

Note

Transcending “Tax” Sovereignty and Tax Standardization: Three Questions

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I.	INTRODUCTION.....	191
II.	STANDARDIZATION, HARMONIZATION, GLOBALIZATION, AND NETWORK POWER	194
A.	Responses to Tax Havens.....	194
1.	The Domestic Approach: The Tax Cuts and Jobs Act.....	194
2.	The Bilateral Approach: Switzerland & Bank Secrecy.....	197
3.	The Regional Approach: State Aid.....	198
4.	The Multilateral Approach: BEPS.....	202
B.	Standards, Harmonization, and Globalization	203
III.	THE SOVEREIGNTY PROBLEM & “TAX” SOVEREIGNTY	204
A.	The “Problem” of Tax Sovereignty.....	204
B.	Tax Sovereignty as Criminal Law?	206
C.	Tax Sovereignty as Privacy and Equal-Protection Law?.....	208
D.	Tax Sovereignty as Immigration Law?	209
E.	Lessons on Sovereignty: No Such Thing as “Tax” Sovereignty	210
IV.	HOW WILL THE PIE BE DIVIDED? <i>WHY?</i>	212
A.	Tax Rules as Distributional Rules.....	212
B.	A Further Question and a Conceptual Frame: G.A. Cohen’s Criticism of Rawls.....	213
C.	Winners Win: CRS, FATCA, and Tax Information Exchange	214
D.	Lessons for States: It’s All About Distribution.....	217
V.	FRAMING AND FORECLOSING	220
VI.	CONCLUSION	223

I. INTRODUCTION

The Panama and Paradise Papers shocked the world by displaying the extent to which tax avoidance and evasion were running amok. Estimates of tax avoidance and evasion facilitated by tax havens and tax competition¹ differ, but most agree that tax avoidance and evasion are significant and are of the order of

¹ Some scholars differentiate between “harmful” tax competition and tax competition more generally. This distinction, however, strikes me as vague and subject to serious and unsolvable problems of moral relativism. Thus, the distinction tends to obscure rather than to enlighten debate. See Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 MICH. J. INT’L L. 411 (2004). As such, this Note will employ the term tax competition in a broader sense, although this term will often refer to what some consider to be “harmful” tax competition.

tens of billions of U.S. dollars.² But, the world has changed since then for both corporate and individual taxpayers. Corporate income tax rates keep dropping, with “business friendly” tax reforms sprouting everywhere, most prominently through the passage of the Tax Cuts & Jobs Act (“TCJA”) in the United States in 2017.³ Emerging global information-sharing regimes like the OECD’s Common Reporting Standard (“CRS”) are under implementation in Switzerland, Panama, and Singapore. At the same time, global pressure against tax havens is at all-time highs. The European Union is weaponizing its strong antitrust laws and the state aid doctrine against members’ aggressive tax practices. Moreover, States seem to be cooperating on a global scale pursuant to the OECD’s recent Base Erosion and Profit Shifting (“BEPS”) initiative. While international taxation has been the subject of intense academic and policy examination, scholars have ignored how these phenomena evidence a broad push towards standardization taking place around the world.

This push has been fueled by the threat that tax havens—alongside tax avoidance and evasion—and “harmful” tax competition pose to developed countries’ treasuries. In appealing to their “right to tax” or tax sovereignty, developed countries have attempted to respond to these threats, often by taking unilateral or multilateral action against tax havens.⁴ However, due to the trans-substantive, conceptual importance of “sovereignty” to the international legal order, measures to curb tax competition and to counter tax havens have sought to redefine “tax sovereignty” in either narrow or functional terms. Bounding the concept of “tax” sovereignty is not a sufficient solution, however; standardization will also require tax havens and other States to accept new intrusions in broad areas of traditional sovereign control—such as immigration, privacy and equal protection, and criminal law.⁵ Whether they will do so is an open question, yet is one that should be appropriately posed.

Another way to get past the sovereignty concerns with standardization is to trumpet the large economic gains⁶ from increased tax revenues. Standard economic theory would suggest that harmonization of the tax system should provide States with the ability to counter tax havens and curb harmful tax competition, therefore increasing the pie. While calls for a bigger pie can seem attractive, States should interrogate how this pie will be divided by the new

² See Thomas R. Tørsløv, Ludvig S. Wier & Gabriel Zucman, *The Missing Profits of Nations* 22 (Nat’l Bureau of Econ. Research, Working Paper No. 24701, 2018), <https://www.nber.org/papers/w24701.pdf>.

³ Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018 (Tax Cuts and Jobs Act), Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁴ See *infra* Section II.A.

⁵ See *infra* Part III.

⁶ I use the language of “economic gains” as opposed to the more conventional language of “welfare gains” by economists and welfarists, as their interchangeable use depends on significant and controversial ethical premises. See generally WILFRED BECKERMAN, *ECONOMICS AS APPLIED ETHICS* (2017). Moreover, even if one assumes that the welfarist project is correct in its main tenets, there are situations in which welfare as ethically understood sharply diverges from economic welfare—as has been forcefully argued by Happiness Economics. See, e.g., JOHN BRONSTEEN ET AL., *HAPPINESS AND THE LAW* (2015); RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* (2d ed. 2011); *LAW AND HAPPINESS* (Eric A. Posner & Cass R. Sunstein eds., 2010).

standards and, perhaps more importantly, whether a bigger pie is indeed attractive. As recent "worldwide" standardization in the field of information exchange evidences, developing States should be skeptical of standardization's benefits and should carefully evaluate the distributional consequences of (and rationale behind) the chosen standard.

Finally, States should consider how, initial welfarist calculations aside, the forces behind standardization, harmonization, and globalization can work to frame and foreclose discourse and debate. As happened in the human rights and international trade context, increased globalization of a uniform standard rendered some previously cognizable claims, especially with regards to normative questions of fairness and justice, unintelligible under the newly adopted legal and normative standards. For taxation, this could mean embracing current inequalities as justifiable under a "legitimate" standard.

Consequently, this Note's purpose is to investigate three questions: (1) Is the "sovereignty" problem posed by tax standardization merely one about "tax sovereignty"? (2) How should we assess the desirability of such a standard with regards to distribution? (3) What might be lost through processes of standardization and what do similar processes in other areas of the law teach us about the effects of increased globalization?

This Note has three main contributions to the literature. First, this Note makes an original theoretical contribution to the literature by paving the way on several unexplored issues with tax standardization, bringing in helpful insights from trade law, human rights law, and egalitarian thought. Second, by grouping recent tax developments under the framework of "standardization," this Note provides a useful conceptual framework for future research. Third, this Note makes a descriptive contribution to the literature by analyzing recent developments in the standardization of the tax law, such as information exchange.

The discussion will proceed in four further Parts. Part II will explore how the processes of standardization, harmonization, and globalization operate at different levels (i.e., national, bilateral, regional, and global) with reference to examples from contemporary taxation, and it will conclude by introducing Professor Grewal's framework for understanding these processes. Then, this Note will turn to the three questions posed by the developments in taxation discussed in Part II. In Part III, this Note will question the concept of "tax sovereignty," and will show that tax standardization will implicate several areas of law usually reserved for State sovereign control. Part IV will question the logic of "economic gains" advanced in support of standardization by looking at questions of distribution. This Note will briefly look into human rights and international trade law, analyzing the way in which standardization has framed these areas of the law. Further, it will interrogate what increased standardization could mean for international tax in a world with vast economic inequality among nations. The last Part will conclude this Note with some preliminary thoughts on

how States should think about these questions and how we might want to engage with and respond to these ongoing processes in international taxation.

Before proceeding, several caveats are in order. This Note should not be taken as a wholesale criticism of globalization, economic integration, and the internationalization of many areas of the law. The creation of the post-Second World War global legal order has brought with it more stability, peace, and economic prosperity than any prior order.⁷ This Note does not contest that overall claim, but it does argue for a reassessment of specific standardizing, harmonizing, and globalizing processes in international tax, which are separable from the overall internationalization project. Unlike other criticisms of processes of globalization, no moral relativism or appeals to culture or communitarianism are either intended or necessitated by the questions and arguments laid out here. Third, this Note unqualifiedly takes the stance that, just as with any other policy, international policies and arrangements are subject to concerns about equality and fairness. Finally, this Note does not take sides on the sovereignty debate, and is generally agnostic to political science and political philosophy debates regarding the source or legitimacy of State sovereignty. Rather, for the purposes of this Note, sovereignty will be assumed to have uncontroversial and traditional contours, and to belong to the “State”⁸—however one might wish to define it.

II. STANDARDIZATION, HARMONIZATION, GLOBALIZATION, AND NETWORK POWER

How are nations responding to the related phenomena of tax havens, tax competition, and tax sovereignty? While the approaches to these issues have been targeted at different levels—in my taxonomy: at the national, bilateral, regional, and multilateral levels—the underlying dynamic in all of these efforts has been the same. States, especially more developed States, are increasingly trying to standardize, harmonize, and globalize international taxation. Section II.A will first analyze how States are seeking to engage in standardization, by looking at four examples of these attacks on tax havens. Then, Section II.B will briefly highlight some of the important forces at work in standardization and harmonization processes.

A. Responses to Tax Havens

1. The Domestic Approach: The Tax Cuts and Jobs Act

⁷ See generally OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* (2017) (tracing the development of our current global legal order).

⁸ This should be fairly uncontroversial. Even those who identify sovereignty not with the government but with its people should be comfortable with such a definition. See Robert Howse, *Sovereignty, Lost and Found*, in *REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW* 61 (Wenhua Shan et al. eds., 2008).

Several nations have sought to address “harmful” tax competition and the problems threatened by tax havens through domestic policies. A good (and recent) example of this trend is the passage of the Tax Cuts & Jobs Act (TCJA) by the United States in 2017,⁹ which sought to address the threats posed by increased international tax competition and tax havens and “[to] mak[e] our country more competitive with other nations.”¹⁰

The TCJA dramatically lowered the corporate income tax rates to twenty-one percent¹¹ and overhauled major parts of the Internal Revenue Code, dramatically changing the its international tax provisions. In doing so, it enacted several policy changes meant to encourage tax competition and to counter tax havens—deploying minimum taxes and lower rates as a way to encourage uniform and global tax standards. While scholars have certainly stressed the TCJA’s “cooperative” policy choices,¹² we should still recognize that large parts of the Act were meant to increase—rather than decrease—competition, as President Trump’s speeches illustrate.

Cooperation is indeed hard to square with both the rhetoric, context, and effects of the TCJA. The global intangible low-taxed income (GILTI) provisions were meant to act as a “soak up” tax of sorts on a Controlled Foreign Corporation’s U.S. Shareholders paying low taxes in foreign jurisdictions.¹³ In this way, GILTI seeks to incentivize tax rate consistency: tax havens attempting to attract mobile capital away from the United States and other countries will be faced with a harsh truth—whatever they do not tax beneath 13.125%, the U.S. will tax through GILTI.¹⁴ As American businesses miss out on the advantages of low tax rates in tax havens (as a result of the soak-up tax), one might predict that tax havens would lose their appeal and would, after a while, converge on taxing corporate income at the GILTI rate.¹⁵ Therefore, GILTI could be seen as designed to incentivize a convergence to a *global* and *uniform* “minimum tax rate” of 13.125%.¹⁶

Yet GILTI does not eliminate incentives to compete through low tax rates. In fact, it just means that, to the extent that nations are to compete with the United States, they will do so by setting their rates in the range of 13.125% (the

⁹ An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

¹⁰ Donald Trump, Remarks in Indianapolis, Indiana, 2017 DAILY COMP. PRES. DOC. 4 (Sept. 27, 2017).

¹¹ See 26 U.S.C. § 11(b) (2018).

¹² Susan Morse, *International Cooperation and the 2017 Tax Act*, 128 YALE L.J.F. 362 (2018). <https://www.yalelawjournal.org/forum/international-cooperation-and-the-2017-tax-act> (arguing that provisions like GILTI provide incentives to cooperate).

¹³ See 26 U.S.C. § 951A(a) (2018).

¹⁴ The United States effectively taxes this income at 10.5%. The 21% rate, see 26 U.S.C. § 11(b) (2018), is multiplied by the GILTI inclusion percentage (50%), see 26 U.S.C. § 250(a)(1)(B)(2018) for an effective rate of 10.5%. See also Morse, *supra* note 12, at 368-69 (calculating GILTI step by step).

¹⁵ Susan Morse describes several possible mechanisms for convergence. See Morse, *supra* note 12, at 375-76.

¹⁶ *Id.*

GILTI-incentivized rate) to 21% (the regular U.S. corporate rate),¹⁷ as not all income is subject to special GILTI rates—for example, sales of goods by a U.S. corporation in the United States. Furthermore, GILTI does not capture all foreign income—rather it captures income on a formula based on a company’s tangible assets in a jurisdiction. As has been broadly acknowledged since the early days of the law,¹⁸ this calculation opens the floodgates to gaming and might provide perverse incentives to U.S. companies to relocate their depreciable tangible assets abroad, leaving ways for other nations to compete.¹⁹

Other international tax provisions, such as the base erosion and anti-abuse tax (BEAT)²⁰ and the foreign derived intangible income (FDII),²¹ were also implemented as tools to combat the rising power of tax havens and the increasing revenue losses due to tax competition. The BEAT is a minimum tax that “penalizes excessive deductible payments, such as interest and royalties, made by certain U.S. firms to related non-U.S. firms.”²² While “facially neutral” the BEAT “generally should operate as an anti-tax haven provision”²³ reducing countries’ abilities to exploit their tax rates to attract mobile capital.

