if questions of taxation are perceived as questions of social justice and thus as questions of politics, and not merely of

¹³ A. Rosenzweig, 'Why Are There Tax Havens', *Legal Studies Research Paper Series*, No 10-11-03 (St Louis, Washington University Law School, 2010); R.S. Avi-Yonah, 'The OECD Harmful Tax Competition Report', *Public Law and Legal Theory Working Paper Series*, Paper No. 115 (Ann Arbor: University of Michigan Law School, August 2008).

economics, can we hope to maintain a ‘political economy’.¹⁴ Motivated by the conviction that debates about global market governance are (and should be) increasingly overlapping with debates on global justice, constitutionalism and global ethics, this article takes a step back from the questions addressed in most of the other chapters in this volume. Instead of addressing specific procedural or substantive norms and their effect on the relationship between sovereign debt and taxation it attempts to problematise the role that international economic institutions, in particular the OECD, are playing in keeping these two interconnected debates artificially apart.

Before I turn to the OECD, section B addresses in more detail how the three objectives of taxation – revenue generation, redistribution and regulation – are affected as governments aim for fiscal consolidation and how government’s power to freely pursue and calibrate these objectives has come to appear rather as a myth than the core of sovereignty. Section C demonstrates how the OECD’s tax policy advice and cooperation in tax matters react to the constraints on governmental taxation powers; how they aim at economic growth and competitiveness to the detriment of (other) ideas of social justice. The paper concludes in section D with a call for (re)integrating social and global justice concerns into debates on taxation.

B. Government objectives of taxation and the myth of fiscal sovereignty

Taxation not only serves to generate revenue, it is also an instrument used in the welfare state to redistribute and to steer the behaviour of economic actors. In times of austerity, the focus is on taxation as much as a means to reduce government debt as it is on taxation as a way to distribute the burdens of fiscal consolidation, and as a potentially cost-efficient way to regulate. Yet, while governments cling to the power of taxation as a core power of government, fiscal sovereignty in times of regional and global economic integration appears increasingly to be a myth.

¹⁴ Cf. A.O. Hirschman, ‘Exit and Voice’ in Id., *Essays in Trespassing* (Cambridge University Press, 1981), 236, at 239 (‘political action or action in the public interest, is liable to escape the fetters of the benefit-cost calculus ...[and is] fundamental for a genuine “political economy”’).

I. Revenue generation

In market economies, governments rely on three main sources for government revenue: charges, taxes and debt instruments, such as government bonds.¹⁵ When governments aim at fiscal consolidation, tax revenue is essential to reduce budget deficits and public debt. Consolidation may follow the recognition that further borrowing to finance the deficit destabilises the economy.¹⁶ It, may, however, also be required by law. Budget rules, such as the so-called debt brake included in the German constitution (the Basic Law) in 2011¹⁷ and now mandated by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union,¹⁸ place legal limits on public debt and thus force governments to turn to other sources of revenue. Governments that receive financial assistance from the International Monetary Fund (IMF) may need to increase revenue generation from taxation as part of the conditionality attached to such assistance.¹⁹ Charges, as an alternative source of revenue are, by contrast, of limited value. Whereas they may pay for the provision of public services, for example public education, they cannot serve directly to reduce the debt burden and, moreover, cannot finance social transfers, such as housing or health benefits.²⁰ Thus, governments rely on revenue from taxation for reducing their debt burden and – unless the concept of the welfare state is abandoned – for offering social services to those in need.

Some of the causes of sovereign debt, however, limit the potential of taxation to reduce public deficits and debt. An aging population leads to increased public expenditure on pensions and health services while reducing revenue from income taxes; economic recessions may necessitate greater public expenditures in order to sustain social safety nets and at the same time negatively affect tax revenue. Consequently, debates on fiscal consolidation

¹⁵ R.A. Musgrave and P.B. Musgrave, *Public Finance in Theory and Practice*, 4th edn (New York, NY: McGraw-Hill, 1984), 219, 220.

¹⁶ On the relationship between sovereign debt and financial crisis, see C.M. Reinhart and K.S. Rogoff, *This Time is Different* (Princeton, NJ: Princeton University Press, 2009), 49 *et seq.*

¹⁷ The German Federation's budget rule is included in Article 115 of the Basic Law.

¹⁸ Article 3:2 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the respective norms shall be 'preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes').

¹⁹ See *supra* note 1.

²⁰ On governments' obligations under international human rights law to provide such benefits, see Markus Krajewski, 'Human rights and austerity programmes', Ch. 19, in this volume at [___].

focus as much on the reduction of expenditures as on the increase of government revenue through taxation.²¹ Economic recessions raise a further dilemma as tax cuts are among the measures governments should consider to stimulate demand in times of economic downturn. Stimuli other than tax cuts include increases in government spending (another fiscal measure straining the public budget), and the lowering of interest rates as a monetary measure.²² For governments concerned with fiscal consolidation the choice might well fall on monetary policy to stimulate the economy. Yet, this option can be limited by independent central banks' mandates to control inflation. Moreover, loose monetary policy may increase private indebtedness (shifting the debt burden from the government to the population) and social inequality.²³ Finally, the observation that protracted periods of fiscal austerity decrease the social acceptance of taxation calls into question whether debt can successfully be paid off with tax revenue.²⁴

II. *Redistribution*

In the modern welfare states, taxes have always been aimed at redistribution. Apart from revenue generation for the provision of public goods and to cover the costs of war, governments collected taxes to address the increasing inequalities emerging from industrialisation. When income taxes were introduced on a comprehensive basis the redistributive objective was maintained and realised mainly through progressivity.²⁵ The guiding principle for taxation has long been the 'ability to pay principle' which aims at horizontal equity (persons with equal

²¹ One way suggested to increase revenue without increasing taxes is the reduction of tax expenditures; see *Memorandum of Economic and Financial Policies*, attached to Ireland's Letter of Intent to the IMF of 29 November 2012, www.imf.org/external/country/irl/index.htm?type=9998#23, p. 6 (announcing the tightening of income tax allowances).

²² M. Horton, A. El-Ganainy. Fiscal Policy, *Finance and Development* (Washington, DC: IMF), www.imf.org/external/pubs/ft/fandd/basics/fiscpol.htm (last visited 2/11/2013).

