Pittsburgh University School of Law

Scholarship@PITT LAW

Book Chapters | Faculty Publications

2012

International Equity and Human Development

Anthony C. Infanti
University of Pittsburgh School of Law, infanti@pitt.edu

Follow this and additional works at: https://scholarship.law.pitt.edu/fac_book-chapters

Part of the Civil Rights and Discrimination Commons, Comparative and Foreign Law Commons, Human Rights Law Commons, International Humanitarian Law Commons, Law and Economics Commons, Law and Gender Commons, Law and Society Commons, Macroeconomics Commons, Organization Development Commons, Political Economy Commons, and the Tax Law Commons

Recommended Citation
Anthony C. Infanti, *Internation Equity and Human Development*, TAX LAW AND DEVELOPMENT (2012).
Available at: https://scholarship.law.pitt.edu/fac_book-chapters/4

This Book Chapter is brought to you for free and open access by the Faculty Publications at Scholarship@PITT LAW. It has been accepted for inclusion in Book Chapters by an authorized administrator of Scholarship@PITT LAW. For more information, please contact leers@pitt.edu, shephard@pitt.edu.

Internation equity and human development

Anthony C. Infanti

I. Introduction

When we speak of 'equity' in tax policy circles, what usually springs to mind is interindividual equity; that is, the concern within a tax system of taxing similarly situated taxpayers similarly ('horizontal' equity) and taxing differently situated taxpayers in an appropriately differentiated fashion ('vertical' equity). In their seminal essay, Richard and Peggy Musgrave approached tax equity from a broader perspective and considered how the international context both complicates questions of interindividual equity and 'creates the additional problem of equity among states and nations'.[1] The Musgraves had earlier labeled this latter problem—and titled their 1972 essay discussing it—'inter-nation equity'.[2]

In that essay, the Musgraves added a new dimension to the discussion of tax equity by viewing the concept through an international lens. In this Chapter, I add a new dimension to the Musgraves' discussion of tax equity, building on my earlier work critiquing the U.S. domestic tax equity debate.[3] There, I viewed tax equity

[1] Richard A. Musgrave & Peggy B. Musgrave, *Inter-nation Equity*, *in* MODERN FISCAL ISSUES: ESSAYS IN HONOR OF CARL S. SHOUP 63, 63 (Richard M. Bird & John G. Head eds., 1972).
[2] *E.g.*, PEGGY B. MUSGRAVE, UNITED STATES TAXATION OF FOREIGN INVESTMENT INCOME: ISSUES AND ARGUMENTS 130–33 (1969); *see* Kim Brooks, *Inter-nation Equity: The Development of an Important but Underappreciated International Tax Policy Objective*, *in* TAX REFORM IN THE 21ST CENTURY: A VOLUME IN MEMORY OF RICHARD MUSGRAVE 471, 472 & n.2 (2009).
[3] Anthony C. Infanti, *Tax ~~Equity~~*, 55 BUFF. L. REV. 1191 (2008). At the outset, it is worth noting that my purpose in this Chapter is not to undertake a comprehensive critique of the Musgraves' conceptualization of internation equity. Instead, I

through a critical lens and highlighted the debate's overweening focus on the economic dimension of individuals. Here, I lay that same critical lens over the Musgraves' international lens in considering the role that tax equity might play in advancing human development.

Strong parallels exist between the U.S. domestic tax equity debate and the internation equity debate. In this Chapter, I first observe how discussions of internation equity track established notions of interindividual equity. Internation equity has distinctly 'horizontal' and 'vertical' aspects to it, and the 'vertical' aspect of internation equity—like its interindividual equity counterpart—focuses entirely on the economic dimension of people. Although commentators sometimes chafe at the economic focus of internation equity, they have failed to break out of this constraint.

Continuing to trace the parallels between these debates, I then describe how they are plagued by a tax 'exceptionalism' that acts like a set of blinkers limiting the horizons of debate. I argue that it is time to remove these blinkers and recognize the larger foreign policy and development context within which the internation equity debate is situated. This is important because the larger debate over development has been undergoing a similar transformation from a narrow focus on economic growth and per capita income to a wider focus on human development.