The FDII effectively reduces the corporate tax rate on exports to 13.125%.²⁴ This change—although likely in violation of WTO anti-subsidy rules²⁵—would also effectively lower the tax rates that American corporations face when earning income internationally from intangible assets. Consequently,

¹⁷ The application of the FDII would obviously affect this competition.

¹⁸ See generally, e.g., David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches under the House and Senate Tax Bills*, 103 MINN. L. REV. 1439 (describing incentive challenges in the new tax law).

¹⁹ Analogously to FDII, GILTI defines the eligibility of income by assuming that all income earned by a corporation above a certain threshold—10% of tangible productive depreciable assets—is IP-related income. While this formulaic approach to determining IP-related income has several advantages (namely, administrability and simplicity), it can be manipulated through tax planning. GILTI is calculated by looking at a company’s “Deemed Intangible Income,” which is in turn defined by its “Deemed Tangible Income Return.” Congress deemed that a corporation’s “Deemed Tangible Income Return” should be 10% of its Qualified Business Asset Investment (QBAI). QBAI is a measure of a corporation’s specified tangible property. In plain English, QBAI is calculated in terms of the tangible and depreciable assets (such as machinery) that a company uses to produce its “tested income.” See 26 U.S.C. § 951A (2018).

²⁰ See 26 U.S.C. § 59A (2018).

²¹ See 26 U.S.C. § 250 (2018).

²² Morse, *supra* note 12, at 379.

²³ *Id.* at 379-80.

²⁴ FDII provides a 37.5% deduction on foreign derived intangible income from the standard corporate income tax rate (21%), resulting in an effective 13.125% rate—at least until the phase-outs kick in. See 26 U.S.C. § 250(a)(3) (2018); see also Morse, *supra* note 12, at 375-76 (describing the TCJA’s tax rate convergence dynamics).

²⁵ See generally, Reuven S. Avi-Yonah, *Does the United States Still Care About Complying with Its WTO Obligations?*, 9 COLUM. J. TAX L. TAX MATTERS 12 (2018) (highlighting that the FDII is a direct descendant of the BTA, which had been found to be in violation of the WTO rules, and questioning whether the U.S. is committed to the WTO); Rebecca M. Kysar, *Critiquing (and Repairing) the New International Tax Regime*, 128 YALE L.J.F. 339, 352-54 (2018), https://www.yalelawjournal.org/pdf/Kysar_su38oca6.pdf (commenting on the legality of the FDII under the WTO rules);

in theory, U.S. corporations would have a smaller economic incentive to move their intellectual property to tax havens.²⁶

2. The Bilateral Approach: Switzerland & Bank Secrecy

States have also countered tax havens through bilateral actions: for example, by establishing information exchange standards between two nations to address bank secrecy issues. Bank secrecy originated in its modern equivalent in Switzerland. As Ronen Palan notes, Swiss banks had offered secrecy to the French aristocracy in revolutionary times.²⁷ However, in the 1920s, the Swiss strengthened their privacy laws, making it a criminal offense to divulge a client's personal information.²⁸ While controversial from the beginning and seen as "a direct act of aggression" by several countries (who sometimes even jailed the owners of Swiss corporations),²⁹ countries around the world followed the Swiss lead and the practice took hold.

This longstanding practice has recently faced intense backlash, especially from the United States and the EU. In 2009, the United States imposed a \$780 million fine on UBS as a result of the *affaire Birkenfeld*,³⁰ where a former UBS employee acted as a whistleblower and shed light on the Swiss banks' questionable offerings to wealthy clients.³¹ Yet the crackdown on Swiss banks resulted not only in huge fines, disclosure of account holders' information,³² and deferred prosecution agreements³³—it even led to the bankruptcy of venerable Swiss banks which had operated for several centuries.³⁴ Switzerland agreed to share information with the United States through a bilateral agreement under the

²⁶ However, that the FDII does not apply to domestic income derived from intangible assets and that system-design issues with GILTI still ensure that tax havens remain competitive vis-à-vis the United States. See Rebecca M. Kysar, *supra* note 25 at 350-55.

²⁷ Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT'L ORG. 151, 161 (2002).

²⁸ *Id.* at 161-62.

²⁹ *Id.* at 162.

³⁰ Matthew Beddingfield & Colleen Murphy, *The UBS Whistle-Blower Who Won't Back Down*, BLOOMBERG: BNA (Apr. 13, 2017), [https://www.bna.com/ubs-whistleblower-wont-n57982086148/\[https://www.whistleblower.org/in-the-news/bloomberg-bna-the-ubs-whistle-blower-who-wont-back-down/\]](https://www.bna.com/ubs-whistleblower-wont-n57982086148/[https://www.whistleblower.org/in-the-news/bloomberg-bna-the-ubs-whistle-blower-who-wont-back-down/]).

³¹ See *UBS Enters into Deferred Prosecution Agreement*, U.S. DEP'T OF JUSTICE (Feb. 18, 2009), <https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement>.

³² Information for as many as 4450 account holders was disclosed for UBS alone. See Raphael Minder, *Pressure Mounts on Vaunted Secrecy of Switzerland's Banks*, N.Y. TIMES (May 24, 2013), <https://www.nytimes.com/2013/05/24/business/global/swiss-banking-secrecy-under-pressure-from-europe.html>.

³³ See, e.g., *UBS Enters into Deferred Prosecution Agreement*, *supra* note 31.

³⁴ See, e.g., Nate Raymond & Lynnley Browning, *Swiss Bank Wegelin to Close After Guilty Plea*, REUTERS (Jan. 3, 2013), <https://www.reuters.com/article/us-swissbank-wegelin-idUSBRE90200020130104>.

Foreign Account Tax Compliance Act (“FATCA”) in 2014,³⁵ thereby changing its policies on bank secrecy—at least in its relationships to U.S. citizens.

This bilateral agreement with the U.S. led to broader changes after Switzerland was pressured by the EU. After strong-arming Austria and Luxembourg into abandoning their secrecy rules, the EU came for Switzerland in 2013.³⁶ The pressure led to impressive results: Switzerland joined the OECD’s information exchange programs³⁷ and began sharing information on Swiss accounts with foreign jurisdictions in late 2018.³⁸ These changes have led commentators to pronounce Swiss bank secrecy dead,³⁹ which if true, would represent a significant shift from heterodoxy to orthodoxy for Swiss privacy laws. These “nudges,” mainly by the U.S. and the EU, illustrate not only how powerful States can bilaterally ensure that their standards are observed by other States (even if they have to do so through the threat of large fines and sanctions)⁴⁰ but also adumbrate how bilateral action can snowball into regional actions.

3. The Regional Approach: State Aid

States have also engaged in the fight against tax havens at the regional level, usually by either pushing for a new uniform tax policy or punishing a State’s “deviant” policy. The EU’s crackdown on Ireland and Luxembourg through European Commission investigations pursuant to the rules on State Aid (and these States’ reactions to the crackdown), highlight regional European anti-haven dynamics.

Article 107(1) of the TFEU prohibits EU members from providing “illegitimate State Aid.” The article reads

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain

³⁵ *Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA*, U.S. DEP’T OF TREASURY (Feb. 14, 2013), <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf>.

³⁶ Minder, *supra* note 32.

³⁷ *CRS by jurisdiction 2018*, OECD (2018), <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/crs-by-jurisdiction-2018.htm> (last visited Nov. 14, 2019).

³⁸ Michael Shields, *Era of Bank Secrecy Ends as Swiss Start Sharing Account Data*, REUTERS (Oct. 5, 2018), <https://www.reuters.com/article/us-swiss-secrecy/era-of-bank-secrecy-ends-as-swiss-start-sharing-account-data-idUSKCN1MF130>.

³⁹ See, e.g., Nicholas Hirst, *The Painful Death of Banking Secrecy*, POLITICO (Mar. 26, 2015), <https://www.politico.eu/article/the-painful-death-of-banking-secrecy>; David Rogers, *The Era of Offshore Bank Secrecy Is Dead*, FIN. POST (Jan. 28, 2015), <https://business.financialpost.com/opinion/the-era-of-offshore-bank-secrecy-is-dead>.

⁴⁰ I refer to the relationship between the EU and Switzerland as bilateral given the cohesiveness of EU action on the matter and the fact that Switzerland is not part of the EU system.

goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.⁴¹

State Aid jurisprudence has construed the article capaciously and has narrowly read the express derogations of the principle contained in the TFEU.⁴² (As State Aid rules are part of the TFEU, national courts do not have the power to construe State Aid’s proper application.⁴³) Generally, State Aid rules prohibit States from using their tax systems to provide selective incentives to corporations affecting competition or trade in the Union.⁴⁴

A key part of the State Aid doctrine, however, has been that only *selective* State Aid—that which deviates from a general benchmark⁴⁵—is forbidden. Therefore, tax rulings given to singular companies are illegitimate State Aid, but general “business-friendly” measures—such as low corporate income tax rates—are not. In other words, Ireland’s private tax rulings regarding Apple are illegal,⁴⁶ but Ireland’s favorable tax structure is not.⁴⁷ While this distinction might not seem very important from an economic perspective, its legal salience is derived from the perceived “inviolability” of a State’s sovereignty over the structure of its domestic tax system.

The Commission’s 1998 Notice evidences its compromise on the issue of tax sovereignty—highlighting a State’s ability to set its own “general tax scheme” while rejecting a State’s ability to create exceptions to that general scheme.⁴⁸ The Notice reads:

The main criterion in applying [Art 107(1) TFEU] to a tax measure is therefore that the measure provides in favour of

⁴¹ Consolidated Version of the Treaty on the Functioning of the European Union, art. 107, May 9, 2008, 2008 O.J. (C 115) 47.

⁴² See CHRISTIANA HJI PANAYI, *ADVANCED ISSUES IN INTERNATIONAL AND EUROPEAN TAX LAW* 238 (2015).

⁴³ This is more complicated as a technical matter. See *Id.* at 244.

⁴⁴ See, e.g., *Tax Rulings*, EUR. COMM’N, http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html (last updated Sept. 25, 2019).

⁴⁵ We should note here that, although the CJEU has recently seemed to conflate the “selectivity” and “advantage” prongs of the State Aid tests, these are analytically distinct. This issue has been heavily discussed by scholars and is outside of the scope of this essay. See Wolfgang Schön, *Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence*, in *STATE AID LAW AND BUSINESS TAXATION* 3, 8 (Isabelle Richelle et al. eds., 2016).

⁴⁶ *State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion*, EUR. COMM’N (Aug. 30, 2016), http://europa.eu/rapid/press-release_IP-16-2923_en.htm; see also Commission Decision 2017/1283, On State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple, 2017 O.J. (L187) 1. (publishing the official decision of the European Commission).

⁴⁷ As a general matter. Nonetheless, the EU has in the past addressed more structural fiscal issues of member states. See CARLO PINTO, *TAX COMPETITION AND EU LAW*, 89-91 (2003) (recounting how Ireland removed some direct tax incentives and changed some of its annual budget after pressure from the EU).

⁴⁸ Panayi, *supra* note 42, at 253 (quoting *Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation*, OJ C384 (1998)).

certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified 'by the nature of the general scheme' of the tax scheme, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned. If this is not the case, then State aid is involved.⁴⁹

This respect for a State's sovereignty over structural choices of their tax code has allowed countries to compete for businesses without running afoul of State Aid rules.

The Netherlands' proposed scrapping of its foreign dividend withholding tax provides a perfect example of this competitive phenomenon. The U.K.-based behemoth Unilever considered relocating to Rotterdam.⁵⁰ As a way of coaxing reluctant Unilever shareholders into backing the gargantuan relocation, the Netherlands considered wide-ranging changes to its tax regime: the country proposed scrapping its 15% withholding tax on dividends to foreign shareholders.⁵¹ This proposal alleviated some shareholders' concerns, but failed to convince a majority of Unilever's shareholders to back the relocation plan. A couple of hours after Unilever decided not to leave the United Kingdom, the Dutch prime minister tellingly indicated he was reconsidering the overhaul, commenting that "[w]e didn't decide to scrap the dividend tax for just one company, but the fact that such a large company that had decided to come to the Netherlands has withdrawn its plan is very relevant."⁵² Although this was his official pronouncement, released documents have all but confirmed the transactional nature of this tax subsidy to Unilever.⁵³ Although Unilever's reversal saved Dutch taxpayers around \$2.2 billion,⁵⁴ the structural change loophole to State Aid rules evidenced how tax sovereignty can shield States from even the most stringent rules against tax competition.

⁴⁹ *Id.*

⁵⁰ Simon Jack, *Unilever Scraps Dutch Relocation Plan*, BBC (Oct. 5, 2018), <https://www.bbc.com/news/business-45756738>.