²³ J.-P. Fitoussi and F. Saraceno, 'How Deep Is a Crisis?' *OFCE Document de Travail*, No 2009–31 (Paris: Center for Economic Research, November 2009).

²⁴ W. Streeck and D. Mertens, 'Politik im Defizit', *Der moderne Staat* 3:1 (2010), 7.

²⁵ For a history of ideas and political economy perspective on the development of European and the US tax systems, see S. Steinmo, 'The Evolution of Policy Ideas', *British Journal of Politics and International Relations* 5:2 (2003), 206.

incomes should pay equal taxes) and vertical equity (persons with higher incomes should pay higher taxes).²⁶

While, until the 1970s, assessment of tax policy was predominantly conducted on the basis of equity considerations a shift occurred in the 1970s and 1980s when tax policy was increasingly tested for its efficiency. Efficiency analysis led both to a questioning of the effectiveness of income taxes as means for distribution (as income tax progressivity may pose a disincentive to work) and of the desirability of redistribution.²⁷ This change in assessment of tax policy went hand in hand with the increasing mobility of capital. As a result investors can easily move capital to other jurisdictions in order to minimise the tax incurred on capital income.

As a result many tax systems were changed by cutting income tax rates whilst broadening the tax base, by reducing the progressivity of income taxation and through the adoption of general consumption taxes,²⁸ which tend to be regressive as the poorer segments of the population spend a higher proportion of their income on consumption than the wealthier ones do.²⁹ While the shares of corporate and personal income taxes of the overall tax revenue appear to have remained relatively stable, tax scholars have shown that the tax burden has shifted away from capital to (less mobile) labour.³⁰

That tax progressivity has waned and the tax burden been shifted onto labour is partly responsible for the growing inequality in many societies. While poverty has been decreasing overall, the income gap (after tax and benefits) between the small segments of society that are extremely rich and the rest of the population has been expanding in many countries.³¹ The gap between the extremely wealthy and the rest of society is not only criticised from the

²⁶ *Ibid.*, 209 et seq. On the two main approaches to tax equity, the 'benefit principle' and the 'ability to pay principle', see R.A. Musgrave and P.B. Musgrave, *supra* note 15, 227 et seq.

²⁷ S. Steinmo, *supra* note 25, 217–220; on the shift from equity to efficiency analysis by tax theorists, see also B. I. Bittker, 'Equity, Efficiency and Income Tax Theory', *San Diego Law Review* 16:4 (1979), 735; generally on the disappearance of redistribution as a concern from economic theory with the method of marginalism: H. Hovenkamp, 'Coase, Institutionalism, and the Origins of Law and Economics', *Indiana Law Journal* 86 (2011), 499.

²⁸ On these convergences in tax systems, see R.S. Avi-Yonah, *supra* note 11; OECD, *Tax Policy Reform and Economic Growth* (Paris: OECD, 2010), 25 et seq.

²⁹ OECD, *ibid.*, at 51; F. Bastagli, D. Coady and S. Gupta, 'Income Inequality and Fiscal Policy', *IMF Staff Discussion Note*, 27 September 2012, SDN/12/08 (revised), at 12.

³⁰ R.S. Avi-Yonah, *supra* note 11, 1618–1622 (with further references).

³¹ F. Bastagli, D. Coady and S. Gupta, *supra* note 29; R. Gower, C. Pearce and K. Raworth, *supra* note 5.

standpoint of social justice; increasingly researchers are pointing out the detrimental effects of inequality on well-being.³² Economists have come to the conclusion that inequality may in fact be destabilising and endanger economic growth.³³ This research is of particular relevance in a context of austerity, as the financial and debt crises pose the danger of increasing inequality even further. Poor countries at the periphery of the global economy have suffered disproportionately more than wealthy countries, and within the wealthier societies it is the poor and middle-income segments that bear the brunt of the burden of government bail-outs and austerity programmes.³⁴

As a consequence, the theme of inequality forcefully reemerges in debates on tax policy³⁵ and has prompted the following proposals by intellectuals, politicians and civil society organisations: First costs to public finances associated with the financial industry shall be internalized, e.g. through financial transaction taxes.³⁶ Secondly, inequality shall be addressed through redistributive taxes on wealth and high incomes.³⁷ Thirdly, tax evasion and tax avoidance shall be tackled more forcefully. The latter is also considered an equality issue since the opportunities for tax evasion and avoidance grow with income.³⁸

³² See e.g. R. Wilkinson and K. Pickett, *The Spirit Level* (London: Allen Lane, 2009).

³³ U. Dadush, K. Derviş, S. Puritz Milsom and B. Stancil, *supra* note 5; J. Stiglitz, *supra* note 5; F. Bastagli, D. Coady and S. Gupta, *supra* note 29.

³⁴ J. Stiglitz et al., *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System* (New York: United Nations, 21 September 2009), 12, 13. K. Pistor, 'Towards a Legal Theory of Law and Finance', *Columbia Law and Economics Working Paper No. 434* (New York: Columbia University School of Law, 18 November 2012) (arguing that finance is a hierarchical system implying that actors at the periphery will be hit harder by financial crisis than those at the core).

³⁵ See e.g. the French government's introduction of a marginal income tax rate of 75% on personal income over €1 million (*Financial Times*, 'France Unveils Tough Budget Measures' (21 September 2009)) or the debates in Germany on the introduction of a wealth tax (*The Economist*, 'A German Wealth Tax' (8 September 2012)).

³⁶ See European Commission, Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM(2011) 594 final (Brussels, 28 September 2011); United Nations, Department of Economic and Social Affairs, *World Economic and Social Survey 2012. In Search of New Development Finance*, E/2012/50/Rev. 1 (New York: United Nations, 2012), 45 *et seq.*; IMF, *A Fair and Substantial Contribution by the Financial Sector* (Washington, DC: IMF, June 2010), 16 *et seq.* (assessing proposals for the introduction of a financial transaction tax).

³⁷ V. Tanzi, 'Equity, Transparency, Cooperation and the Taxation of High Net Worth Individuals', *Asia-Pacific Tax Bulletin* (July/August 2012), 299 and the references *supra* in note 5.

³⁸ F. Bastagli, D. Coady and S. Gupta, *supra* note 29, at 19; V. Tanzi, *ibid.*, at 306.