I next offer some initial thoughts on how countries might reform their extant international tax rules to embrace a wider focus on human development. I close with a description of the advantages of expanding the internation equity debate to address both economic *and* noneconomic lines of difference among nations in an

---

narrowly focus my attention here on one approach to internation equity articulated by the Musgraves—namely, redistribution.

effort to encourage all countries to advance human development, especially for the most vulnerable among us.

II. Internation equity

A. The Musgraves' description

In their 1972 essay, the Musgraves explain internation equity with the help of a simple case involving multiple countries. For the Musgraves, the crux of internation equity lies in determining the appropriate allocation of national gain or loss among these countries: 'Let X, a resident of A, invest in B. Income earned thereon constitutes a national "gain" to country A. If country B taxes income earned by X, the gain accruing to country A as a nation is reduced. This is the issue of inter-nation equity'.[4] Whether this national gain or loss is accompanied by a gain or loss to country A's treasury is a different question, because that 'is a matter of intra-nation transfer between treasury and individual and does not affect the existence of national gain or loss'.[5] Thus, the subject of internation equity is nations—not individuals—and the crux of internation equity is 'whether and how' the country of source will tax.[6]

In exploring the question of whether and how the source country will tax, the Musgraves discussed four different approaches: (1) benefit taxation, (2) source taxation, (3) national rental charges and (4) redistribution. A brief summary of each of these four approaches follows.

---

[4] Musgrave & Musgrave, *supra* note 1, at 68.
[5] *Id.*
[6] *Id.* at 69.

First, under the benefit principle, 'each jurisdiction would charge for services which it has rendered'.[7] The Musgraves summarily dismissed the idea of allocating taxing jurisdiction based on the benefit principle because '[m]ost taxes are not imposed on a benefit basis'.[8]

Second, the Musgraves concluded that residence-based taxation 'has no bearing on inter-nation equity' because '[s]uch national gain as country A derives is obtained by it whether A's treasury imposes a tax or not'.[9] In contrast, source-based taxation is relevant to internation equity because it permits a country 'to tax income which results from activities undertaken in its borders. That is to say B is permitted to tax X's income and thus to appropriate part of A's national gain'.[10] If a country imposes tax based on the source of income, the Musgraves argue that a rule of nondiscrimination should apply; that is, 'B should tax income received by X as if it were received by B's own residents'.[11]

Third, turning from a legal to an economic perspective, the Musgraves discuss the possibility that, were it resource rich but capital poor, country B might justifiably argue that it is entitled to 'obtain a rental or royalty share in A's gain over and above the addition to its labor income'.[12] This national rental would take the form of a tax but would be imposed outside of country B's domestic tax system. In essence, the levy would constitute 'an *in rem* tax on operations by foreigners'.[13]

---

[7] *Id.* at 70.
[8] *Id.* at 71.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 71–72.
[12] *Id.* at 73.
[13] *Id.*

Finally and most directly relevant to this Chapter, the Musgraves turned to the possibility that internation equity might serve 'as an instrument of international redistribution'.[14] As they explain, '[w]ith a highly unequal distribution of resource endowments and per capita income among countries and in the absence of an adequate method for dealing with the problem, an appropriate pattern of tax-imposed national gains and losses might be used to secure some degree of adjustment'.[15] The Musgraves proposed a uniform rate schedule for corporate taxation that would, by international agreement, apply in all capital-importing countries.

The rates would not be reciprocal, as are the withholding tax rates in current tax treaties. Rather, the rates 'would be related inversely to per capita income in the capital-importing country and directly to per capita income in the capital-exporting country. This would improve the relative position of low-income countries'.[16] Thus, at one extreme, the Musgraves proposed applying a rate of 60% where the per capita income of the capital-exporting country was greater than $1000 and the per capita income of the capital-importing country was less than $250. At the other extreme, the Musgraves proposed applying a rate of 10% where the per capita income of the capital-exporting country was less than $250 and the per capita income of the capital-importing country was greater than $1000.