⁵¹ The Prime Minister's true motivations were further cast into doubt by a document release regarding his government's discussions with Unilever regarding the withholding tax. See, Toby Sterling, *Dutch Government Memos: Tax Cut Was 'Decisive' for Unilever's Headquarters Choice*, REUTERS (Apr. 24, 2018), <https://www.reuters.com/article/us-netherlands-unilever-tax/dutch-government-memos-tax-cut-was-decisive-for-unilevers-headquarters-choice-idUSKBN1HV2V1>.

⁵² *Id.*

⁵³ Linda A. Thompson, *Netherlands Used Tax Break to Keep Shell, Unilever in Netherlands*, BLOOMBERG BNA (Apr. 25, 2018), <https://www.bna.com/netherlands-used-tax-n57982091530>.

⁵⁴ Joost Akkermans & Wout Vergawen, *Dutch Drop Dividend Tax Plan After Unilever's U.K. Decision*, BLOOMBERG (Oct. 15, 2018), <https://www.bloomberg.com/news/articles/2018-10-15/dutch-drop-plan-to-end-dividend-tax-after-unilever-u-k-decision>.

But, in recent years, facing a proliferation of tax rulings and “structural” incentives, the Commission and the Court of Justice of the European Union (CJEU) have signaled a shift in their approach, partially abandoning tenets of the 1998 Notice and pushing towards regional standardization and harmonization. In response to several States using their tax code to attract capital and invoking their national sovereignty to defend their practices from criticism,⁵⁵ the Commission has taken a stronger approach against tax competition, by seriously questioning whether a State indeed has absolute control over its own “general” tax structure.⁵⁶

These recent positions suggest that the Commission is seeking to expand its role in designing the EU tax landscape. In response to the Commission’s perceived penchant for prosecuting American corporations, the U.S. Treasury Department argued that the Commission’s Directorate-General for Competition has expanded “beyond enforcement of competition and State aid law under the TFEU into that of a supra-national tax authority that reviews Member State transfer price determinations.”⁵⁷

In fact, the Commission has been exceedingly enthusiastic in finding substantive benchmarks in OECD guidelines, rather than in national law, in order to determine selectivity for State Aid purposes.⁵⁸ In its filings against Fiat, Starbucks, and Apple, the Commission suggested that *even if* a State’s tax incentives were non-selective with respect to the structural design of its domestic tax system, a State might still have given a “selective advantage” in violation of State Aid rules through a domestically legal, but inappropriate (in the eyes of the Commission) application of a substantive “arm’s-length principle.”⁵⁹ More recent cases against European companies have also evidenced this approach by the Commission.⁶⁰ In light of these cases, Professor Panayi aptly notes

[W]hat is most disconcerting is that the Commission does not actually satisfy . . . the selectivity test. It fails to examine the system of reference (ie [sic] the domestic transfer pricing rules) *Rather, the OECD Transfer Pricing Guidelines seem to be treated as part or akin to a national tax system, when in fact*

⁵⁵ As has long been the case with Ireland.

⁵⁶ See *infra* notes 58-62 and accompanying text.

⁵⁷ *The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings*, U.S. DEP’T OF TREASURY 9 (Aug. 24, 2016), <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf>.

⁵⁸ See Raymond Luja, *State Aid Benchmarking and Tax Rulings: Can We Keep It Simple?*, in STATE AID LAW AND BUSINESS TAXATION 111, 117 (Isabelle Richelle et al. eds., 2016).

⁵⁹ Panayi, *supra* note 42, at 267-81 (emphasis added).

⁶⁰ Oliver R. Hoor, *INSIGHT: The Engie State Aid Decision—Another One Bites the Dust*, BNA BLOOMBERG (Nov. 21, 2018), <https://www.bna.com/insight-engie-state-n57982094076/> (discussing the Engie case).

not all Member States had adopted or followed these Guidelines.⁶¹

Professor Mason has, in a similar vein, criticized the Commission's actions in these investigations and has questioned the Commission's "*sui generis* arm's-length standard."⁶²

In other words, the EU has seemed to adopt substantive standards and principles—e.g., an EU arm's length principle—which if derogated, would lead to a finding of State Aid.⁶³ If this is the direction of EU jurisprudence, member states will cede their ability to fully determine their tax structure and would have to comply with at least some basic EU principles, generally designed to combat tax competition by tax havens.⁶⁴ (While the Commission faced mixed success in recent decisions by European courts, the courts have accepted the Commission's role in defending the "arm's length principle.")⁶⁵ Recent cases have, in fact, led European scholars to advocate for an abandonment of previous State Aid doctrine in favor of a more capacious and simple "non-discrimination" analysis,⁶⁶ possibly setting the scene for *even more* structural standardization across Europe.⁶⁷

4. The Multilateral Approach: BEPS

States have also sought to use a multilateral approach to combat tax havens through the creation and promulgation of uniform international standards of taxation. The OECD's Base Erosion and Profit Shifting Initiative is the most recent and high-profile example of such a move towards standardization. Pascal Saint-Amans, the Director for the OECD Centre for Tax Policy and Administration, described BEPS themes,

⁶¹ Panayi, *supra* note 42, at 277-78 (emphasis added).

⁶² Ruth Mason, *State Aid Special Report — Part 6: Arm's Length on Appeal*, 158 TAX NOTES 771, 784 (2018)

⁶³ Ruth Mason, *Tax Rulings as State Aid — Part 4: Whose Arm's-Length Standard?*, 155 TAX NOTES 947, 954 (2017).

⁶⁴ See, e.g., Rita Szudoczky, *Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law: Comments*, in STATE AID LAW AND BUSINESS TAXATION 163, 176 (Isabelle Richelle et al. eds., 2016) ("The most controversial point of this reasoning is certainly the claim that a 'single tax' principle exists above and beyond national tax laws which would not allow national tax legislators to derogate from such principle.")

⁶⁵ Ryan Finley, *EU Court Overturns Starbucks Decision and Affirms Fiat*, TAX NOTES (Sept. 25, 2019), <https://www.taxnotes.com/tax-notes-today-international/competition-and-state-aid/eu-court-overturns-starbucks-state-aid-decision-affirms-fiat/2019/09/25/29z33>.

⁶⁶ Cf. Schön, *supra* note 45, at 9-14.

⁶⁷ Moreover, structural changes to the EU procedures allowing for a lower voting threshold when passing taxation matters could foretell more action in the regional tax arena and further standardization. Elodie Lamer, *New Tax Commissioner Vows to Use TFEU to End Tax Unanimity*, TAX NOTES (Sept. 30, 2019), <https://www.taxnotes.com/tax-notes-today-international/legislation-and-lawmaking/new-tax-commissioner-vows-use-tfeu-end-tax-unanimity/2019/09/30/29zs6>.

The BEPS package covers three unifying themes: to align rules on taxation with the location of economic activity and value creation; to improve coherence between domestic tax systems and international rules; and to promote transparency. Like our exchange of information standards, BEPS also provides governments with practical measures and tools for implementation, including model provisions for tax treaties and domestic legislation, good practice templates and more.⁶⁸

If implemented, BEPS actions could, for example, reduce the ability of taxpayers to exploit mismatches in domestic law to escape taxation altogether.⁶⁹ They could also reduce treaty abuse⁷⁰ or create efficient and fast dispute resolution mechanisms in tax matters.⁷¹ All of these actions would constrain a State’s powers to regulate its own tax matters, thereby reducing or eliminating tax havens’ ability to attract investment through certain schemes (and taxpayers’ ability to aggressively take advantage of structural differences and discontinuities among domestic tax regimes). Yet, by harmonizing and standardizing, some countries will be able to reduce friction costs and more effectively address tax evasion, therefore likely producing aggregate economic gains on a global scale.

B. *Standards, Harmonization, and Globalization*

States are increasingly reacting to the fiscal threat posed by tax havens. In doing so, they are acting at the domestic, bilateral, regional, and multilateral level. While some of these measures might be more effective than others—e.g., a multilateral solution over a loophole-laden domestic approach such as the TCJA—all of these measures have *one* feature in common: they all seek to harness the forces of standardization, harmonization, and globalization as positive influences in curbing the power of tax havens.

In this way, nations are increasingly willing to abandon their *laissez faire* attitude regarding a State’s prerogative to independently structure their tax systems. In doing so, nations are strongly pushing towards uniform models, adopted by developed nations or enacted by international organizations steered

⁶⁸ Pascal Saint-Amans, *Global Tax and Transparency: We Have the Tools, Now We Must Make Them Work*, OECD OBSERVER (2016),

http://oecdobserver.org/news/fullstory.php/aid/5558/Global_tax_and_transparency:_We_have_the_tools,_now_we_must_make_them_work.html.

⁶⁹ See *Neutralising the Effects of Branch Mismatch Arrangements, Action 2*, OECD (2017), https://read.oecd-ilibrary.org/taxation/neutralising-the-effects-of-branch-mismatch-arrangements-action-2_9789264278790-en#page4 (describing Action 2 of the BEPS Project). *But see*, Reuven Avi-Yonah & Haiyan Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 6 HARV. BUS. L. REV. 185, 212-15 (2016) (noting the limitations of Action Item 2).

⁷⁰ *But see* Avi-Yonah & Xu, *supra* note 69 (highlighting the BEPS’ drawbacks).

⁷¹ See *BEPS Action 14 Peer Review and Monitoring*, OECD, <http://www.oecd.org/tax/beps/beps-actions/action14> (last visited Nov. 14, 2019). *But see* Avi-Yonah & Xu, *supra* note 69, at 232-33 (noting the limitations of Action Item 14, namely the lack of a framework for *mandatory arbitration*).

by these nations, which other nations will have to adopt. Yet this movement—towards the de-localization and “nudged” convergence of tax structures—is not unprecedented in international law.

As Professor Grewal has argued in other areas of international law, globalization has operated both by creating standards that incentivize large scale cooperation (with snowballing benefits to increased standardization) and by relatively disincentivizing alternatives.⁷² Perhaps unsurprisingly, “network power”—the term Professor Grewal uses to describe the dynamic propelling these two forces—does not operate uniformly or evenly: its operation is influenced by power dynamics and asymmetries. Uniform standards “impose their costs unevenly, and frequently privilege the already powerful. Therefore, globalization may appear to many who feel its effects most acutely not as the iron cage of modernity manifest on a newly global scale, but as foreign imposition in the familiar mold of empire.”⁷³

III. THE SOVEREIGNTY PROBLEM & “TAX” SOVEREIGNTY

The literature on international tax competition, tax evasion, and tax havens is plentiful and countries’ policy responses to the problems caused by these phenomena are varied. Notwithstanding this abundance, the literature is unqualifiedly concerned with economic analysis and (classically utilitarian⁷⁴) welfare calculations, often ignoring—or at least repeatedly sidestepping—the important formal and normative constraints and obstacles in the “fight against international tax avoidance.” These somewhat myopic discussions usually address concerns about the loss of a thin conception of “tax sovereignty,” while ignoring the robust sovereignty principles that undergird international law and will more broadly be implicated by current approaches to tax evasion. This Part will first analyze how tax scholars and reformers have conceptualized the problem of “tax sovereignty.” The following three sections note instances—in criminal, privacy and equal protection, and immigration law—in which proposed tax reforms seriously intrude into traditional areas of exclusive State control, challenging conventional notions of a narrow “tax” sovereignty.

A. *The Problem of “Tax” Sovereignty*

Scholars and practitioners have indeed recognized that some proposals to curb harmful tax competition and to limit the proliferation of tax havens will implicate matters of State’s “tax” sovereignty. For example, the OECD paid lip service to sovereignty by noting that its BEPS project was designed to “provide governments with more efficient tools to ensure the effectiveness of their

⁷² DAVID S. GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 4 (2008).

⁷³ *Id.* at 8.

⁷⁴ See BECKERMAN, *supra* note 6, at 63-76.

sovereign tax policies.”⁷⁵ In this vein, Allison Christians, notes that, in order to defeat rampant tax evasion and avoidance and “[t]o regain effective autonomy in tax policymaking, governments will have to end their deep-seated resistance to multilateralism on grounds of sovereign entitlement.”⁷⁶ Others, however, rightly point to the uselessness and vagueness of the concept of “tax sovereignty,” correctly suggesting that adding “tax” to sovereignty obscures more than it enlightens, given the breadth and interconnectedness of a State’s tax and other powers.⁷⁷ However, these critics conclude that, instead of clarifying or appropriately employing the concept, “international tax discourse would benefit greatly if participants simply refrained from making sovereignty-based assertions.”⁷⁸ These reactions are understandable as, after all, States often have often mis- and overused the language of sovereignty to defend all sorts of undesirable—and immoral—policies,⁷⁹ including tax policies.⁸⁰

Regardless of the historical mis- or overuse of sovereignty language in the context of tax, the current international legal order *requires* that any reforms address the “problem of sovereignty.” State consent is the main legitimizing value of international law. Sources of international law—whether they be treaties⁸¹ or customary international law—critically hinge on State consent. Any cooperative framework or push towards standardization, then, would depend on informed and uncoerced consent from States. Yet the relevance and value of consent is derived from notions of sovereignty and political self-determination,⁸² which theoretically undergird the current international legal system,⁸³ even in its

⁷⁵ OECD, OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Statement, OECD (2015), www.oecd.org/tax/beps-explanatory-statement-2015.pdf (emphasis added).