III. Regulation

Taxes – if assessed in terms of economic efficiency – constitute costs that influence economic behaviour. Due to their steering effect taxes are frequently used to regulate by deterring or incentivising certain behaviour. In the course of the financial crisis a number of tax policy proposals have aimed at incentivising behaviour that stabilises the economy and at dis-incentivising potentially destabilising economic activities. Thus, for example, it has been suggested to remedy the preferential tax treatment of debt as compared to equity financing, to tax bonuses and to introduce financial transaction taxes.³⁹

IV. The myth of fiscal sovereignty

Who decides about the structure of taxation (the proportion of income taxes, property taxes and consumption taxes, the degree of progressivity) or the level of taxation (the tax rates)? The formal legal answer is: the government, subject to domestic constitutional law, EU law (if the state is an EU member) and international law. Taxation is usually seen as one of the last vestiges of national sovereignty. For example, the German federal constitutional court, in its 2009 Lisbon judgment on European integration, stated that the power to tax was – as a core government function – part of Germany's constitutional identity and could not be transferred to the European Union.⁴⁰ According to this understanding, the power to tax is an essential characteristic of statehood which cannot be relinquished.

In the course of global and regional economic integration the ability of governments to tax has, however, been severely limited. Limitations are due to international and regional law that directly or indirectly restrict the power to tax as well as the liberalisation of capital which is as much a consequence of political choices as it is an (unintended) consequence of trade liberalisation and technological change.⁴¹ Examples of legal limitations on governments' powers are found in the WTO Agreements,⁴² international investment treaties, or double

³⁹ For these proposals, see IMF, *supra* note 36. On the financial transaction tax, see also section C.1.2. below.

⁴⁰ *Lisbon Case*, BVerfG, 2 BvE/08 of 30 June 2009, para. 252, www.bverfg.de/entscheidungen/es20090630_2bve000208.html.

⁴¹ On the liberalisation of transboundary capital flows, see B. Eichengreen, *The Globalization of Capital*, 2nd edn (Princeton: Princeton University Press, 2008), 92, 118 *et seq.*

⁴² For example Article III General Agreement on Tariffs and Trade (GATT).

taxation treaties.⁴³ The power to tax is also limited when tax reform becomes part of conditionality attached to financial assistance granted by the World Bank or the IMF.⁴⁴ In addition to these direct limitations, indirect limitations, while formally leaving fiscal sovereignty intact, arguably have had a much further reaching effect on domestic tax systems. Most prominently, the liberalisation of capital flows has allowed capital to move between jurisdictions so as to (legally) avoid or (illegally) evade taxation.⁴⁵

Capital controls had been an important element of the International Monetary System negotiated in 1944 at Bretton Woods.⁴⁶ Keynes, in particular, regarded them as essential to allow governments to pursue policies which might otherwise result in capital flight, such as expansive monetary policy to promote full employment.⁴⁷ However, capital controls were not maintained for long. At first the liberalisation of trade in goods made it increasingly difficult to enforce capital controls,⁴⁸ and later liberalisation of capital was being promoted, *inter alia* by the International Financial Institutions, as a policy to further economic growth.⁴⁹ Today capital can flow largely unimpeded, and small changes in government policies, including tax policies, can induce capital flight.⁵⁰

Yet, governments still insist on the 'myth of fiscal sovereignty'. This may be explained by the fact that in liberal constitutional democracies taxation is not understood as a technical question of 'optimal tax design', but as a function of conceptions of individual autonomy, collective responsibility and distributive justice⁵¹ – conceptions which are partly laid down in the constitution and in part are the subject of recurring deliberations within the public sphere and the

⁴³ On double taxation treaties, see section C.II1. below.

⁴⁴ M. Stewart and S. Jogarajan, 'The International Monetary Fund and Tax Reform,' *British Tax Review* (2004), 146.

⁴⁵ In the European Union the free movement of workers, services, capital and freedom of establishment have had a significant impact on Member States' tax systems, see D. Birk, *Steuerrecht*, 15th edn (Heidelberg: C.F.Müller, 2012), 67 *et seq.*

⁴⁶ R. N. Gardner, *Sterling Dollar Diplomacy* (Oxford: Clarendon Press, 1956); B. Eichengreen, *supra* note 41, 91 *et seq.*

⁴⁷ R. N. Gardner, *ibid.*, 77 *et seq.*

⁴⁸ B. Eichengreen, *supra* note 46, at 92.

⁴⁹ For a critical account of this policy and its economic justification, see D. Rodrik, *The Globalization Paradox* (New York, NY: Norton, 2011), 90 *et seq.*; see also J. Stiglitz, *Globalization and its Discontents* (New York, NY: Norton, 2011), ch. 4; recently the IMF has changed its policy on capital controls, now considering them as 'part of the policy toolkit' of governments, see <http://www.imf.org/external/pubs/ft/survey/so/2011/NEW040511B.htm>.

⁵⁰ See R. S. Avi-Yonah, *supra* note 11, 1579 *et seq.*, 1631.

⁵¹ T. Nagel and L. Murphy, *The Myth of Ownership* (New York, NY: Oxford University Press, 2002).

political process.⁵² Nonetheless, given the impact on taxation of international law and the globalised economy, issues of taxation are bound to become a matter of transnational and international cooperation. The predominant venue for such cooperation currently is the OECD. Yet, questions of justice and distribution – crucial to taxation as a governmental power – are largely lost in translation when dealt with at the OECD. While the OECD formally acknowledges national fiscal sovereignty, through its policy advice it provides its members with guidelines for the establishment of tax systems that centre around economic growth and efficiency. Instead of aiming at regaining policy space for redistributive tax policies through international cooperation, the OECD seems to fully embrace the integration of the global economy that has led to the erosion of embedded liberalism.

C. OECD tax policy advice and cooperation

The OECD is the most active international institution in the field of taxation. While membership in the OECD is limited and excludes most developing countries, many OECD activities have effects beyond its membership; the OECD considers itself to be the ‘market leader in developing standards and guidelines in the core of International Taxation’.⁵³ In tax matters the OECD operates mainly through its Center for Tax Policy and Administration, which forms part of the OECD bureaucracy, and the Committee on Fiscal Affairs⁵⁴ which consists of government officials from the OECD member states and can be considered a transnational government network.⁵⁵

In the following I will concentrate firstly on the OECD’s work on tax policy and, secondly, on the organisation’s efforts to mitigate harmful tax competition. With reference to the language employed in the OECD texts I intend to show how the OECD treats questions of taxation primarily as questions of economic efficiency

⁵² J. Habermas, *Faktizität und Geltung [Between Facts and Norms]* (Frankfurt a.M.: Suhrkamp, 1992), in particular ch. 3. At the international level such responsibility of government to provide a minimum of social welfare is reflected in human rights instruments, in particular the International Covenant on Social, Economic and Cultural Rights.