B. 'Horizontal' v. 'vertical' internation equity

[14] *Id.* at 74.
[15] *Id.*
[16] *Id.*

This fourth approach of the Musgraves is quite distinct from the prior three. To borrow the familiar terminology used in domestic discussions of tax equity for rhetorical purposes only,[17] the first three approaches (i.e. benefit taxation, source taxation, and national rental charges) all have a 'horizontal' flavor to them. Indeed, when discussing the situation where income is derived from a combination of activities in several different countries, the Musgraves advocate the adoption of 'taxation . . . on an international basis' with formulary apportionment to allocate the tax on those profits among the several countries that can claim to be their origin.[18]

In contrast, the fourth approach (i.e. redistribution) has a 'vertical' flavor to it. It does not concern the competing claims of similarly situated capital-importing countries to a share of the profits generated within their respective territories. Instead, it concerns the allocation of the tax base between differently situated capital-exporting and capital-importing countries. The fourth approach thus recognizes the reality that all states are *not* situated equally and that 'states will vary significantly in their resources and power'.[19]

The Musgraves highlight the distinctive nature of the fourth approach when discussing the multiple-source-country situation. They qualify their advocacy of

---

[17] As I have explained elsewhere, there is significant controversy among U.S. tax academics over whether the concepts of horizontal and vertical equity have independent significance. *See* Infanti, *supra* note 3, at 1192–94. In contrast, I have argued that, '[f]ar from lacking normative content, tax equity abounds with it.' *Id.* at 1195. For instance, by judging the fairness of income tax policy solely by reference to taxpayers' income, tax equity 'effectively forecloses consideration of non-economic forms of difference (e.g., of race, ethnicity, gender, sexual orientation, or physical ability) when determining the appropriate allocation of societal burdens, even though these other forms of difference have served, and continue to serve, as the basis for invidious discrimination that already imposes heavy burdens on its victims.' *Id*. at 1196.

[18] Musgrave & Musgrave, *supra* note 1, at 84.

[19] Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 FLA. TAX REV. 555, 558 (2009).

formulary apportionment by stating that there should be an 'allocation of proceeds on an apportionment basis among the participating countries, *making allowance for distributional considerations*'.[20] In other words, in keeping with the first three approaches, there should be a horizontal allocation of the tax base among the several source countries. But that horizontal allocation should then be altered to take account of the vertical differences in per capita income levels between these source countries.

The first three approaches to internation equity all view the nations connected to the generation of income as co-equal sovereigns competing for their fair portions of a shared tax base. The fourth approach expands this view to recognize that these nations comprise groups of people, some of which are economically better off than others. It further acknowledges that the economic differences between these groups might properly influence what is considered to be a fair sharing of the tax base. This represents a marked shift away from viewing nations connected with the generation of income as a homogeneous group of sovereigns vying to exercise their taxing jurisdiction to a (slightly) more nuanced view of them as heterogeneous groups of people with different resource endowments and average levels of income.

C. The focus on per capita income

The focus on income in describing the redistributive aspect of internation equity is worth further exploration. The Musgraves explicitly recognize that nations, like individuals, are different from one another. But the only differences that the

[20] Musgrave & Musgrave, *supra* note 1, at 85 (emphasis added).

Musgraves deem relevant to their analysis are along the lines of resource endowments and per capita income. And in their proposal, they collapse even these two lines of difference into one. The Musgraves' proposed sliding scale of tax rates uses per capita income as the only metric for determining whether and how redistribution should occur.

Although Peggy Musgrave often revisited and refined this seminal articulation of internation equity in her later work,[21] she has never returned in any sustained way to the redistributive aspect of internation equity.[22] Other commentators have followed her lead. In one of the most in-depth treatments of internation equity, Nancy Kaufman focuses on questions of division of the tax base among co-equal sovereigns and merely mentions the redistributive aspect of internation equity.[23] Other commentators focus exclusively on horizontal allocation