⁷⁶ Allison Christians, *BEPS and the Power to Tax*, in *TAX SOVEREIGNTY IN THE BEPS ERA 4* (Sergio André Rocha & Allison Christians eds., 2017) [hereinafter Christians, *BEPS*].

⁷⁷ Yariv Brauner, *An Essay on BEPS, Sovereignty, and Taxation*, in *TAX SOVEREIGNTY IN THE BEPS ERA 73, 75* (Sergio André Rocha & Allison Christians eds., 2017).

⁷⁸ *Id.*

⁷⁹ See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT’L L.* 866 (1990).

⁸⁰ See Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 *GEO. L.J.* 543, 597 (2000) (“Mandated tax uniformity (enforced by punitive sanctions, if available) is generally regarded as an intolerable infringement on national sovereignty. . . . It is one thing to argue that a country should be able to use the tools at its disposal—tools that impose costs on the local population—to attract investment and tax revenues. It is another to attract investment (or launder the profits generated by investment elsewhere) by using tools that impose costs only on outsiders (including outside governments).”).

⁸¹ The Vienna Convention on the Law of Treaties, the authoritative international law source on treaties, has no less than 55 references to “consent” in just 20 pages of text. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *U.N.T.S.* 331, 332-351.

⁸² These concepts buttress one of the foundational documents of modern international law, the United Nations Charter. U.N. Charter art. 2(1) (“The Organization is based on the principle of the *sovereign equality* of all its Members.”) (emphasis added).

⁸³ For an interesting tale of how the current international legal order came to be and of the changing valence of the concept of sovereignty, see OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* (2017).

softest versions.⁸⁴ So fundamental and established is sovereignty to our international law⁸⁵ that Hans Kelsen published an article titled “*The Principle of Sovereign Equality of States as a Basis for International Organization*.”⁸⁶

Consequently, a plain rejection of the concept of sovereignty will just not do. A reformer ought to engage with the concept of sovereignty. Scholars and policymakers have thus sought to justify the increasing standardization, harmonization, and globalization of taxation by (i) defining “tax sovereignty” narrowly or functionally (i.e., a State enhances its sovereignty with increasing revenues, despite more limited control over its tax system)⁸⁷ or (ii) engaging in welfarist appeals and claiming that standardization is necessary to solve a harmful coordination problem.⁸⁸

The recognition that sovereign interests (even if they are called “tax” sovereign interests) are involved in the push towards standardization, however, has been notoriously devoid of the conscious acknowledgment that the fight will implicate much more than just “tax” sovereignty.⁸⁹ A couple of recent examples evidence that the effective fight against tax evasion will *require* a significant intrusion into State sovereignty, a fact that States should consider before ceding theirs. Addressing cooperation in tax matters will, for example, involve a harmonization of everything from criminal law to privacy and immigration law.

B. Tax Sovereignty as Criminal Law?

Criminal law has entered the tax debate, as some States are pressuring others to adopt wide (or any) definitions of the crime of tax evasion. Intervention is warranted, States argue, as extradition requests are usually subject to a treaty

⁸⁴ See John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782 (2003) (assessing absolutist notions of sovereignty critically but acknowledging the still-fundamental role of sovereignty to the current international legal order).

⁸⁵ See Samantha Besson, *Sovereignty*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=OPIL#law-9780199231690-e1472-div1-5> (last updated Apr. 2011) (providing a thorough background on the concept of sovereignty in international law).

⁸⁶ Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 214-15 (1944) (discussing the importance of sovereignty in the context of the creation of the League of Nations and the beginning of a new world order).

⁸⁷ Christians, *BEPS*, *supra* note 76, at 4 (“To regain *effective autonomy* in tax policymaking, governments will have to end their deep-seated resistance to multilateralism on grounds of sovereign entitlement.”) (emphasis added).

⁸⁸ See, e.g., Luís Eduardo Schoueri & Ricardo André Galendi Júnior, *Justification and Implementation of the International Allocation of Taxing Rights: Can We Take One Thing at a Time?*, in TAX SOVEREIGNTY IN THE BEPS ERA 47, 59-63 (Sergio André Rocha & Allison Christians eds., 2017) (explaining both rationales for standardization); see also Reuven S. Avi-Yonah, *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, 25 VA. TAX REV. 313, 334 (2005) (“[The Age of Cooperation (1989-)] is marked by a different response to globalization than unilateral competition—acting in concert with our major trading partners to reduce both double taxation and double nontaxation. Because the emphasis is on concerted action, this move promises a way out from the need to balance U.S. international tax policy goals with competitiveness considerations.”).

⁸⁹ Brauner, *supra* note 78, at 75.

requirement of “double criminality.”⁹⁰ (This only applies to treaties in which tax crimes are not explicitly carved out, as is often the case.⁹¹) As such, if a country has not criminalized tax evasion, then extradition requests to that country would be frustrated. Additionally, absent a bilateral Tax Information Exchange Agreement (TIEA)—treaties on mutual cooperation, referred to as Mutual Legal Assistance Treaties (MLAT), might require “double criminality” for the exchange of information.⁹² Moreover, States might (rightfully) consider that other States should criminalize tax fraud as a normative matter.

Therefore, it should come as no surprise that some countries with “generous” tax regimes have used these formalisms to their advantage. Panama, for example, was not a signatory to automatic exchange regimes like the Common Reporting Standards until 2018.⁹³ Panama did not criminalize tax evasion until it was pressured to do so in February 2019.⁹⁴ Moreover, *even* Panama’s MLAT with the U.S. had “double criminality” requirements—a rare occurrence!⁹⁵ That means that until the date of criminalization, most tax evaders would have been able to exploit the “double criminality” requirement to avoid information exchange that would aid in their prosecution and would have been ineligible for extradition *even if* they would have been successfully prosecuted. Interestingly (and tellingly), Panama criminalized tax evasion less than two months after the United States charged four men (two of them Panamanian) with a slew of financial crimes—such as money laundering, wire fraud, and tax evasion—in the aftermath of the Panama Papers exposé.⁹⁶ International pressure has forced other countries, like Andorra, to similarly enact laws criminalizing tax evasion.⁹⁷ While many, myself included, think that tax evasion should be a crime, shouldn’t societies be allowed to make their own determinations about what is legal and what isn’t (absent important claims about fundamental or minority rights violations)?

⁹⁰ Bruce Zagaris, *U.S. Efforts to Extradite Persons for Tax Offenses*, 25 LOY. L.A. INT’L & COMP. L. REV. 653, 654-655 (2003).

⁹¹ *Id.*

⁹² See Michael E. Tigar & Austin J. Doyle, Jr., *International Exchange of Information in Criminal Cases*, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 61, 81 n.31 (1983); see also *infra* note 95 (showing that Panama’s MLAT with the U.S. had a “double criminality” requirement). But see Sarah Cortes, *MLAT Jiu-Jitsu and Tor: Mutual Legal Assistance Treaties in Surveillance*, 22 RICH. J.L. & TECH 2, 69-71 (2015) (noting how MLATs have recently lost their double criminality requirements).

⁹³ *Panama Joins International Tax Co-Operation Efforts to End Bank Secrecy*, OECD (Jan. 15, 2018), <http://www.oecd.org/ctp/panama-joins-international-tax-co-operation-efforts-to-end-bank-secrecy.htm>.

⁹⁴ Christopher Copper-Ind, *Panama Outlaws Tax Evasion, as New Blacklisting Looms*, INT’L INVESTMENT (Feb. 13, 2019), <https://www.internationalinvestment.net/news/4000914/panama-outlaws-tax-evasion-blacklisting-looms>.

⁹⁵ *Treaty with Panama on Mutual Assistance in Criminal Matters*, S. EXEC. DOC. NO. 104-3, art. 2, 6, (May 5, 1995).

⁹⁶ Doha Madani, *4 Men Charged with Fraud, Money Laundering in Connection to Panama Papers Investigation*, NBC NEWS (Dec. 4, 2018), <https://www.nbcnews.com/news/us-news/4-men-charged-fraud-money-laundering-connection-panama-papers-investigation-n943836>.

⁹⁷ *Fiscal Paradise Lost: Andorra Criminalises Tax Evasion*, FRANCE24 (July 17, 2017), <https://www.france24.com/en/20170717-fiscal-paradise-lost-andorra-criminalises-tax-evasion>.

C. Tax Sovereignty as Privacy and Equal-Protection Law?

The broad fight against tax havens has also involved difficult intrusions into privacy and equal protection laws. An important and alluring aspect of tax havens has been their secrecy and their tight control of information exchange. The revelation of the extent to which secretive avoidance schemes flourished in tax havens (e.g., the *affaire Birkenfeld*)⁹⁸ led to massive policy changes, often resulting in the repeal of banking secrecy laws or financial privacy rules, most prominently in Switzerland.⁹⁹

That being said, perhaps nowhere has the clash between information exchange and fundamental constitutional protections been more evident than in Canada.¹⁰⁰ In 2014, Canada signed an agreement subjecting itself to information exchange of bank account information¹⁰¹ in order to avoid the imposition of onerous withholding taxes under FATCA to noncomplying financial institutions.¹⁰² While Canada is only one of many countries “nudged” into signing these agreements,¹⁰³ the signing of the FATCA agreement has posed unique questions under Canadian law.

After the signing of the agreement with the U.S., a Canadian group sued their government, claiming that the agreement violated fundamental privacy protections under Canadian law. The lawsuit alleges, inter alia, that the Canadian parliament acted ultra vires in signing the FATCA agreement,¹⁰⁴ that the FATCA agreement violates Canadian’s constitutional rights to “liberty and security,”¹⁰⁵ that the FATCA agreement violates Canadians’ “reasonable expectation of privacy in their [bank information],”¹⁰⁶ and more importantly, that it violates equal protection by discriminating with regards to national origin and citizenship (in the case of dual citizens).¹⁰⁷ While a lower Canadian court dismissed the action,¹⁰⁸ the decision of Ontario’s Federal Court is expected to be appealed.¹⁰⁹

⁹⁸ See *supra* Section II.A.

⁹⁹ *Id.*

¹⁰⁰ Some have (unsuccessfully) challenged information exchange treaties as unduly affecting analogous individual rights. See Schoueri & Galendi Júnior, *supra* note 88 at 69

¹⁰¹ Agreement to Improve International Tax Compliance Through Enhanced Exchange of Information Under the Convention with Respect to Taxes on Income and on Capital, U.S.-Can., Feb. 5, 2014, T.I.A.S. No. 14-627.

¹⁰² See *infra* Section IV.C (describing FATCA and IGAs in detail).

¹⁰³ *Id.*

¹⁰⁴ See Complaint at 13 ¶ 65, *Deegan v. Canada*, [2019] F.C. 960 (Can. Ont. Fed. Ct.) No. T-1736-14, <http://files4.design-editor.com/41/410162/UploadedFiles/18a42f1e-e327-4102-bb53-12e0dbd2fa84.pdf>.

¹⁰⁵ *Id.* at 13 ¶ 69.

¹⁰⁶ *Id.* at 13 ¶ 70-72.

¹⁰⁷ *Id.* at 14-15 ¶ 73-77.

¹⁰⁸ *Deegan v. Canada* [2019] F.C. 960, ¶442 (Can. Ont. Fed. Ct.).

¹⁰⁹ ALLIANCE FOR THE DEFENCE OF CANADIAN SOVEREIGNTY, <http://www.adcs-adsc.ca> (last visited Nov. 14, 2019); Pedro Gonçalves, *Canadians Anti-FATCA Fight in Court Will Be Further Appealed*, INT’L INV. (Feb. 12, 2019), <https://www.internationalinvestment.net/news/4000885/canadians-anti-fatca-fight-court-appealed>.

While some might view these claims (perhaps rightly) as a typical example of a cynical abuse-of-rights scenario, we should acknowledge that there might be good reasons as to why a State might decide to have stricter privacy or equal protection laws. For example, nations might ground these strict constitutional protections on legitimate concerns for the safety of citizens’ tax records in foreign countries—let us remember how hackers stole information on more than five million accounts from the Bulgarian tax authorities, including information on foreign persons shared with Bulgaria by foreign governments.¹¹⁰ However, we should assume *arguendo* that the claims have some merit under Canadian law, as at least a prominent Canadian constitutional scholar thinks they do.¹¹¹ After all, constitutional protections vary widely from country to country, often representing differing cultural values and concerns. Wouldn’t changing the contours of citizens’ constitutional rights to benefit another country represent an action in need of serious democratic justification?