⁵³ OECD, Focus on Africa, www.oecd.org/tax/40999877.pdf.

⁵⁴ For an overview of OECD activities related to taxation, see OECD, *Current Tax Agenda 2012* (Paris: OECD 2012).

⁵⁵ A.-M. Slaughter, ‘Global Government Networks’, *Michigan Journal of International Law* 24 (2003), 1041.

and competitiveness. Contrary to the logic of embedded liberalism, the OECD in its tax policy advice does not adopt a political economy perspective that ties the freedom of governments in setting tax policies to questions of how to pursue their constituencies' ideas of social justice. Nor does the OECD in its work on harmful tax competition address questions of global justice that result from governments' attempts to tailor their tax systems to attract globally operating businesses.

I. The eclipse of social justice in tax design for economic growth

The main objectives of the OECD's work on tax policy are clarified in a recent description of the Committee on Fiscal Affairs' mandate. According to the OECD's Current Tax Agenda 2012 it is

[t]he overarching objective of the Committee on Fiscal Affairs ... to contribute to the shaping of globalization for the benefit of all through the promotion and development of effective and sound tax policies and guidance that will *foster growth* and allow governments to provide better services to their citizens. Its work is intended to enable OECD and non-OECD governments to improve the design and operation of their national tax systems, to promote co-operation and co-ordination among them in the area of taxation and to *reduce tax barriers to international trade and investment*.⁵⁶

While the reduction of tax barriers to trade and investment is primarily pursued by the OECD's work on double taxation,⁵⁷ the OECD promotes its growth objective, *inter alia* with the publication of tax policy studies including recommendations to policy-makers.

1. Revenue generation through taxation that is 'least negative to economic growth'

The emphasis on economic growth coupled with the ideal of global economic integration through liberalised trade and investment has consequences for the policy advice given by the OECD. While the OECD recognises that taxation

⁵⁶ OECD, *supra* note 54, at 14 (my emphasis).

⁵⁷ See section C.II.1 below.

may not only serve as an instrument to generate revenue, but also to address inequality through redistribution, and that decisions on tax policy ultimately have to be made within a democratic political process, its focus lies squarely on the question of how taxation for revenue generation can be reconciled with the promotion of economic growth. The OECD Tax Policy Study 'Tax Policy Reform and Economic Growth'⁵⁸ demonstrates how questions of social justice (even though recognised in frequent references to potential equity concerns)⁵⁹ are thus being sidelined and how economic growth comes to represent the predominant yardstick by which tax policy should be measured.

The study was prepared by members of the OECD Secretariat. As it dates from 2010 it takes account of the strained budgets of the OECD member states in the wake of the 2008 financial crisis and their need for fiscal consolidation. It states: 'Debt-to-GDP levels can be reduced either by reducing spending or increasing taxes but also by increasing the GDP growth rate. Such considerations point to designing the tax system in such a way that is the *least negative for economic growth*.'⁶⁰

Proceeding from the assumption that all taxation impedes growth and distorts competition⁶¹ the study establishes a ranking of taxes according to the relative weight of their negative effects on economic growth 'in terms of reducing long-run GDP per capita'.⁶² The smaller the negative impact on economic decisions of individuals and firms the less negative for economic growth the taxes are judged to be. According to this measurement the study considers corporate taxes to have the most detrimental effects on growth. Income taxes are held to be the second-most detrimental and consumption taxes and regulatory environmental taxes take third place. Finally, taxes on immovable property are found to be least harmful.⁶³

⁵⁸ OECD, *supra* note 28.

⁵⁹ Social justice concerns are mainly dealt with under the heading 'Obstacles to Fundamental Tax Reforms', *ibid.*, 47 *et seq.*; see also OECD, 'Income Inequality and Growth', *OECD Economics Department Policy Notes*, No. 9 (Paris: OECD, January 2012).

⁶⁰ *Ibid.*, 9–10 (emphasis added).

⁶¹ Corrective taxes constitute an exception as the report states that environmental taxes may promote 'Green Growth' (*ibid.*, at 104); on the OECD's view of corrective taxes see section C.1.3. below.

⁶² *Ibid.*, at 20.

⁶³ *Ibid.*, at 20, 21.

On the basis of this ranking the study makes the following recommendations: tax reform should 'shift the burden of taxation from income to consumption and/or residence property' and 'improve the design of a tax regime by broadening the tax base and lowering the rate and for improving its externality correcting properties.'⁶⁴ The study sees its recommendations partly reflected in recent trends in OECD members' tax structures. Many have already cut personal and corporate income taxes, broadened the tax base and increased the use of the Value Added Tax as a general consumption tax.⁶⁵ The study recognises that these changes are partly induced by the mobility of capital.⁶⁶ This mobility affords corporations (and individuals) more freedom in their location decisions which, in turn, are becoming more sensitive to tax policies.⁶⁷ As a consequence 'countries increasingly use their tax systems to improve their ability to compete in global markets.'⁶⁸

The study stresses that tax reforms need to be based on solid policy analysis. To assess the revenue and welfare impact of taxation, its authors express a preference for behavioural tax policy models.⁶⁹ The study supports its own findings with the potential behavioural consequences of certain tax structures. With respect to top marginal statutory rates on personal income, for example, it argues that their reduction would encourage individual risk-taking and entrepreneurship.⁷⁰ By contrast, high progressivity of income taxation will, according to the study, negatively affect the hours worked and productivity (output per hour worked).⁷¹

The study acknowledges that – if implemented – the proposed reforms would lead to less progressivity (and even regressivity) within tax systems and thus may raise distributional concerns.⁷² It presents the potential impact of the proposed reforms on the redistributive function of taxation as a trade-off between GDP growth and equity, which is up to the individual OECD countries

⁶⁴ *Ibid.*, at 21.

⁶⁵ *Ibid.*, 26 *et seq.*

⁶⁶ *Ibid.*, at 140 (referring to empirical literature for this finding).