---

[21] Brooks, *supra* note 2, at 480–87.
[22] *E.g.*, Peggy B. Musgrave, *International Tax Differentials for Multinational Corporations: Equity and Efficiency Considerations*, *in* THE IMPACT OF MULTINATIONAL CORPORATIONS ON DEVELOPMENT AND ON INTERNATIONAL RELATIONS 43, 46–48 (Carl S. Shoup ed., 1974); Peggy B. Musgrave, *The OECD Model Tax Treaty: Problems and Prospects*, COLUM. J. WORLD BUS., Summer 1975, 29, 36–37; Peggy B. Musgrave, *Fiscal Coordination and Competition in an International Setting*, *in* RETROSPECTIVES ON PUBLIC FINANCE 276, 294–96 (Lorraine Eden ed., 1991); Peggy B. Musgrave, *'Substituting Consumption-Based Direct Taxation for Income Taxes as the International Norm': A Comment*, 45 NAT'L TAX J. 179, 180–81 (1992); Peggy B. Musgrave, *Consumption Tax Proposals in an International Setting*, 54 TAX L. REV. 77 (2000); Peggy B. Musgrave, *Interjurisdiction Equity in Company Taxation: Principles and Applications to the European Union*, *in* TAXING CAPITAL INCOME IN THE EUROPEAN UNION: ISSUES AND OPTIONS FOR REFORM 46, 59 (Sijbren Cnossen ed., 2000); Peggy B. Musgrave, *Sovereignty, Entitlement, and Cooperation in International Taxation*, 26 BROOK. J. INT'L L. 1335, 1340 (2001); Peggy B. Musgrave, *Combining Fiscal Sovereignty and Coordination: National Taxation in a Globalizing World*, *in* THE NEW PUBLIC FINANCE: RESPONDING TO GLOBAL CHALLENGES 167, 175–77 (Inge Kaul & Pedro Conceição eds., 2006) [hereinafter Musgrave, *Combining Fiscal Sovereignty*].
[23] Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 LAW & POL'Y INT'L BUS. 145, 191–92, 203 (1998) [hereinafter Kaufman, *Fairness*]; *see* Nancy

of the tax base and make no mention at all of the redistributive aspect of internation equity.[24]

Approaching the question of redistribution directly—but failing to address the Musgraves' contribution to the literature—Ilan Benshalom provides a limited moral or philosophical basis for global wealth redistribution through the international tax regime.[25] Benshalom eschews cosmopolitan or statist approaches to global distributive justice and proposes an alternative, 'relational-distributive' approach that relies upon economic relationships as the foundation for global wealth redistribution.[26] Yet, even without directly addressing the Musgraves' conceptualization of internation equity, Benshalom proposes a framework that nonetheless relies upon nations' relative incomes as the cornerstone for determining whether a relational-distributive duty exists.[27]

Similarly, Diane Ring has approached the redistributive aspect of internation equity in the context of discussing the role of sovereignty in the tax competition debate.[28] Ring strongly questions whether internation equity can play any role in the debate over tax competition because 'firm foundations for a generally accepted vision

---

H. Kaufman, *Equity Considerations in International Taxation*, 26 BROOK. J. INT'L L. 1465 (2001).

[24] *E.g.*, Rifat Azam, *E-commerce Taxation and Cyberspace Law: The Integrative Adaptation Model*, 12 (5) VA. J.L. & TECH. ¶¶ 23, 32, 36, 97 (2007); William B. Barker, *An International Tax System for Emerging Economies, Tax Sparing, and Development: It Is All About Source!*, 29 U. PA. J. INT'L L. 349 (2007); Klaus Vogel *Worldwide vs. Source Taxation of Income—A Review and Re-evaluation of Arguments (part III)*, 11 INTERTAX 393, 398, 400, 401 (1988).

[25] Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. REV. 1 (2010).

[26] *Id.* at 9–36.

[27] *Id.* at 59.

[28] Ring, *supra* note 19.

of inter-nation equity have yet to be established'.[29] When Ring does eventually consider a 'realistic' application of internation equity claims to the tax competition debate, her focus is entirely on the economic dimension of states.[30] She speaks of the possibility of 'expand[ing] upon some of the accepted thinking on human rights to encompass more clearly defined economic rights'.[31] Ring's concern here is not with human rights generally but with the redistribution of wealth from higher-income countries to lower-income countries in an effort to ensure a baseline of economic subsistence.[32]

Other commentators addressing issues of internation equity have adopted the same singular focus on income.[33] Working within this framework, some commentators have even noted the possibility that the international tax regime may work a form of 'reverse redistribution', with lower-income countries ceding a portion of their tax base under some circumstances to higher-income countries.[34]

Thus far, Kim Brooks has made the only contribution to the literature on internation equity that attempts to break with an unbending focus on per capita

