

Fairness in International Taxation June 23-24, 2022

University of Surrey School of Law
Toulson Law Library

The workshop, Fairness in International Taxation, took place at the Toulson Law Library at the University of Surrey School of Law on June-23-24 2022. It was organised and hosted by Ira Lindsay (University of Surrey School of Law) and Benita Mathew (Surrey Business School). The workshop consisted of the presentation and discussion of 11 draft papers with a view toward producing an edited collection addressing the fundamental normative questions raised by recent changes in the international tax policy landscape. The workshop was hybrid in format and included speakers from three continents and seven countries. Six papers were presented in person and five papers presented online with discussion including both in-person and remote participants. A workshop dinner has held at Lakeside Restaurant on the evening of June 23 for in-person participants and accommodation was provided by the Mandolay Hotel in Guildford. Despite a train strike on the first day of the workshop, all attendees were able to arrive and departed as planned and the workshop ran as originally scheduled.



Workshop Aims

Fairness in International Taxation brought together legal scholars, political theorists and political philosophers to consider both high-level theories of distributive justice and the normative underpinnings and implications of leading international tax policy proposals. The nature of international tax policy has changed dramatically in recent years. Twentieth century international tax policy sought to prevent double taxation of income, to treat taxpayers doing business abroad fairly and to mitigate inefficiencies in the allocation of investment. Recently, the focus of international tax policymaking has shifted, aiming to prevent double non-taxation of corporate income and to achieve a fair division of the resulting tax revenue. This is illustrated most prominently by the recent agreement on a global minimum corporation tax rate. As international tax policy raises its ambitions, there is a need for normative theories adequate to the challenges of this new era. By combining theoretical approaches to distributive justice with analysis of the political and institutional context of policymaking Fairness in International Taxation aimed to develop new accounts of fairness in international taxation.

Event themes

Fairness in International Taxation gave authors a venue to share and receive in-depth feedback on work in progress on some aspect of the normative foundations of international tax policy. By design, the papers addressed a wide range of topics at the intersection of political theory and international tax policy, including how to divide tax revenue from multinationals between nations, how to strike a fair balance between combating profit shifting and respecting national autonomy, and how to tax internationally mobile workers. Nevertheless, there was considerable thematic overlap between many of the papers. As the workshop was not organised into separate panels, but all participants were instead expected to attend and participate in all panels, it makes most sense to discuss the papers presented in terms of common themes rather than in chronological order.

The majority of the papers addressed the question of how to divide corporate tax revenue between jurisdictions in one way or another. This topic is at the forefront of the international economic policy agenda and is hotly contested among tax experts. Not surprisingly, presenters advanced a range of different proposals with points of both agreement and disagreement among them. In 'The Ethics, Economics and Politics of Taxing (Digital) Multinationals' Peter Dietsch of (University of Victoria) and Thomas Rixen (Free University of Berlin) surveyed the landscape of possible approaches (including their own prior work) to evaluating the division of tax revenue from multinational corporations between jurisdictions, using theories from the global distributive justice literature to consider the role of efficiency and distributive justice in allocating tax revenue. Their analysis discussed prior work by several of the participants in the workshop, including Adam Kern and Laurens Van Apeldoorn, as representative of different approaches to global distributive justice in tax policy. Dietsch and Rixen's presentation and the lively discussion with Kern and Van Apeldoorn that ensued were a fitting opening to the second day of the workshop.

Thematically closely connected to Dietsch's and Rixen's paper was Adam Kern's 'Optimal Taxation for the World.' Kern (Law Clerk at the United States District Court for the Southern District of New York) defended an approach to international tax policy based on moderate individualism. His view is that effects on individuals and not nations as a whole are the correct unit of analysis for evaluation of international tax agreements and that analysis should nevertheless take into account the distinction between effects on one's co-nationals and on foreigners. The result is a normative framework that justifies greater concessions of tax revenue to the developing world. Kern traced out the implications of his theory for current debates such as the OECDs BEPS and contrasted his position with that of others, including other participants in the workshop.

Besides Kern's, several other papers also pursued the theme of fairness for developing countries. Vasiliki Koukouloti (formerly Newcastle University, now Queen Mary University of London) in 'Jurisdiction to Tax in the Digital Economy and the Benefit Principle' defended a theory of tax fairness, the 'reverse benefit principle' under which tax revenues should be apportioned among nations according to the benefits tax revenue will bring to the recipient nation rather than, for example, value created by the multinational in the jurisdiction. This theory implies greater allocation of tax revenue to developing nations, which tend to benefit relatively more from increased public spending on health, education, and infrastructure. In 'Uniform International Tax Collection and Distribution for Global Development, a Utopian BEPS Alternative Abstract,' Harry Ordower (Saint Louis University) advanced a proposal that goes even farther in this direction. Ordower proposed to replace the current international tax system with a global system of collection and distribution of tax revenue. This would avoid the inequities and inefficiencies of the present system and allow developing nations to secure a larger proportion of revenue without pressure from tax competition to lower tax rates.