⁶⁷ *Ibid.*, at 19, 20.

⁶⁸ *Ibid.*, at 19.

⁶⁹ *Ibid.*, at 65.

⁷⁰ *Ibid.*, at 24 and 114, 115.

⁷¹ *Ibid.*, at 23.

⁷² *Ibid.*, at 13, 22 and 49.

to evaluate.⁷³ It leaves no doubt, however, about the authors' preference for the first and attempts to address equity concerns by making the argument that eventually the proposed reforms will increase societal welfare. In a number of places, moreover, the study points out that the trade-off between equity and efficiency might appear to be non-existent.⁷⁴ Where equity concerns persist, policy-makers could respond with the compensation of 'reform losers', preferably, however, through direct transfers rather than through changes to the proposed tax structure.⁷⁵

The interpretation according to which the study does not take equity or social justice seriously as a challenge to the desirability of the implementation of its policy recommendation is further illustrated by the fact that it treats equity concerns in a chapter on 'Strategies for Successfully Implementing Growth-oriented Tax Reforms' as potential obstacles to the implementation of the proposed tax reforms.⁷⁶ Generally, the authors of the study regard growth-oriented tax reforms as a necessity in times of increasing sovereign debt to which they see no alternative.⁷⁷

2. Cost-efficient regulation through taxation

The same OECD study includes a recommendation for governments to use taxation in a regulatory mode. More specifically, governments shall 'improve the extent to which taxes correct for externalities.' Where taxes are used as corrective taxes they justify, according to the OECD, a departure from the general guiding principle of a broad tax base and low tax rates.⁷⁸

The rationale for the endorsement of corrective taxes is similar to the justification of the other tax recommendations listed above. Corrective taxation is held not only to be less distortive of economic behaviour than other types of taxation, such as income taxes, and less distortive than command-and-control regulation, but it is also said to be able to promote growth by offering incentives

⁷³ *Ibid.*, at 22.

⁷⁴ Residence property taxes, for example, which are frequently regarded as inequitable, according to the OECD, can be justified on the basis of the benefit principle (*ibid.*, at 52).

⁷⁵ *Ibid.*, at 79.

⁷⁶ *Ibid.*, at 47 *et seq.*

⁷⁷ *Ibid.*, at 102.

⁷⁸ *Ibid.*, at 10.

for economic activity. Moreover, corrective taxation is held to be preferable to regulation due to its cost-effectiveness: it regulates and raises revenue at the same time.⁷⁹ Consequently, the OECD endorses the taxation of environmental pollution. Taxing pollution or abolishing tax benefits for certain industries, such as the fossil fuel industry, is expected to create incentives to reduce pollution and generate government revenue. In the OECD's own words: 'Shifting part of the tax burden onto pollution aligns with the logic of business – it creates market demand for entrepreneurs to develop and sell new smarter and cleaner technologies, thereby promoting *green growth*.'⁸⁰

While the OECD Secretariat endorses environmental taxes as a win-win-win situation in terms of innovation, regulation and revenue generation⁸¹ it is equally clear in its opinion about taxes on financial transactions. In contrast to the EU Commission, which supports the financial transaction tax *inter alia* for its potential corrective function by discouraging risky trading activities,⁸² the OECD does not share this view. Instead it considers financial transaction taxes to be highly distortive and thus does not advocate them.⁸³ The OECD's view is shared by the IMF which argues that a financial transaction tax is undesirable *inter alia* because its 'corrective function' to reduce 'socially unproductive financial activity' was unclear.⁸⁴

3. The eclipse of social justice, or: economic growth as (the new) social justice

The above interpretation of the OECD's policy advice on tax reform does illustrate the degree to which considerations of social justice risk being eclipsed in the OECD's analysis of taxation. To be sure the emphasis by the OECD on economic growth is in line with its mandate in the Convention on the Organisation for Economic Co-operation and Development of 1960. According

⁷⁹ In its Tax Agenda for 2012, the OECD Secretariat stresses the cost-effectiveness of taxation vis-à-vis regulation, see OECD, *supra* note 54, at 50.

⁸⁰ *Ibid.*, at 51 (emphasis added).

⁸¹ See also OECD, *Taxation, Innovation and the Environment* (Paris: OECD, 2010).

⁸² European Commission, *Common Rules for a Financial Transaction Tax. Frequently Asked Questions*, MEMO/11/640 (Brussels, 28 September 2011), http://europa.eu/rapid/press-release_MEMO-11-640_en.htm.

⁸³ OECD, *supra* note 28, at 21.

⁸⁴ IMF, *supra* note 36, at 20, Box 5.

to its Article 1 (a) '[t]he aims of the Organisation for Economic Co-operation and Development ... shall be to promote policies designed ... to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy.'

However, while the Convention explicitly mandates the OECD to promote policies designed to achieve economic growth, it qualifies this aim with the adjective 'sustainable' and complements the objective of growth with further aims – including raising standards of living. Thus, the Convention opens the door for the OECD to integrate into its work the long-standing and increasing criticism of taking GDP as a measure of social progress and well-being.⁸⁵ And indeed the OECD acknowledges that 'there is not necessarily a direct link between economic growth and overall wellbeing.' Nonetheless it posits that 'there are good reasons for OECD countries to try to increase the rate of economic growth.'⁸⁶

While it may be worthwhile to analyse the effect of tax policies on economic growth, what is being criticised here is, firstly, that the analysis and recommendations as put forward by the OECD leave very little room for the integration of social justice concerns (apart from economic growth) into the process of tax policy-making; and secondly that the OECD's own analysis, by tying any justification of taxation to the concept of economic growth, which is in itself ambivalent, renders the evaluation of taxation a quasi-scientific and neutral-objective exercise even where it is based on value or moral judgements. In its presentation as a trade-off between two apparently irreconcilable policy goals, the OECD juxtaposes taxation that furthers (or at least does not impede) economic growth with taxation that aims at redistribution. Coupled with the presentation of economic growth as an inevitable necessity and the arguments

⁸⁵ For recent initiatives to consider indicators other than GDP to measure societal progress and well-being, see A. Sen, J.-P. Fitoussi, J. Stiglitz, *Report of the Commission on the Measurement of Economic and Social Progress* (2009); UN General Assembly Res/65/309, 'Happiness. Towards a Holistic Approach to Development' (25 August 2011); J. Helliwell, R. Layard and J. Sachs (eds), *World Happiness Report* (2012); for the OECD's own Measuring Well-being Agenda see www.oecd.org/statistics/measuringwell-beingandprogressresearchanddevelopmentprojects.htm.