[29] *Id.* at 583.
[30] *Id.* at 590.
[31] *Id.*
[32] *Id.*
[33] *E.g.*, Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1648–51 (2000); Jinyan Li, *Improving Inter-nation Equity Through Territorial Taxation and Tax Sparing*, *in* GLOBALIZATION AND ITS TAX DISCONTENTS: TAX POLICY AND INTERNATIONAL INVESTMENTS 117 (Arthur J. Cockfield ed., 2010); Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries*, 23 VA. TAX REV. 161, 192–97, 201–02 (2003); Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1590–91, 1593–99 (2009); Adam H. Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555, 600–08 (2007).
[34] *E.g.*, Aldo Forgione, *Clicks and Mortar: Taxing Multinational Business Profits in the Digital Age*, 26 SEATTLE U. L. REV. 719, 762, 766–67 (2003); Jinyan Li, *The Rise and Fall of Chinese Tax Incentives and Implications for International Tax Debates*, 8 FLA. TAX REV. 669, 707–11 (2007).

income.[35] She approaches the question of revenue allocation between high- and low-income countries from a feminist perspective and explores how that perspective might support allocating a greater share of revenue to low-income countries. Focusing on the role of tax treaties in the international tax regime, Brooks observes:

> There are a wide range of ways feminists might approach tax treaties as a tool for tempering the unregulated market: they could be used to compensate low-income states for the prevalent abuses perpetuated by corporations resident in high-income states; they might be used to allocate increased international tax revenue to states that actively promote women's equality; and, finally, they might be used to punish corporate taxpayers who act in ways that erode or hamper women's equality.[36]

Comment [ACI1]: extract

Among her particular suggestions, Brooks proposes allocating a larger share of tax revenues to a low-income country that 'better advances women's equality' or imposing a tax penalty on multinational companies that 'fail to adopt pay equity'.[37] Though these suggestions do not so narrowly focus on per capita income, they do generally incorporate and perpetuate the general income-centric focus of internation equity by furnishing little more than a feminist justification for the redistribution of wealth from high- to low-income countries.

III. Tax blinkers

[35] Kim Brooks, *Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation*, 21 CAN. J. WOMEN & L. 267 (2009).
[36] *Id.* at 290–91.
[37] *Id.* at 291, 292.

A. Tax exceptionalism

Discussions of internation equity, like discussions of interindividual equity, largely seem to occur in a tax vacuum. For instance, interindividual equity debates in the United States—the country whose tax academic debates I am most familiar with—proceed on the assumption that the tax laws form a closed system, even though their 'larger purpose is to allocate the burden of funding our government and of paying for public services'.[38] Tax is viewed as separate and apart from (and, therefore, wholly unconcerned with) other areas of the law—not to mention the spending side of the fiscal system and domestic social systems more generally. Thus, as it is sometimes said in the United States, tax is treated as 'exceptional'.

Viewing the world wearing tax blinkers, U.S. commentators generally ignore the larger context in which the tax system operates and, consequently, ignore all differences among taxpayers other than differences in amount or type of income.[39] These commentators thus fail to take account of other forms of difference (e.g. race, ethnicity, gender, sexual orientation, and physical ability) that 'have served, and continue to serve, as the basis for invidious discrimination that already imposes heavy burdens on its victims'.[40] Elsewhere, I have urged U.S. commentators to take a holistic view of the allocation and apportionment of burdens in American society. More pointedly, I urged them to 'begin to offer competing ideas about what makes a tax system fair' that take into account the nontax burdens imposed by American

[38] Infanti, *supra* note 3, at 1195.
[39] *Id.* at 1200.
[40] *Id.* at 1196.

society on groups that have traditionally been subordinated along lines other than class.[41]

Debates about internation equity are similarly plagued by tax exceptionalism. For example, U.S. commentators seem to view international tax as being separate and apart from international law. Tellingly, Reuven Avi-Yonah begins his essay 'International Tax as International Law' with the question: 'Is international tax law part of international law?'[42] He then candidly states that one of his aims in writing the essay is 'to persuade international tax lawyers and international tax academics that their field is indeed part of international law'.[43]