D. *Tax Sovereignty as Immigration Law?*

Immigration law has also been an area of proposed reform and promises to be another hotbed of tax avoidance and evasion. Around the world, countries are increasingly using “golden passport” or “golden visa” schemes to attract foreign investment and increase tax revenues.¹¹² In these schemes, investors are allowed to obtain citizenship or permanent residency after investing a certain amount in a country.¹¹³

Notwithstanding how common they are, the use of “golden visas” has become increasingly controversial—especially in the EU, where Bulgaria, Cyprus, and Malta operate such schemes.¹¹⁴ A recent report by the EU decried their use, warning that monitoring was necessary to ensure “that individuals do not take advantage of these schemes to benefit from privileged tax rules.”¹¹⁵ The Commission elaborated: “a risk of potential aggressive tax planning and evasion can be created when individuals partaking in the schemes are abruptly granted new or additional citizenships which may help to obscure the actual tax residence of the individual, leading to the tax rules in their original country to be

¹¹⁰ *OECD Notes Hack of Bulgarian Revenue Agency Data*, TAX NOTES (Aug. 30, 2019), <https://www.taxnotes.com/tax-notes-today-international/common-reporting-standard-crs/oecd-notes-hack-bulgarian-revenue-agency-data/2019/09/03/29wv1>.

¹¹¹ Peter Hogg (a leading scholar and former Dean of Osgoode Hall Law School) argued that Canada’s agreement to comply with FATCA violated the equal protection guarantees of the Canadian constitution. Letter from Peter W. Hogg to Department of Finance Canada (Dec. 12, 2012), http://elizabethmaymp.ca/wp-content/uploads/peter_hogg_fatca.pdf.

¹¹² See Kim Gittleson, *Where Is the Cheapest Place to Buy Citizenship?*, BBC NEWS (Jun. 4, 2014), <https://www.bbc.com/news/business-27674135>.

¹¹³ See, e.g., *Citizenship by Investment Malta*, MALTA IMMIGR., <http://www.maltaimmigration.com> (last visited Nov. 14, 2019) (providing a wide menu of citizen by investment options in Malta).

¹¹⁴ Commission Reports on the Risks of Investor Citizenship and Residence Schemes in the EU and Outlines Steps to Address Them, EUR. COMM’N (Jan. 22, 2019), http://europa.eu/rapid/press-release_IP-19-526_en.htm.

¹¹⁵ *Id.*

circumvented.”¹¹⁶ Additionally, “[s]chemes in countries which do not tax the income, or tax it at a very low rate,” the Commission warned, “carry a greater risk of account holders hiding evidence of the real state of residence and thereby evading tax.”¹¹⁷ Responding to the report, a German member of the European Parliament went further stating that “[g]olden visa and passport programmes should be stopped immediately. . . . We need a European law to curb the sale of European citizens’ rights.”¹¹⁸

The OECD has opposed these schemes, similarly warning that they facilitate tax evasion. It has stressed that these immigration schemes might also endanger its CRS protocol,¹¹⁹ because they might allow investors to opt out of information-exchange by becoming citizens of countries with either non-existent or minimal information exchange obligations or by selectively disclosing their citizenship.¹²⁰ In this fashion, individuals might be able to hide assets abroad, escaping taxation. In response to this threat, the OECD published a “blacklist” of twenty-one nations, seeking to shame jurisdictions away from their “golden passport” schemes.¹²¹ Whether the blacklist will work is subject to debate, but similar blacklists have brought about domestic law changes in other areas, such as criminal law.¹²² Should immigration—a traditional area of exclusive State control—be harmonized on a global scale without sufficient democratic debate about the propriety of doing so?

E. Lessons on Sovereignty: No Such Thing as “Tax” Sovereignty

However sympathetic (or more likely, unsympathetic¹²³) these claims of sovereignty might be,¹²⁴ we should acknowledge the intrusiveness of incursion into these areas of sovereign control. For example, determining who is and who is not a citizen of a nation has remained one of the paradigmatic prerogatives of

¹¹⁶ Questions and Answers on the Report on Investor Citizenship and Residence Schemes in the European Union, EUR. COMM’N (Jan. 22, 2019), http://europa.eu/rapid/press-release_MEMO-19-527_en.htm.

¹¹⁷ *Id.*

¹¹⁸ *Citizenships and Visas: EU Commission Must Set and Comply With Binding Minimum Standards Against the Sale Of Citizens’ Rights*, SVEN GIEGOLD (Jan. 23, 2019), <https://sven-giegold.de/citizenships-commission-standards/>.

¹¹⁹ See *infra* Section IV.C for a discussion of FATCA and CRS.

¹²⁰ *Residence/Citizenship by Investment Schemes*, OECD, <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/> (last updated Nov. 20, 2018).

¹²¹ *Id.*; see also Juliette Garside, *Tax Evasion: Blacklist of 21 Countries With ‘Golden Passport’ Schemes Published*, THE GUARDIAN (Oct. 16, 2018), <https://www.theguardian.com/business/2018/oct/16/tax-evasion-oecd-blacklist-of-21-countries-with-golden-passport-schemes-published>.

¹²² As was the case with Panama and Andorra, see *supra* Section III.B.

¹²³ For an example of a broader criticism of these types of sovereignty claims, see generally Reisman, *supra* note 79.

¹²⁴ See Ayelet Shachar, *Citizenship for Sale?*, in OXFORD HANDBOOK OF CITIZENSHIP 789 (Ayalat Shachar et al. eds., 2017) (rehearsing arguments for and against the sale of citizenship).

the modern State¹²⁵—even in the EU.¹²⁶ If a State cannot decide who belongs in its own community, *then who can?* A push towards non-recognition of the State’s citizenship decision-making would represent a strong rebuke to the usual deference and comity other States award to these sorts of determinations. Apart from obvious legal issues that would be implicated by non-recognition, non-recognition would involve dangerous line-drawing exercises: why are Malta and Dominica’s golden passport schemes “dangerous,” while similarly flexible regimes in Austria¹²⁷ and the United States¹²⁸ are deemed “acceptable?” Merely pointing to the ability to “hide assets abroad” might not be enough—the United States has strong financial secrecy laws and very minimal information exchange frameworks that make it easy to “hide assets” from other jurisdictions in American banks.¹²⁹ Are these just games of politics based on reputation and power?

Similarly, incursions into States’ abilities to construe their citizens’ constitutional rights or to criminally proscribe certain behaviors should be seen for what they are: serious concessions of State sovereignty in need of justification. Clearly there are situations in which most would agree that States are not and *should not* be free to use their sovereign power to regulate domestically. In these cases, appeals to sovereignty ring hollow: for example,

¹²⁵ Even a decision critical of the State’s power to grant citizenship recognized that “[I]t is for every sovereign State [] to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. . . . This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.” *Nottebohm Case (Liech. v. Guat.)*, Judgment, 1955 I.C.J. 4, 20-21 (Apr. 6).

¹²⁶ Though strongly critical of the Maltese “golden passport” scheme, Sergio Carrera acknowledges that,

From an EU law perspective, the case was a difficult one to argue. Questions related to the acquisition and loss of nationality have remained in the ambit of Member State’s exclusive competence since the kick-off of EU citizenship in 1993 with the entry into force of the Maastricht Treaty. One of the most sacred of cows in the division of competences between the Member States and the EU is the entitlement to control citizenship laws. No one can become a EU citizen without first passing through the hands of a Member State. Since the introduction of EU citizenship, a number of Member States have been exceedingly anxious to keep the EU out of their citizenship laws and policies. Since then, citizenship has been something of a ‘hands-off’ area for EU law.

Sergio Carrera, *The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters*, 21 MAASTRICHT J. EUR. & COMP.L. 406, 407 (2014) (footnote omitted); see also Case C-192/99, *The Queen v Secretary of State for the Home Department*, ex parte: Manjit Kaur, ECR I-1237 (E.C.J.).

¹²⁷ Sahel Zarinfard, *Visa Scandals Slammed Austria’s Door Shut — Or Did They?*, OCCRP (Mar. 5, 2018), <https://www.occrp.org/en/goldforvisas/visa-scandals-slammed-austrias-door-shut-or-did-they>.

¹²⁸ The U.S. has had a golden visa regime for decades. See *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/eb-5> (last visited Nov. 14, 2019).

¹²⁹ See *Want to Stay Away from CRS? Set up a Company in the USA*, MEDIUM (Jan. 30, 2018), <https://medium.com/@icoservices/want-to-stay-away-from-crs-set-up-a-company-in-the-usa-f7a383fa838>; Craig Rose, *Sticking Out like a Sore Thumb—The U.S., FATCA and the CRS (Part 2)*, BLOOMBERG: INT’L TAX BLOG (May 17, 2016) <https://www.bna.com/sticking-sore-thumbthe-b57982072499> [<https://web.archive.org/web/20160828235708/https://www.bna.com/sticking-sore-thumbthe-b57982072499/>].

most would agree that there is a strong reason to reject appeals to sovereignty when faced with policies clearly in contravention of fundamental rights, such as policies encouraging slavery or blatant discrimination on the basis of race, gender, or sexual orientation.¹³⁰ As such, this is *not* an appeal to moral relativism or to an absolutist view of sovereignty. Rather, this Note seeks to acknowledge that contravening one of the organizing principles of our Westphalian (or post-Westphalian)¹³¹ world in the name of “standardization” requires serious normative justification. So, is standardization worth the trouble?

IV. HOW WILL THE PIE BE DIVIDED? *WHY?*

Most agree that standardization in international tax should bring global economic gains. Yet that is not and should not be the end of policy analysis. A common—and legitimate—response to a structure designed to maximize economic or welfare gains is to ask about distribution. In that vein, scholars frequently ask: setting aside the size of the pie, how will it be distributed?¹³² This strand of distributional questions has been common in policy analysis of all sorts, especially in tax, where issues of horizontal and vertical equity are part of the standard framework of policy analysis. Perhaps unsurprisingly, these questions now abound in the literature critical of tax standardization.

This Note takes a different approach: it argues that in the face of large mutual gains potentially achievable from standardization—which come at the expense of significant intrusions into sovereignty at large, not just “tax” sovereignty¹³³—developing countries should ask more questions than simply, “Will we divide the bigger pie?” By referencing recent developments in information exchange, this Note posits that developing countries will be well-served by *further* asking, “Why should the bigger pie be distributed this way?”

A. *Tax Rules as Distributional Rules*

Any standardization of taxing rules (whether partial or complete), even absent an explicit distribution mechanism like rate progressivity, will imply an underlying allocation of tax revenue. For example, in the double-taxation treaty (DTA) arena, even “wonky” clauses defining “permanent establishment” will have the effect of divvying up taxing rights between source and residence States—a more restrictive definition usually benefitting residence (and capital-exporting) States. Differences in the definitions of permanent establishment can

¹³⁰ Cf. Reisman, *supra* note 79.

¹³¹ See Jackson, *supra* note 84, at 786-87. (recognizing that, although we seem to have transcended a Westphalian understanding of sovereignty, sovereignty is still a foundational concept of our international order).

¹³² But see MAARTEN FLORIS DE WILDE, SHARING THE PIE 719 (2017) (arguing that “fairness” in taxation should be based on the “neutrality principle” and that fairness requires that “[t]he distribution of production factors should take place on the basis of market mechanisms without—or at least with as little as possible—public interference (economic efficiency)”).

¹³³ See *supra* Part III.

thus be seen as directly carving out revenue and distributing it among States that adopt the definitions. Current model tax treaties in the area of resource extraction help elucidate how standards can have vastly different distributional consequences: by some accounts, the (largely failed) U.N. Model gives resource-rich source countries as much as *twice* the taxing power than they would receive under the (unsurprisingly) less favorable OECD model.¹³⁴

Therefore, arriving at new tax standards will not only involve “wonky” and technocratic details, it will involve questions of global tax revenue distributions that should be seriously considered. Global standards will clearly have some “winners” and “losers,” as even small changes to definitions in DTAs can result in significant changes in the distribution of taxing powers. Proponents of these measures are quick to point that these new global standards promise to increase the size of the pie by alleviating the revenue losses from some international tax avoidance and evasion. Therefore, a new standard is likely to lead to a potential Pareto or Kaldor-Hicks efficient solution.¹³⁵ In such a scenario, every State *could* be made better off through higher revenues. However, this promise is vague in one important respect—will all States, especially developing States, *actually* be better off?

B. A Further Question and a Conceptual Frame: G.A. Cohen’s Criticism of Rawls

Distributional inquiries should not necessarily *stop* with an assurance that a policy will be Pareto efficient. In other words, we should question the distribution *even if* we are assured that the mutual gains will be distributed to make everyone at least a little better off. Critics have raised these questions even when the proposed structure has been specifically designed or tailored to distribute some to the least well-off. G.A. Cohen’s rejection of Rawls is instructive on this point.

In his famous critique of Rawls, G.A. Cohen rejected the difference principle (and more generally the moral case for mere Pareto improvements in unequal societies) in part by arguing that inequality should not be tolerated merely because the worse-off are “bought off” with residual scraps from the overall gains brought by inequality, while the better-off keep a hefty portion of these

¹³⁴ Luis M. Almeida & Perrine Toledano, *Understanding How the Various Definitions of Permanent Establishment Can Limit the Taxation Ability of Resource-Rich Source Countries*, COLUM. CTR. ON SUSTAINABLE DEV. 9-12 (2018), <http://ccsi.columbia.edu/files/2018/03/Optimizing-the-PE-clause-for-resource-riche-source-state-CCSI-2018-2.pdf> (noting that while the OECD has a “minimum period of time of more than twelve months for a construction activity to constitute a P[ermanent Establishment], the UN model reduces that period of time by half”).