⁸⁶ OECD, *supra* note 28, at 9.

that present efficiency and competitiveness as equitable, the OECD clearly does not see room for redistributive aims in tax-policy making.⁸⁷

Effectively, the OECD appears to pit economics against politics. In that vein, economic analysis is referred to to tell us how tax policy should be designed. Yet, what the OECD reveals only implicitly is that of course any assessment of what is economically efficient already relies on value or moral judgments about what is considered good (or, bad) as well as certain predictions about human behaviour.⁸⁸ This becomes particularly apparent in the discussion of corrective taxes where the OECD hails the taxation of 'bads' for its economic efficiency and consequently recommends environmental taxes as promoting 'green growth'. What the OECD does not say is that this policy advice is based on a presupposition as to which effects of economic activities are to be considered as 'bads' – for example, what constitutes 'pollution' – as well as a certain understanding as to the behavioural effects of taxation. Even more crucially the OECD's assumption that taxation generally impedes growth ignores the fact that most economic activity relies on tax-funded infrastructure and thus ultimately on government.⁸⁹

The OECD's policy advice thus stands in stark contrast to the concept of embedded liberalism. Instead of testing and delineating the policy space for governments to pursue redistributive policies domestically (or by means of transnational collaboration), it embraces the desirability of policy convergence directed towards the overarching aims of growth, efficiency and competitiveness, which are portrayed as self-explanatory.

⁸⁷ See *ibid.*, at 49: 'Distributional Considerations might become an obstacle to implementation [of the proposed reforms].' The study goes on to suggest other measures to address inequality: 'The question, of course, arises as to which degree governments would want to use the tax system to redistribute income. Non-tax policy measures that stimulate education, for instance, increase individuals' earning capacity and may therefore contribute to a more equal income distribution' (*ibid.*).

⁸⁸ Cf. G. Myrdal, *Institutional Economics*, excerpt reprinted in: Ö. Appelqvist, S. Andersson (eds), *The Essential Gunnar Myrdal* (New York, NY: New Press, 2004), 236 *et seq.*

⁸⁹ This point is stressed by T. Nagel and L. Murphy, *supra* note 51.

II. The eclipse of global justice in international cooperation to avoid harmful tax competition

Whereas the OECD Secretariat's advice on tax policy reform rather unquestioningly embraces the pressures that economic globalisation puts on taxation, the concern of governments about their shrinking policy space has figured prominently in the work of the OECD's Committee on Fiscal Affairs (a body of government representatives). Here too, however, in the respective OECD documents, concerns about diminishing fiscal sovereignty are clothed in the economic language of competitiveness. Private economic competition, considered to be welfare enhancing, is to be facilitated through the elimination of barriers to transboundary economic activities including double taxation. By contrast, governmental competition for capital through the use of tax incentives is judged as potentially harmful for global welfare as it distorts private competition. Through this focus on competition, questions of justice again are sidelined, this time questions of *global* justice that can be seen to lie at the heart of the OECD debates on harmful tax competition.

1. International tax law to further economic integration and private competition

Under the OECD Convention members agree to 'pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalisation of capital movements' (Article 2 (d)). The OECD complies with this mandate *inter alia* by the maintenance of the OECD Model Tax Convention on Income and on Capital. The OECD Model Tax Convention provides a blueprint for the (mainly bilateral) double taxation treaties concluded between states.⁹⁰ These aim, firstly, at preventing double taxation of transboundary economic activities and, secondly, at delineating the allocation of tax revenue between the different jurisdictions that lay a claim to taxes, mainly the state of the source of the income and the state of residence. The OECD postulates that the international tax law based on

⁹⁰ Y. Margalioth, 'Double Taxation' in Wolfrum (ed.), *Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online edition, www.mpepil.com.

its Model Tax Convention serves to remove obstacles to the international exchange of goods and services and the cross-border movement of capital, technology and persons as well as offering security and predictability for tax payers.⁹¹

Arguably, however, the second aim – the allocation of tax revenue between the source and the residence state – constitutes the more important rationale for double taxation treaties.⁹² The fact that the OECD Model Tax Convention gives preference to the residence state has prompted the United Nations to set up and administer its own Model Tax Convention – the United Nations Model Double Taxation Convention Between Developed and Developing Countries. In comparison with the OECD Model Convention it favours the source country's taxation rights over those of the investor's residence country and thus aims at greater tax revenue for developing countries (which are frequently host countries to foreign investors rather than capital exporters).⁹³

2. International tax law and cooperation to counter 'harmful tax competition'

While both the OECD and the UN Model Tax Conventions, aspire to avoid double taxation as an impediment to transboundary trade and investment, they are only partially successful in containing what has come to be known as 'harmful tax competition.'⁹⁴ With the liberalisation of capital flows, governments have attempted to attract capital through their tax laws. As a result the tax burden was shifted from labour to capital, and progressivity in taxation decreased. Apart from the convergence of tax systems, countries have adopted preferential tax schemes which grant benefits to multinational enterprises – either to keep them from shifting residence to another jurisdiction or to induce them to locate production facilities in their jurisdiction.⁹⁵ These developments,

⁹¹ OECD, *Model Tax Convention on Income and on Capital 2010 (updated 2010)* (Paris: OECD, 2012), at I-1.

⁹² R.S. Avi-Yonah, 'Double Taxation Treaties. An Introduction' in K.P. Sauvant and L.E. Sachs, *The Effect of Treaties on Foreign Direct Investment. Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009), 99.

⁹³ United Nations, *Model Double Taxation Convention Between Developed and Developing Countries* (New York, NY: United Nations, 2011), at vi.

⁹⁴ For an argument that international tax law promotes tax competition, see A. Rosenzweig, *supra* note 13.