Two other contributions were centrally concerned with inequities in bargaining power between nations in the tax policy making process. In ‘Theories of Contract as a Guide to Fairness in International Taxation,’ Bastiaan van Ganzen, Dirk Broekhuijsen and Henk Vording (Leiden University) considered the normative defensibility of double-taxation agreements negotiated between powerful developed nations and developing nations with relatively little bargaining power. They used theories of fairness found in contract law and contract theory to evaluate the fairness of bilateral double-taxation agreements, and concluded that the civil law tradition of contract has some resources to regulate agreements between parties with different levels of bargaining power. This suggested that this could be a promising foundation for considering whether double-taxation agreements are fair and how they might be reformed in light of the unequal bargaining positions of the parties, but expressed more sceptical view about whether the same analytical tools are fit for analysing multilateral agreements. Natalia Pushkaeva (University of Urbino) took an institutional analysis approach in ‘Why “Global” Fails: Inclusive Institutions & International Tax Policy Making’ exploring the ways in which international policy-making bodies represent, or fail to represent, developing nations. As points of comparison to the OECD’s BEPS project, she considered the composition of other international organisations such as the World Bank and IMF and suggested ways in which the tax policy-making process might be better structured to represent the interests of developing countries.

Continuing the theme of reallocation of tax revenue, Amanda Parsons (University of Colorado) in ‘The Economic Allegiance of Capital Gains’ proposed to expand the scope of international tax policy by changing the way in which capitals gains from the sale of shares in multinational corporations are taxed. Parsons argued that it is anomalous that tax rights over profits from multinational corporations are apportioned across the jurisdictions in which they do business whereas capital gains from the sale of stock in the same multinational are typically taxed in the residence jurisdiction of the shareholder. Instead, she argued, it would be more consistent with the principles underlying international taxation to apportion tax revenue from capital gains across the jurisdictions in which the multinational does business.

David Elkins (New York University) sounded a more sceptical note about tax cooperation in ‘The Right and the Good: Taxing Rights, Value Creation, and the Rhetoric of International Taxation.’ He considered arguments advanced by states seeking a greater share of tax revenue in light of the philosophical approaches to distributive justice that purportedly support them. He found these arguments lacking when considered either as claims of right or as claims about what is good. Instead, Elkins argued that the much-discussed principle that taxation rights should follow value creation is little more than rhetorical cover for nations’ purely self-interested claims to a greater share of tax revenue at the expense of others.

In ‘Incentive Compatibility and Destination-Based Taxation’ Laurens van Apeldoorn (Open University, The Netherlands) provided a philosophical analysis of an innovative and influential recent proposal to reformulate the international tax system. In *Taxing Profit in a Global Economy*, Michael Devereux and co-authors suggest replacing taxation of corporate profits with a tax levied on corporate revenues by the jurisdictions from which the multinational receives income. Van Apeldoorn analysed whether this reform would, as its proponents suggest, be preferable to the current system in promoting efficiency and preventing harmful tax competition and whether it is fair compared with potential alternatives. His analysis represents a significant challenge for Devereux’s proposal, which has hitherto been mainly scrutinised from an economic and legal point of view rather than in terms of its implications for distributive justice.

Two papers provided complementary discussions of the treatment of cross-border workers in the international tax system. In ‘Caught Between Two Sovereigns: The International Taxation of Cross-Border Individuals,’ Bernard Schneider (Queen Mary University of London) considered the various approaches states take to deciding who is a tax resident. This is a crucial question in light of the growing number of high-earning workers who work across multiple jurisdictions in the course of a single year. Schneider tentatively suggested that it is preferable to adopt a bright-line rule such as one based on a number of days a taxpayer spends in a jurisdiction in a year in order to determine tax residency. In ‘Re-evaluating the Allocation of Tax Collection of Immigrants Between Home Country and Host Country,’ Tamir Shanan (College of Management School of Law, Israel) & Doron Narotzki (University of Akron) addressed how the tax system might respond to the ‘brain drain’ problem of high-skilled workers leaving developing countries after receiving training in order to work in higher-wage economies. Shanan and Narotzki argued that in order to address the ‘brain drain’ problem the international tax system should develop a mechanism for jurisdictions to collect tax revenue from high-earning migrants and share this revenue with the migrant’s country of origin.

Feedback on the workshop from participants was uniformly positive. Participants commented that the workshop was ‘impeccably organised,’ was ‘very well run’ with a ‘friendly atmosphere’ and that ‘the papers were well chosen and complimented each other, and the discussions were informative and stimulating.’

Next Steps

Following the workshop, Benita Mathew and Ira Lindsay submitted a proposal for an edited volume to a leading UK law publisher.¹ Although they had not received an official response at the time this report was written, they are optimistic that the proposal will be accepted based on the peer reviews received by the publisher. The edited volume will include seven of the papers presented at the workshop, one additional substantive paper by Ira Lindsay and an introduction by Benita Mathew and Ira Lindsay. The remaining four papers were not included because they have already been published elsewhere or because the authors preferred to publish in US law reviews due to publishing expectations for pre-tenure US legal academics. One of these papers has subsequently been accepted by the *Florida Tax Review*, one of the top US tax law journals. The eight chapters of the edited volume include contributions from authors from the UK, the Netherlands, Italy, Germany, Canada, and Israel.

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¹ [Hart Publishing] please only include the name of the publisher if and when the proposal is official accepted.