¹³⁵ Wilfred Beckerman masterfully defines these concepts through a philosophical lens, still carefully respecting their technical complexity in economics. *See* BECKERMAN, *supra* note 6, at 63-76.

gains.¹³⁶ In other words, we should not be agnostic to how mutual gains are distributed—even if a portion are distributed to the worse-off.

But this critique does not just strike at the actual distribution of the gains; it more importantly interrogates the reason why, for example, in order to agree to make the pie bigger, the already better off *need* to be bribed with a slice larger than everybody else's. Sidgwick helpfully summarizes Cohen's rather complex critique:

The argument is, I think, decisive from a political point of view, as a defense of a social order that allows great inequalities in the distribution of wealth for consumption [like Rawls']. [But] . . . when we have decided that the toleration of luxury as a social fact is indispensable to the full development of human energy, *the ethical question still remains for each individual, whether it is indispensable for him; whether, in order to get himself to do his duty, he requires to bribe himself by a larger share of consumable wealth than falls to the common lot.*¹³⁷

Therefore, not only should we question *how* the pie will be divided,¹³⁸ but we should also problematize distributions which, under the guise of a Pareto rationale, award a large portion of mutual gains to the *already* better-off, searching for an ethical justification for a given distribution of mutual gains, even if collectively beneficial. We should be especially searching of the question of distribution insofar as the choice of an international tax design is not compelled by science or by tax's *telos*; rather, as prominent scholars have argued, these general tax designs are arbitrary.¹³⁹

C. Winners Win: CRS, FATCA, and Tax Information Exchange

Academics and policymakers have generally been in favor of broad information exchange, optimistically calling for the creation of extensive "global tax information networks"¹⁴⁰ and lauding tax transparency "activists."¹⁴¹ But

¹³⁶ Cohen's version of this argument is stronger, also criticizing the better-off citizens' desire for incentives to benefit the worse-off. See G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* 154-55 (2008).

¹³⁷ ALAN THOMAS, *REPUBLIC OF EQUALS* 69 (2017) (quoting HENRY SIDGWICK, *PRACTICAL ETHICS* 108-09 (1998)) (second alteration in original) (emphasis added).

¹³⁸ This question has been the subject of continued philosophical and policy analyses, often centered around questions of global justice. See, e.g., Laurens van Apeldoorn, *BEPS, Tax Sovereignty and Global Justice*, 21 *CRITICAL REV. INT'L SOC. & POL. PHIL.* 478 (2018). However, the question of not only *how* but *why* we should accept unequal distribution of taxing resources is often forgotten.

¹³⁹ See Michael J. Graetz, *Taxing International Income - Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy*, 54 *TAX L. REV.* 261 (2001).

¹⁴⁰ Miranda Stewart, *Global Tax Information Networks*, in *TAX, LAW AND DEVELOPMENT* 316 (Yariv Brauner & Miranda Stewart eds. 2013).

¹⁴¹ Allison Christians, *Tax Activists and the Global Movement for Development Through Transparency*, in *TAX, LAW AND DEVELOPMENT* 288 (Yariv Brauner & Miranda Stewart eds. 2013) [hereinafter, Christians, *Tax Activists*].

even academics skeptical of the general promise of standardization and harmonization in taxation have a soft spot for information exchange. In an article critical of countries’ push towards “tax coordination or tax harmonization,”¹⁴² Professor Roin advocates for the harmonization of tax information systems and argues that “focusing reform efforts *solely* on informational cooperation rather than tax rate harmonization has significant policy advantages.”¹⁴³

Yet developments in the information exchange arena show that settling on international standards might have asymmetrical results. Increased scrutiny of tax havens and tax evasion—accompanied by pressure by the public¹⁴⁴—led to the push for information exchange measures. Enhanced transparency and information exchange in tax matters were the focus of several high-level meetings at the OECD and G-20.¹⁴⁵ Swiss bank scandals, most prominently the *affaire Birkenfeld*,¹⁴⁶ provided the necessary political will for the passage of FATCA.

In 2010, Congress passed FATCA,¹⁴⁷ which (in a nutshell) imposes a 30% withholding tax on transactions by financial institution or “recalcitrant” account holders who fail to report to the IRS (or to their domestic national authorities) accounts owned by a U.S. citizen or whose beneficial owner is a U.S. citizen.¹⁴⁸ As such, while FATCA is designed as a withholding tax, in practice¹⁴⁹ it operates as a requirement to disclose U.S. citizens’ bank accounts abroad by financial institutions.

The unilateral push by the U.S. to obtain taxpayer information was followed with a multilateral push by the OECD for information exchange. The OECD marshalled nations to adopt the Common Reporting Standards (“CRS”) framework.¹⁵⁰ Like FATCA, the CRS framework requires nations to engage in the automatic exchange of information (“AEOI”) of foreign taxpayers with accounts in their jurisdictions. By creating a networked AEOI, the CRS framework promises to enable countries to track citizens and their assets abroad,

¹⁴² Roin, *supra* note 80, at 544.

¹⁴³ *Id.* at 594 (emphasis added).

¹⁴⁴ See generally Christians, *Tax Activists*, *supra* note 141 (commenting on the rise of transparency activism and its success in pressuring governments to adopt more transparency measures more generally).

¹⁴⁵ See Policy Department for Citizens’ Rights and Constitutional Affairs, *FATCA Legislation and Its Application at the International and EU Level*, EUR. PARL. 10 (May 2018).

[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604967/IPOL_STU\(2018\)604967_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604967/IPOL_STU(2018)604967_EN.pdf)

¹⁴⁶ See *supra* section II.A.2.

¹⁴⁷ Hiring Incentives to Restore Employment Act, Pub. L. No. 111–147, § 501, 124 Stat. 71, 97 (2010).

¹⁴⁸ William Byrnes & Robert J. Munro, *Background and Current Status of FATCA*, in *FATCA AND CRS COMPLIANCE 1–4* (2019), <https://www.americansabroad.org/media/files/files/8f1c0f32/SSRN-id2926119.pdf>.

¹⁴⁹ As evidenced by legislators’ comments during the passage of FATCA. See *id.* (quoting Senator Levin on the passage of FATCA) Moreover, as has been widely noted, FATCA has fallen way behind JCT’s revenue projections, lagging behind FBAR fines. See *id.* Nonetheless, FATCA has been pretty successful in making it harder for U.S. citizens to hide their cash abroad.

¹⁵⁰ For a simple explanation of the different instruments in the framework, see *infra* note 151.

potentially making tax evasion harder. More than 100 jurisdictions have signed on to CRS,¹⁵¹ including nations previously considered to be some of the most “secretive” jurisdictions—e.g., Panama and Switzerland—after strong “nudges” from the EU¹⁵² and the European Commission.¹⁵³

The success of multilateral efforts at information exchange notwithstanding, the United States “has said it will not sign the CRS; does not fully reciprocate under the FATCA intergovernmental agreements, especially when entities are involved; and has not ratified the Convention on Mutual Administrative Assistance in Tax Matters”¹⁵⁴—despite strong pressure by parts of the U.S. government¹⁵⁵ and by other countries.¹⁵⁶

Why wouldn’t the United States join such an initiative, after it got the ball rolling on AEOI?¹⁵⁷ There are several possible answers. Some might point to the compliance burden and high costs of joining such an initiative. Others might point to the new administration’s distaste for coordinated international action.¹⁵⁸

¹⁵¹ See *Automatic Exchange Portal*, OECD, <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs> (last visited Nov. 14, 2019).

¹⁵² See Robert Goulder, *The Blacklist Game: Should the EU Label the United States a Tax Haven?*, TAX NOTES (Jan. 8, 2019), <https://www.taxnotes.com/worldwide-tax-daily/tax-havens/blacklist-game-should-eu-label-united-states-tax-haven/2019/01/08/29119> (discussing the listing and quick subsequent delisting of Panama in the EU’s tax haven blacklist in 2018).

¹⁵³ Copper-Ind, *supra* note 94 (discussing Panama’s criminalization of tax fraud, which would significantly aid in the exchange of information, after the European Commission’s decision to blacklist Panama). *But see* Francesco Guarascio and Alastair Macdonald, *EU States Block Blacklisting Saudi, Panama Over Dirty Money*, REUTERS (Mar. 7, 2019), <https://www.reuters.com/article/us-eu-saudi-moneylaundering/eu-states-block-blacklisting-saudi-panama-over-dirty-money-idUSKCN1QO15M> (commenting on how EU members blocked the EC’s decision to blacklist Panama after “heavy lobbying”).

¹⁵⁴ Bruce Zagaris, *International Tax Enforcement Cooperation in the Trump Administration*, TAX NOTES (Sep. 19, 2018), <https://www.taxnotes.com/worldwide-tax-daily/tax-reform/international-tax-enforcement-cooperation-trump-administration/2018/09/19/28bx0>; *see also* Casey Michel, *The U.S. is a Good Place for Bad People to Stash Their Money*, THE ATLANTIC (July 13, 2017), <https://www.theatlantic.com/business/archive/2017/07/us-anonymous-shell-companies/531996> (detailing the extensive use of American shell companies by foreign criminals).

¹⁵⁵ The Obama administration sought to gain Congress’ approval for some reciprocity in AEOI under some FATCA IGAs. However, Congress did not pass them. *See* Laurie Hatten Boyd, *Are Problems Looming for FATCA and the “Reciprocal” IGA?* TAX ADVISER (June 1, 2016), <https://www.thetaxadviser.com/issues/2016/jun/problems-looming-for-fatca-and-reciprocal-iga.html>. While the US reciprocates under some model IGA’s, not all tax information is covered under these IGAs and not all countries (especially developing countries) have the benefit of reciprocal IGAs.

¹⁵⁶ *See* Kirsten Hastings, *‘Frustrated’ EU Politicians Step Up Pressure on US over FATCA*, INT’L ADVISER (May 9, 2017), <https://international-adviser.com/frustrated-eu-politicians-step-pressure-us-fatca/>.

¹⁵⁷ *See generally* Noam Noked, *Should the United States Adopt CRS?*, MICH. L. REV. ONLINE (2019), <https://michiganlawreview.org/should-the-us-adopt-crs-2/> (discussing the U.S. Government Accountability Office’s report recommending against implantation of CRS, and arguing that important considerations were left out of it).

¹⁵⁸ *See, e.g.*, HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2019) (discussing the administration’s distaste for the current international legal order and commenting on

But, perhaps more cynically, we should consider the strategic benefits of rejecting CRS while simultaneously enforcing a unilateral FATCA. By doing so, the United States benefits from a structural information asymmetry: it obtains information about U.S. citizens living abroad while retaining the information of foreign taxpayers. Such an asymmetrical regime not only increases the rate of tax evasion by non-U.S. citizens,¹⁵⁹ but also incentivizes this behavior in the U.S.¹⁶⁰ In other words, the U.S. is effectively increasing the costs of evading abroad, thereby becoming relatively attractive for investors with a taste for secrecy. Such behavior has led commentators to hold that the “U.S. is becoming the world’s tax haven.”¹⁶¹ A recent bill passed by the House of Representatives that would give the U.S. government the beneficial ownership information of U.S. shell entities is a step towards more tax transparency; however, the bill’s political fate is uncertain and, even if passed, the bill would do nothing to resolve the current asymmetry in information exchange.¹⁶² Despite pressure from Europe, the American unilateral approach doesn’t seem to be changing: when asked about the United States’ approach to a unilateral FATCA and CRS, a high-ranking Treasury Department official confirmed that the administration is taking a bilateral approach.¹⁶³ In other words, the few who are able to bargain for information might get some—developing countries might just be out of luck.

D. *Lessons for States: It’s All About Distribution*

Recent developments in tax information exchange reveal the current and potential shortcomings of tax standardization, harmonization, and globalization. While the narrative of *mutual* economic gains was often trumpeted to justify standardization in tax information exchange,¹⁶⁴ after some thought this claim now rings mostly hollow. Developing countries are often left holding the bag, incurring massive compliance costs to asymmetrically provide benefits to larger and more developed economies. While CRS might bring with it some benefits to non-tax haven developing countries net of the large compliance costs involved, these benefits are dwarfed by the significant gains flowing to developed

transnational legal actors’ efforts and strategies to curb the administration’s efforts to subvert the international legal order).

¹⁵⁹ Dhammika Dharmapala, *Cross-Border Tax Evasion Under a Unilateral FATCA Regime*, 141 J. PUB. ECON. 29, 32-35 (2016) (crafting a theoretical model to show the tax evasion consequences of a unilateral FATCA regime).

¹⁶⁰ See Michel, *supra* note 154.

¹⁶¹ Editorial Board, *The U.S. Is Becoming the World’s New Tax Haven*, BLOOMBERG (Dec. 28, 2017), <https://www.bloomberg.com/opinion/articles/2017-12-28/the-u-s-is-becoming-the-world-s-new-tax-haven>.