⁹⁵ Avi-Yonah distinguishes between production tax havens and headquarters tax havens: R.S. Avi-Yonah, *supra* note 11, 1588 *et seq.*

coupled with the existence of so-called offshore tax havens with no or nominal tax rates and strict bank secrecy laws, have facilitated and increased opportunities for tax avoidance and tax evasion.⁹⁶ The beneficiaries have been multinational enterprises and high-income individuals, including dictators and criminals, who are frequently able to channel their income so as to escape taxation almost entirely.⁹⁷

The losers are the populations of developed countries who incur higher taxes on labour and higher consumption taxes and who are living in increasingly unequal societies. Even worse off, however, are the populations of developing countries. While the OECD member states through tax reforms as well as the international cooperation described below have been able to safeguard their tax revenues, developing countries are losing revenue.⁹⁸ Such observations constitute important elements in an emerging perspective on 'tax competition' as an issue of global distributive justice.

However, this is not how the OECD governments, conscious of the threat to their national budgets, have been addressing this issue. Rather, the official stance has maintained that the problem remains one of *fair* versus *unfair competition*. In the 1998 OECD Report on Harmful Tax Competition, redistribution is mentioned only in passing, when the report's authors state that competition in taxation 'hampers the application of progressive tax rates and the achievement of redistributive goals.'⁹⁹ Overall the OECD's message is that global economic integration and, in particular, the mobility of capital across borders is welfare enhancing; the resulting tax reforms are denoted as 'modernisations' of tax systems that improve capital neutrality.¹⁰⁰ The problem that is identified instead is the distortion of global competition through preferential tax regimes and tax havens. According to the OECD 'location decisions should be driven by economic considerations and not primarily by tax

⁹⁶ *Ibid.*; see also N. Shaxson *Treasure Islands* (London: Vintage, 2012 (first published 2011)); R. Murphy, Closing the European Tax Gap, www.socialistsanddemocrats.eu/gpes/media3/documents/3842_EN_richard_murphy_eu_tax_gap_en_120229.pdf (estimating that 'tax evasion in the European Union is approximately €860 billion a year' (at 2)).

⁹⁷ N. Shaxson, *supra* note 96, ch. 1.

⁹⁸ R.S. Avi-Yonah, *supra* note 13.

⁹⁹ OECD, *supra* note 7, at 14.

¹⁰⁰ *Ibid.*, at 13, 14: 'Globalisation ... has encouraged countries to reduce tax barriers to capital flows and to modernise their tax systems to reflect these developments.'

factors;¹⁰¹ levelling the playing field is considered 'essential to the continued expansion of global economic growth'.¹⁰² As a consequence, governments are reprimanded if they engage either in 'harmful tax competition' by exploiting the interaction of tax systems or they free-ride on public goods financed by other jurisdictions' tax revenues. As a consequence, the OECD attempted in its report to single out factors that can help in identifying tax havens and preferential tax regimes¹⁰³ based on which the OECD issued recommendations to governments.¹⁰⁴

The core OECD activities against harmful tax competition so far have been the promotion of information exchange based on the OECD standard on transparency and information exchange and the establishment of the Global Forum on Transparency and Information Exchange that monitors the implementation of this standard.¹⁰⁵ In order to enforce information exchange the OECD lists uncooperative tax havens on so-called blacklists.¹⁰⁶ When the G20, motivated by the urgency of fiscal consolidation, threatened to take countermeasures against tax havens,¹⁰⁷ the OECD initiative received a renewed impetus leading to the conclusion of a large number of information exchange agreements.¹⁰⁸

The evaluation of the success of these activities differs. While some consider them a charade¹⁰⁹ others believe they have helped OECD governments to prevent the erosion of their tax bases.¹¹⁰ Empirical evidence shows, however, that they have had no positive effect on developing countries which, unlike

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, 21 *et seq.*

¹⁰⁴ *Ibid.*, 65 *et seq.*

¹⁰⁵ The Global Forum, in its Terms of Reference of 2009, refers to the transparency and information exchange standards in the OECD Model Agreement on Exchange of Information and Article 26 of the OECD Model Tax Convention and breaks them down to 10 essential elements against which tax jurisdictions that participate in the Global Forum are reviewed, see Global Forum on Transparency and Exchange of Information for Tax Purposes, Terms of Reference (2010), www.oecd.org/tax/transparency/keydocuments.htm.

¹⁰⁶ Currently no country is listed on the OECD's List of Uncooperative Tax Havens, <http://www.oecd.org/ctp/harmfultaxpractices/listofunco-operativetaxhavens.htm>.

¹⁰⁷ G20, Leaders' Statement, London Summit 2 April 2009, para. 15; G 20, Leaders' Statement, Pittsburgh Summit, 24 September 2008, para. 16.

¹⁰⁸ Information on these agreements can be found on the OECD's website, at <http://www.oecd.org/tax/transparency/exchangeoftaxinformationagreements.htm>

¹⁰⁹ N. Shaxson, *supra* note 96, ch. 10; M. J. McIntyre, 'How to End the Charade of Information Exchange', *Tax Notes International* 56: 4 (26 October 2009), 255.

¹¹⁰ R. S. Avi-Yonah, *supra* note 13.

developed countries, have been suffering from an erosion of their tax bases. This erosion is mainly due to tax evasion and avoidance, which is facilitated by the tax laws of developed countries.¹¹¹ By way of illustration, developing countries have an incentive to grant preferential tax treatment to multinational enterprises as long as these enterprises can avoid paying taxes in their country of residence. As a consequence, stopping tax competition among developing countries would require a concerted effort by developed countries to end tax avoidance by their multinationals.¹¹²

3. The eclipse of global justice, or: 'fair competition' as global justice

As the integration of the global economy continues to diminish the capacity of individual governments to autonomously set their tax policies, international cooperation appears to be one way to reconcile economic integration with the pursuit of redistributive policies by governments. International cooperation on redistribution seems all the more important as it becomes apparent that the promise that economic globalisation will benefit all countries and eventually also all human beings remains unfulfilled. International cooperation in the field of taxation could mean that the redistributive role of taxation is debated at the global level and that governments agree on measures such as global taxes that are aimed at redistribution across societies.¹¹³

Such cooperation has, however, not been the route taken by the OECD. Instead of initiating a global debate on tax justice, it seeks to expand the logic of economic competition among private actors to cover governmental policy. With respect to taxation this means that international cooperation should aim at levelling the playing field and reducing harmful tax competition. And once again the seemingly technical language hides the underlying, highly contested, value judgements and conceptions of justice.

¹¹¹ *Ibid.*; see also N. Shaxson, *supra* note 96, ch. 8.