¹⁶² Corporate Transparency Act of 2019, H.R.2513, 116th Cong. (2019); see also Andrew Velarde & Stephen K. Cooper, *Combating Tax Evasion Central to U.S. Corporate Transparency Act*, TAX NOTES (Nov. 4, 2019), <https://www.taxnotes.com/tax-notes-today-federal/transparency/combating-tax-evasion-central-us-corporate-transparency-act/2019/11/04/2b36n>.

¹⁶³ Conversation with High-Ranking Treasury Official (Mar. 7, 2019) (conversation recording on file with author).

¹⁶⁴ *Cf.*, Christians, *Tax Activists*, *supra* note 141 at 288 (describing global activists’ calls to insert their non-elite voices in tax policymaking to encourage more equitable global development, and noting the immense challenges they face); Julie Roin, *supra* note 80, at 594 (questioning such reform proposals).

economies.¹⁶⁵ The distribution of the touted economic gains is telling. Why should the costs be mostly borne by developing countries when the benefits mostly flow to developed nations? Even if bureaucrats and econometricians were able to prove that global information exchange (even an asymmetrical system) is a Pareto efficient improvement desirable under a given social welfare function, G.A. Cohen's prescient question still stands: in a society of nations with (at least formally) equal legal and sovereign rights but vastly unequal economic positions, what moral reasons can developed nations provide to receive a disproportionate share of the gains derived from intrusions into the sovereignty of developing countries? There seems to be a real difference between "might is right" and "might ought to be right."

Yet this need not be a *fait accompli*. In our current international legal order, serious intrusions into the sovereign domain of States ought to be justified normatively and legally, often by State consent. As Professor Grewal noted, however, we should be especially skeptical of consent to standardization because usually "convergence on a set of common global standards is driven by an accretion of individual choices that can be *considered both free and unfree*,"¹⁶⁶ due to the strong network incentives toward standardization and disincentives against alternative frameworks. While State consent might in fact be legitimately procured with the alluring appeal of economic or welfare gains, States—especially developing nations—should interrogate this vague language. In doing so, States should shine light on the moral vacuity of terms such as Kaldor-Hicks and Pareto efficiency,¹⁶⁷ and further question why—in a vastly unequal international system—the rich *must* be made richer for the poor to be made somewhat less poor. States need not engage in a wholesale rejection of welfare maximization, of Kaldor-Hicks and Pareto efficiency, or of Rawlsian ideals in every arena or policy decision.¹⁶⁸ Rather, what this criticism requires in the

¹⁶⁵ This is the result of four factors. First, most developing countries are not capital exporters, reducing the relevance of tax information of nationals operating abroad for purposes of residence taxation. See Christians, *BEPS*, *supra* note 76, at 21-22. Second, the structure is designed to asymmetrically yield information (e.g., unilateral information flow under FATCA). See *infra* Section IV.C. Third, the overall incidence of tax avoidance and evasion targeted by these regimes is higher in developed countries. See Thomas R. Tørsløv, et al., *supra* note 2, fig.7 (showing that the EU and the U.S. lose more than the global average to tax profit shifting). Fourth, developing countries miss out on the benefits of attracting capital through selective regimes, a privilege that only the U.S. (particularly Wyoming and Delaware) will enjoy. See *infra* notes 182-186, and accompanying text.

¹⁶⁶ GREWAL, *supra* note 72, at 5 (emphasis added).

¹⁶⁷ See BECKERMAN, *supra* note 6, at 63-76 (discussing the ethical issues often ignored in the concepts of Pareto optimality and Kaldor-Hicks efficiency); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 *YALE L.J.* 165, 195 (1999) (adumbrating problems with Pareto-superiority and Kaldor-Hicks).

¹⁶⁸ G.A. Cohen himself clarifies that there is no need for a wholesale rejection of these criteria. Instead, we should recognize their lack of moral force and complement decision-making with considerations about the distribution of net welfare gains. In his Tanner lectures, Cohen also clarifies the pragmatic need to *both* criticize empty notions of Pareto improvements and embrace unjust but necessary policies. He states that "[t]he policy of paying productive people plenty to get them to produce so that badly off people will be better off is rational when productive people are resolved to serve only if they are richly rewarded. But their stance is then unjust by the very standard which the difference principle itself sets. Accordingly, on a strict view of Rawlsian justice, the difference principle in its lax interpretation, which

taxation context is that the overall revenue gains obtained from tax policy changes that require considerable sovereign concessions be distributed in ways that significantly favor countries that need tax revenue the most—developing countries.¹⁶⁹ In policymaking terms, such a move would necessitate a serious investigation of the social welfare function that policymakers talk about when referring to “mutual gains.”¹⁷⁰ The exact shape that a social welfare function should be is both a contentious and technical subject and is therefore outside the scope of this Note.¹⁷¹ Nonetheless, the previous discussion should help us at least realize that traditional utilitarian and Rawlsian social welfare functions fail to provide us with reasons to reject a Pareto-optimizing, yet still grossly unequal, policy—for example, unidirectional tax information exchange frameworks.

In rejecting the moral force of appeals to some “efficiency” criterion without additional ethical justifications, developing States might at least uncover the motivations underlying some tax standardization policies, such as tax information exchange.¹⁷² Although the *realpolitik* of international relations might require developing States to concede part of their area of sovereign decision-making and consent to policy changes that result in unfair bargains, they should not agree without at least seeking to strengthen their bargaining position by first seeking common ground and engaging in coordinated action with similarly-situated States.¹⁷³ Moreover, they should use the legal and institutional tools at their disposal to promote tax standards resulting in a more equitable, fair, and just distribution and reject appeals to mere efficiency. Perhaps this is a fool’s errand,¹⁷⁴ but it’s worth a try.

does mandate the incentives policy, is not a basic principle of justice but a principle for handling people’s injustice. . . . When there is no way to get [a kidnapped] child back without paying, when a just outcome is not to be had, then paying, which makes all (kidnapper, parents, child) better off than refusing to pay, is almost certainly preferable, although in some cases, with less at stake, we might prefer to forgo the Pareto improvement, in order not to accede to an unjust demand.” G.A. Cohen, *Incentives, Inequality, and Community*, Address at Stanford University (May 21, 23, 1991), in 13 THE TANNER LECTURES ON HUMAN VALUES 261, 326-27 (G.B. Peterson ed., 1992).

¹⁶⁹ Figuring out how exactly to make these decisions is a complex task. For an interesting take spanning philosophy and economics, see MARC FLEURBAEY, *FAIRNESS, RESPONSIBILITY, AND WELFARE* (2008).

¹⁷⁰ See generally WILFRED BECKERMAN, *supra* note 6, at 57-61.

¹⁷¹ *Id.*

¹⁷² See *supra* note 168.

¹⁷³ Other scholars have recently called for such an arrangement; see, for example, Sergio André Rocha, *The Other Side of BEPS: “Imperial Taxation” and “International Tax Imperialism,”* in *TAX SOVEREIGNTY IN THE BEPS ERA* 179, 196-200 (Sergio André Rocha & Allison Christians eds., 2017).

¹⁷⁴ “The attempt by mostly developing countries to use the institutional framework of the WTO to take back some of their lost (to the US) sovereignty in respect to intellectual property resulted in two weak agreements, the Doha Declaration on TRIPS and Public Health and the pre-Cancun agreement on the implementation of the Doha Declaration. While symbolically important as an acknowledgement that WTO norms are revisable and not rigidly constitutional, these agreements have largely unaffected the real-world ability of the U.S. and its major industrial interests to determine outcomes with respect to intellectual property globally.” Howse, *supra* note 8, at 71 (Wenhua Shan et al. eds., 2008).

V. FRAMING AND FORECLOSING

Recent changes in tax law seek to set reference points and standards, and once those have been established, other alternative standards, reference points, or structures will be disfavored.¹⁷⁵ In assessing standardization, therefore, we should also assess the alternatives that are “traded-off,” especially if they are traded-off for frameworks buttressed on tax competition. While critiques on cultural frames or cultural hegemony¹⁷⁶ should be familiar to scholars in certain areas of international law, they have not significantly permeated tax discourse.

Two analogous areas of international law—human rights and trade—experienced processes of globalization, standardization, and harmonization. Recent developments and critiques in these areas provides warning signs for advocates of tax standardization.

In the human rights arena, the creation of universal minimum standards has resulted in incredible improvements around the world.¹⁷⁷ However, it has also led to the foreclosure of serious debate about decolonization¹⁷⁸ and economic justice in international fora¹⁷⁹ and has transformed economic rights into incognizable claims within the standard,¹⁸⁰ as Professor Samuel Moyn has extensively documented.

Similarly, while trade law’s liberalization has arguably resulted in large economic gains worldwide,¹⁸¹ network power and its epistemological framing have transubstantiated “market openness” and “free trade” from instrumentally valuable and negotiable goals into untouchable maxims.¹⁸² This shift has shut out policies that give special weight to social and normative concerns: for example, sensible policies that strike a different balance between the poor’s need

¹⁷⁵ See *supra* Section II.A.

¹⁷⁶ Some scholars’ concerns regarding framing effects and discourse in different areas of international law appear to be heavily indebted to the work of Antonio Gramsci. See generally ANTONIO GRAMSCI, SELECTIONS FROM THE *PRISON NOTEBOOKS* OF ANTONIO GRAMSCI (1971).

¹⁷⁷ See WILLIAM F. SCHULTZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL 135-46 (2001); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 101 (2002); Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT’L STUD. Q. 939 (2010).

¹⁷⁸ See MARK MAZOWER, NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS 62-63 (2009) (highlighting how the creation of the United Nations served anti-decolonization efforts).

¹⁷⁹ See, e.g., SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 5-6 (2018).

¹⁸⁰ *Id.* at 146-72 (2018) (charting the broad ideological movement away from equality and towards sufficiency); *Id.* at 182 (presenting an enlightening chart comparing the prevalence of human rights books with books about socialism).

¹⁸¹ The distribution of these gains, however, is an important caveat.

¹⁸² MARC D. FROESE, SOVEREIGN RULES AND THE POLITICS OF INTERNATIONAL ECONOMIC LAW 65-66 (2018) (citing Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 98 (2002)).

for affordable healthcare and intellectual property protections for medicines¹⁸³—policies that might result in economic losses but overall welfare gains.¹⁸⁴

This Note *does not* claim that these epistemic framing effects necessarily outweigh the benefits of standardization, which we should acknowledge are significant (although some scholars might contest this premise).¹⁸⁵ However, this Note *does* claim that previous standardization, harmonization, and globalization processes have brought about with them epistemic frameworks which often foreclose important debates—especially ones that are essential for the needy and the poor—because, as we have seen, standardization processes rarely operate without reference to power asymmetries.¹⁸⁶

States should therefore seriously weigh the epistemological effects of consenting to further tax standardization, especially considering the large sovereign concessions this process requires and the uncertain and uneven benefits standardization has produced in the past. Most importantly, States should be wary of adopting uniform standards which implicitly (and sometimes explicitly) legitimate tax competition as an acceptable or desirable buttress for the international tax regime. In other words, States should ensure that measures intended to counter what the OECD considers to be “harmful” tax competition—for example, tax competition through the use of deliberately uncooperative tax privacy mechanisms in “tax havens”¹⁸⁷—do not silence global concerns about the fairness of the global tax system by merely relocating competition from one policy or legal arena to the other (e.g., from tax law to trade law). States should be wary of endorsing, for example, policy agendas that imply that harmonizing tax privacy laws¹⁸⁸ or outlawing “state aid” will fix the international tax system and ameliorate the significant harms of tax competition. Such standardization might be of some help to global treasuries, but it will certainly not address how a global race-to-the-bottom on corporate tax rates to attract multinationals could

¹⁸³ See Howse, *supra* note 8, at 75.. But see Lee Branstetter, *TPP and the Conflict over Drugs: Incentives for Innovation Versus Access to Medicines*, in ASSESSING THE TRANS-PACIFIC PARTNERSHIP 20, 20-31 (Jeffrey J. Schott & Cathleen Cimino-Isaacs eds., 2016).

¹⁸⁴ The growing field of happiness economics has underscored the importance of pursuing holistic policy goals, especially by showing how in some situations more income is not welfare enhancing. See BRONSTEEN ET AL., *supra* note 6;; ERIC A. POSNER & CASS R. SUNSTEIN (EDS.), *LAW AND HAPPINESS* (2010).

¹⁸⁵ Cf. GREWAL, *supra* note 72.

¹⁸⁶ See, e.g., *supra* Section IV.C; GREWAL, *supra* note 72, at 8 (noting that global standards “impose their costs unevenly, and frequently privilege the already powerful. Therefore, globalization may appear to many who feel its effects most acutely not as the iron cage of modernity manifest on a newly global scale, but as foreign imposition in the familiar mold of empire.”).

¹⁸⁷ See *supra* Section II.A.2.

¹⁸⁸ See *supra* Section II.A.2; III.C.

starve developing (and developed¹⁸⁹) countries of much-needed tax revenue.¹⁹⁰ Reinforcing those narratives and policy agendas could induce policymakers to fail to see the forest for the trees—as it has done in the context of trade and human rights law.

Apart from these general concerns about tax competition, States should evaluate the specific epistemic risks that adopting a specific proposal might bring. Take, for example, Action 1 of the BEPS initiative.¹⁹¹ Action 1 seeks to arrive to a global standard on how to tax the digital economy on a worldwide basis. Several alternative designs for such a system exist¹⁹²: some adopt a specific profit allocation rationale on a global basis (for example, the location of users), others seek the application of a global minimum tax regime (drawing inspiration from GILTI and the BEAT¹⁹³). No specific tax design is pre-ordained by science or logic¹⁹⁴ and the morally arbitrary choice will designate how and to which countries revenue should flow. For example, taxing digital services based on where the users of the services are located—rather than where the company providing the services is “physically present”—could help developing countries like India to tax elusive profits to which these countries are not entitled to under the hegemonic source and residence taxation principles.¹⁹⁵

States (especially developing States) should consider the degree to which, by consenting to a specific standardizing tax initiative, they might foreclose alternative pathways and cede their ability to make cognizable claims about what legitimate domestic tax structures can be. In doing so, States are thereby all but forbidding the adoption of alternative structures that might better fit the needs or wants of their citizens. In other words, India should be wary of the OECD’s endorsement of a global minimum tax—because after an alternative standard has

¹⁸⁹ See generally Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000) (arguing that tax competition deprives both developed and developing countries of revenue and forces reliance on less progressive forms of taxation).

¹⁹⁰ See, e.g., Joseph Bankman, et al., *Collecting the Rent: The Global Battle to Capture MNE Profits*, 72 TAX L. REV. (forthcoming 2020) (noting how States are engaged in battles in multiple areas of the law to capture MNE profits).

¹⁹¹ See *supra* Section II.A.4.

¹⁹² Stephanie Soong Johnston, *OECD Sets Course Toward Global Digital Tax Deal by 2020* (Jun. 3, 2019), <https://www.taxnotes.com/beps-expert/digital-economy/oecd-sets-course-toward-global-digital-tax-deal-2020/2019/06/03/29kb1>.

¹⁹³ See *supra* Section I.A.1.

¹⁹⁴ Some might argue that internal consistency or coherence with other principles of international tax law (for example, source and residence taxation) will imply a set of given policy options. However, such arguments seriously overestimate the degree to which tax law has an “internal logic.” See Luis C. Calderon Gomez, *Is Tax Law, “Law?”* Lon Fuller, *Legality, and the Problem of Contemporary Taxation* (unpublished manuscript) (on file with author). Moreover, even assuming that the tax law has a *telos* or internal logic does not mean that there is a “right” policy choice—a “consistency” or “coherence” criterion could still be indeterminate as to a certain set of policy alternatives.

¹⁹⁵ India has been at the forefront of conversations on the current tax principles’ inadequacy in dealing with the digital economy. See Committee on Taxation of E-Commerce, *Proposal for Equalization Levy on Specified Transactions*, GOV’T OF INDIA (Feb. 2016), <https://www.incometaxindia.gov.in/news/report-of-committee-on-taxation-of-e-commerce-feb-2016.pdf>.

been chosen, a user-value tax could change from a practicable and legitimate alternative that a sovereign state would be entitled to enact, to a deviant or noncomplying tax structure clashing with settled OECD “best practices.”¹⁹⁶

We should bear in mind that standardization in international taxation can happen fast. In the past, creating alternative arrangements post-standardization has proven to be exceedingly difficult, even with the support of large international organizations. Simply remember the failure of the UN¹⁹⁷ and regional developing country groups¹⁹⁸ to create effective tax treaty alternatives to the OECD’s model after it became hegemonic.¹⁹⁹ Unsurprisingly, this OECD model has proven highly beneficial to developed countries like the U.S. often at the expense of developing countries’ taxing rights.²⁰⁰

Additionally, these States should consider whether in embracing Action 1 of the BEPS initiative they are legitimating tax competition and the language of standardization, thereby closing the door to claims about global tax justice and inequality. For example, it will be hard for countries like India to criticize the injustice of distributing the lion’s share of tax revenue from the digital economy to developed countries once States have consented to an alternative standard.²⁰¹ Just as claims of sufficiency framed out claims of fairness in human rights law,²⁰² wouldn’t claims of compliance or non-compliance with a consented-to, neutral, and uniform standard frame out discussions of global tax justice?²⁰³

VI. CONCLUSION

Tax standardization, harmonization, and globalization are coming. Experiencing revenue shortfalls and facing domestic political backlash for governments’ lackadaisical responses to headline-grabbing tax scandals, developed nations are pushing strongly against tax havens, “harmful” tax competition, and tax avoidance and evasion. These policy responses have been multifaceted (at the domestic, bilateral, regional, and multilateral levels) and

¹⁹⁶ Contrast this with the harmonization efforts led by the European Commission against countries’ “interesting” takes on the arm’s length principle. See *supra* Subsection II.A.3.

¹⁹⁷ See, e.g., Philipp Genschel & Thomas Rixen, *Settling and Unsettling the Transnational Legal Order of International Taxation*, in *TRANSNATIONAL LEGAL ORDERS* 154, 161 (2015).

¹⁹⁸ *Id.* Several proposals for other model treaties by developing countries, especially in Latin America, were abandoned after wealthy OECD nations refused to sign them in favor of the OECD model.

¹⁹⁹ Pasquale Pistone, *Geographical Boundaries of Tax Jurisdiction, Exclusive Allocation of Taxing Powers in Tax Treaties and Good Tax Governance in Relations with Developing Countries*, in *TAX, LAW AND DEVELOPMENT* 267, 275-76 (Yariv Brauner & Miranda Stewart eds. 2013).

²⁰⁰ This point, however, is contentious. Compare *id.* (arguing the OECD standard usually benefits developed nations at the expense of developing nations), with Rebecca M. Kysar, *Unraveling the Tax Treaty* Minn. L. Rev. (forthcoming 2020). http://www.law.nyu.edu/sites/default/files/upload_documents/Unraveling%20the%20Tax%20Treaty%20-%20Kysar_0.pdf (arguing that this is not the case).

²⁰¹ Jim Stewart, *User Value and Taxation of the Digital Economy*, *KLUWER INT’L TAX BLOG* (May 9, 2019), <http://kluwertaxblog.com/2019/05/09/user-value-and-taxation-of-the-digital-economy>.

²⁰² See Moyn, *supra* note 179, at 146-72.

²⁰³ Schoueri & Galendi Júnior, *supra* note 88, at 59-63.

varied (domestic tax reform, bilateral treaties for information exchange, renewed enforcement of anti-tax competition doctrines, and seeking the standardization of several parts of the tax system). Nevertheless, these unique responses can all be understood as part of a push to standardize, harmonize, and globalize the tax system. As discussed previously, standardization processes both (i) coercively assimilate through the increasing incentives from cooperation in an increasingly larger network, and (ii) dis-incentivize alternative standards through epistemic framings and increased costs of exit or divergence from the standard.

The standardization, harmonization, and globalization of tax law, however, face the “sovereignty problem.” In the Westphalian (or post-Westphalian) era,²⁰⁴ the design and structure of domestic tax systems has traditionally been under the almost exclusive control of the State. Therefore, any international law solution to the coordination problems States face will require international action that somehow intrudes into what has been traditionally regarded as the exclusive dominion of the State. Reformers have thus sought to obtain State consent and buy-in into their standardization agenda by arguing that (i) the intrusion into sovereignty will be light; more often than not, by taking a narrow or functional view of “tax sovereignty” and (ii) the intrusion is justified by the large economic gains attainable by resolving this coordination problem. This Note takes aim at these two arguments and posits three questions that the dense tax haven, tax competition, and tax sovereignty literatures have been unable or unwilling to ask given their relative disciplinary and methodological isolation.

First, in Part III, this Note questions whether standardization advocates’ claims of light intrusions into States’ “tax” sovereignty will indeed be light and will indeed only intrude into a State’s “tax” sovereignty. After considering three separate areas of the law in which tax standardization is taking place—criminal law, privacy and equal protection, and immigration law—this Note concludes that reformers are vastly underestimating the breadth and depth of the necessary concessions of sovereignty needed for effective and realistic tax standardization. Given the breadth and depth of such concessions, States should (i) engage in political consultations to ensure democratic consent for ceding broad sovereign control and (ii) carefully size the gains of such standardization in deciding whether the game is worth the candle.

Second, while questions of distribution are often repeated, their singular focus on Pareto or Kaldor-Hicks criteria as “good enough” is unwarranted. If reformers wish to trumpet the economic gains from increased standardization, they should also discuss the distribution of the mutual gains of such standardization. Tax design is not compelled either by logic or science—it is an arbitrary policy choice. We live in a vastly unequal world, and costs will likely be distributed unevenly amongst States. Therefore, why should the benefits of tax standardization accrue mostly to already-wealthy States? Again, tax lacks an internal *telos* or unifying moral architecture supporting it—choosing a legal

²⁰⁴ Take your pick, but this sovereignty analysis is still applicable. See Jackson, *supra* note 84.

standard from a set of different possible standards is a question of practical policymaking and is not necessitated by a universal logic or morality. That being so, there is no going around the necessary ethical questions posed by a chosen standard which results in a grossly unequal distribution. Standardization and globalization of information exchange have in fact led to asymmetric costs and vastly unequal benefits for nations. Consequently, developing States, which are usually on the losing end of the equation, should set aside blanket appeals for merely “efficient” or “mutually beneficial” policies, and instead ask how the mutual benefit will be distributed and why. In practical terms, that means States should seek to modify the policymaking criteria used to assess the effects of standardization, and favor criteria which deal with the distribution of collective gains more head-on. Finally, developing nations should seek to engage in collective action if the distributional consequences of proposed standardization policies are unjust and should engage in forceful moral appeals that highlight the unfairness of standards that reinforce, maintain, and justify grossly unequal distributions.

Third, States should also be wary of the framing effects of these processes. Standardization, harmonization, and globalization often create reference points and understandings of what is valuable and cognizable and what is not. Other areas of international law which experienced analogous processes provide helpful insights. In human rights, for example, the push towards universal standards has indeed led to the improvement of the lives of many, but with it, it has led to the establishment of “sufficiency” as the relevant criterion for human worth, closing the door to legitimate claims about fairness and equality. Moreover, in trade law, the increasing globalization and harmonization of different trade systems has eroded the traditional compromise between “market openness” and concerns about social welfare and its domestic regulation. These processes, therefore, have effectively “framed out” valid and potentially welfare-maximizing policies that seek to obtain a balance between, say, the poor’s access to medicine and orthodox views on the benefits of zealous IP protection.

This Note’s three questions reveal that, although standardization portends large gains and small losses, we should be more skeptical. While there might be great potential gains from tax standardization, as embodied by the BEPS project or by global information exchange frameworks like CRS, States (especially developing States) should heed the lessons of previous standardization processes, carefully analyze how and why tax revenue is being distributed among States, engage in collective dialogue to find areas of common interest, and carefully negotiate these policies, one by one. Maybe there is truth in the old adage: the devil is in the details.

Or, instead of legitimating the current unfair regime through State consent and cooperation, States could transcend potentially unproductive debates on the importance of “tax” sovereignty or on the details of a specific tax standardization proposal. States should rather question the overall *structure* and *values* of the international tax system and address the coordination problem head-on. BEPS, State Aid, FATCA, CRS, and the TCJA have all sought to change—and in doing

so, standardize—the international tax system, seeking to reduce the harms of “illegitimate” tax competition. Yet these policies exemplify contemporary taxation’s addiction to (and unnecessary legitimization of) tax competition more broadly. Instead of seeking shallow cooperation through standardization (i.e., setting arbitrary limits on which kinds of competition are to be forbidden and which are to be encouraged), we should perhaps strive for real cooperation in comprehensive tax structures through which the harm of tax competition is comprehensively addressed. For example, we might look at structures that minimize the mobility of international profits by clearly and fairly delineating who gets what; restrict the ability of States to compete in race-to-the-bottom tax rate games; and allow for open debate over alternative types of structures and substructures. (The OECD’s recent discussions on a minimum global tax *à la* GILTI and new allocation and nexus rules for global taxation of the digital economy could be early but positive steps in this direction.)²⁰⁵ Perhaps while these structures are agreed upon and tax competition is addressed we will be able to more freely talk about claims of tax justice, rather than getting bogged down with empty rhetoric on whether a given subsidy is “harmful” or a program “legitimate” under an arbitrarily chosen standard. Perhaps at that time we will be able to make the international tax system serve the needs of the State and the needy, instead of an international tax system—standardized or not—that is almost exclusively focused on a global economic rat race.

²⁰⁵ Stephanie Soong Johnston, *Countries Cheer OECD’s Latest Corporate Tax Reform Proposal*, TAX NOTES (Oct. 14, 2019), <https://www.taxnotes.com/tax-notes-international/digital-economy/countries-cheer-oecd-latest-corporate-tax-reform-proposal/2019/10/14/2b107?highlight=oced%20digital%20taxation>.