¹¹² R. S. Avi-Yonah, *ibid.*; for a recent initiative in this respect, see the EU Commission's Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final (6 December 2012).

¹¹³ For a recent proposal on global taxes to finance development, see United Nations, Department of Economic and Social Affairs, *supra* note 36, 36 *et seq.*; for historical overviews, see P. Wahl, *International Taxation*. (Berlin: WEED, 2005); M. J. Frankman, 'International Taxation', *World Development* 24:5 (1996), 807.

D. Conclusion: Taking the justice dimension of taxation seriously

I. Competing ideas of social justice

Critiques abound with regard to the mantra of economic growth in terms of GDP as the all-purpose measure of social progress and well-being.¹¹⁴ So far, however, *alternative* visions of a successful society have not really entered into the mainstream analysis of economic policy as conducted at the OECD. Instead economic growth, to be pursued through economic competition, remains the yardstick against which economic policy is measured. Despite the many disappointments of economic globalisation, including increasing inequality and environmental degradation, the hopes for social progress remain confined, it seems, to the realm of private economic freedom.

The role of government is not diminished within this conception of social progress, but it is different from the role of governments within embedded liberalism. As government provides the infrastructure for economic activities and ensures 'fair competition' through regulation, it becomes a facilitator of the economy. Taxation is still necessary to provide revenue to pay for regulatory capitalism.¹¹⁵ It ceases, however, to be considered as an important instrument for redistribution for fear of the distortive effects such market governance would have on competition and economic output.

To perceive economic liberty and free competition as the main (and only) aims of societal ordering represents one vision of a 'good or just society', which may have its advantages and which finds support in political and economic theory.¹¹⁶ It is important, however, to recognise it as such – as only a contingent concept of social order and the role of government that is not without alternative. Whether to choose this concept or another cannot be a question of economic analysis, but falls within the ambit of political processes, be they domestic, regional or global.

¹¹⁴ See *supra* note 85; see also A. Sen, *Development as Freedom* (Oxford: Oxford University Press 1999); A. Sen, *Inequality Revisited* (New Haven, MA: Harvard University Press: 1992).

¹¹⁵ J. Braithwaite, *Regulatory Capitalism* (Cheltenham: Edward Elgar, 2008), at 23, 24.

¹¹⁶ See only F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).

II. *Politics and uncertainty*

To recognise that decisions about taxation imply political choices among competing visions of social justice also entails embracing the fact of indeterminacy and uncertainty. Economists may, using certain models, predict the effect of certain tax measures on certain economic variables on the basis of certain assumptions. How tax policies work in reality, however, is a different matter¹¹⁷ and it would be fallacious to assume that the answer could be predicted with certainty. The adoption of one economic policy or another ultimately is a political decision between two options both of which hold uncertain futures.¹¹⁸ Nonetheless international economic institutions, such as the OECD and the IMF, regularly base policy recommendations on the results of economic analysis thus ignoring the role of political choice in light of uncertainty.

This attitude towards political decision-making can be illustrated by reference to the diverging treatment by the IMF and the United Nations of the question as to whether to introduce a financial transaction tax. The IMF simply recommended against its adoption because it would not have a corrective effect on financial volatility and would impede growth.¹¹⁹ By contrast, debates within the framework of the United Nations on the introduction of a financial transaction tax to finance development openly embraced uncertainty.¹²⁰

In 2000 the UN General Assembly adopted a resolution in which it called for 'a rigorous analysis of the advantages, disadvantages and other implications of proposals for developing new and innovative sources of funding, both public and private, for dedication to social development and poverty eradication programmes'.¹²¹ In reaction to this call the UN Department of Economic and Social Affairs asked the World Institute for Development Economics Research (UNU-WIDER) to study 'innovative sources for development finance'. The assessment of UNU-WIDER of a financial transaction differs markedly from that

¹¹⁷ Critical with respect to the transposition of economic findings based on specific economic models into economic policy advice is D. Rodrik, *supra* note 49, ch. 6.

¹¹⁸ N. Luhmann, 'Die Paradoxie des Entscheidens', *Verwaltungsarchiv* 84 (1995), 289.

¹¹⁹ See *supra* note 84.

¹²⁰ A.B. Atkinson, 'New Sources of Development Finance. Funding the Millennium Development Goals,' *Policy Brief* No. 10 (Helsinki: UNU-WIDER, 2004).

¹²¹ UN General Assembly Res/S-24/2 (15 December 2000), para. 142 (g).

of the IMF. Like the IMF, UNU-WIDER addresses the economic implications of a financial transaction tax. Unlike the IMF it is, however, much more cautious in its conclusions. While the IMF is quite unequivocal in its finding of distortive effects, and, as a result, does not recommend the adoption of a financial transaction tax,¹²² UNU-WIDER concludes that the final distributional effects of a financial transaction tax are hard to predict. More importantly, it clarifies that the decision on whether or not to introduce such a tax implies a political choice. A political decision that balances the potential benefits – finances for development and stabilisation of financial markets – against the potential drawbacks – including increases in the prices of commodities, which might disproportionately affect the poor.¹²³

III. Experimental taxation

Given the uncertainty attached to any predictions on the effects of taxation, governments would be ill-advised to base their tax policy decisions exclusively on such forecasts. *Experimentation* with tax policy may ultimately be more fruitful than relying solely on the advice of economic experts. While economists come to diverging conclusions, for example about the behavioural effects of progressive income taxes,¹²⁴ only the imposition of such taxes can reveal their true effects. Detrimental or unforeseen consequences may be limited by evaluating the effects of such taxes after a certain period or by including sunset clauses in the tax legislation.

Finally, experimental tax policy-making and legislation may play an important role in establishing a counter-narrative to that of economic growth and competitiveness. In such a narrative citizens may be perceived as stakeholders of the global economy who call for multinational enterprises and individual profiteers of capitalism to bear a fair share of the cost of government and contribute towards a just distribution of economic benefits through paying taxes. Thus, taxation might not be perceived merely as a necessary evil in times of austerity but restored to its place as an essential element of a just society.

¹²² IMF, *supra* note 36, at 21.

¹²³ A.B. Atkinson, *supra* note 120.

¹²⁴ For references, see F. Bastagli, D. Coady and S. Gupta, *supra* note 29, at 13, 14.