Likewise, these commentators only rarely acknowledge that international tax rules embodied in domestic law and tax treaties form part of a nation's foreign policy. Notably, Michael Graetz has recognized that '[f]oreign policy concerns have long played an important role in U.S. international tax policy'.[44] Indeed, he has neatly summarized this history, which extends from the U.S. Congress's creation of China Trade Corporations in the 1920s to Western Hemisphere Trade Corporations in the 1940s to the Subpart F rules targeting developing countries in the 1960s—not to mention the Congress's denial of foreign tax credits to those who invested in South Africa during apartheid and, even now, to those who participate in boycotts of Israel.[45] Graetz also pointed out that '[f]oreign policy objectives may influence decisions about which countries to enter or cancel tax treaties with and the

---

[41] *Id.* at 1197.
[42] Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 483 (2004).
[43] *Id.*
[44] Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 307 (2001).
[45] *Id.* at 307–08.

appropriate parameters of treaty concessions'.[46] Graetz further observed that, if tax were to be used as a means of redistributing income among nations, then '[t]ax policy, of course, would have to be coordinated with other policies such as foreign policy and debt forgiveness'.[47]

In the same vein, it is rare to find U.S. commentators discussing the idea that international tax provisions may constitute foreign aid or assistance. Obviously, tax sparing, which the United States has consistently rejected, is widely viewed as a form of foreign aid.[48] Less obviously, David Pozen has highlighted how U.S. tax expenditures relating to nonprofit organizations can be reconceptualized as a hidden form of foreign aid or assistance.[49]

Of particular interest here, unilateral departures from a country's exercise of source tax jurisdiction can be conceptualized as tax expenditures.[50] For example, it has been suggested that the U.S. portfolio interest exemption might be classified as

---

[46] *Id.* at 310.
[47] *Id.* at 301 n.165.
[48] *E.g.*, ORG. FOR ECON. CO-OPERATION & DEV., TAX SPARING: A RECONSIDERATION 16, 19 (1998); Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice?*, 34 QUEEN'S L.J. 505, 518–21 (2009); Yariv Brauner, *A Framework for an Informed Study of the Realistic Role of Tax in a Development Agenda*, 42 U. BRIT. COLUM. L. REV. 275, 315 (2010).
[49] David E. Pozen, *Hidden Foreign Aid*, 8 FLA. TAX REV. 641 (2007).
[50] Allaire Urban Karzon, *Tax Expenditures and Tax Reform*, 38 VAND. L. REV. 1397, 1408–11 (1985) (reviewing STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985)).

It is worth noting that the discussion of tax expenditures in the text below makes implicit assumptions about the baseline international tax regime—including the relationship between source and residence taxing jurisdiction and whether certain tax provisions constitute tax expenditures (and, therefore, hidden foreign aid) as compared to that baseline. There are some—for example, Nancy Kaufman—who would argue that the current international tax regime does not provide assistance to lower-income countries, but works a redistribution in the opposite direction. *See supra* note 34 and accompanying text. For an argument that tax sparing is not a concession to the source state but a recognition of the source state's jurisdiction over an item of income, see Luís Eduardo Schoueri's contribution to this volume.

a tax expenditure.[51] Canada actually does classify its unilateral (as opposed to treaty-based) departures from its nonresident withholding tax as tax expenditures.[52] Australia likewise classifies its unilateral (as well as certain of its treaty-based) departures from its nonresident withholding tax as tax expenditures.[53] Such reductions in a source country's nonresident withholding tax inure to the benefit (i.e. provide aid to) the residence country, which is permitted to retain that much more of the national gain produced by its residents' investments in the source country.

Similarly, the most common methods for mitigating double taxation—the foreign tax credit and the exemption from tax of foreign source income—can also be conceptualized as tax expenditures. For instance, it has been suggested that the U.S. foreign tax credit might be classified as a tax expenditure when compared to a baseline of allowing only a deduction for foreign taxes.[54] In fact, Canada includes its foreign tax credit on a list of arguable tax expenditures.[55] The U.S. exclusions from gross income for (1) certain income earned by U.S. citizens residing abroad and (2) income of U.S. residents from sources within certain U.S. possessions are already classified as tax expenditures.[56]

---

[51] Karzon, *supra* note 50, at 1411–13; *see* Avi-Yonah, *supra* note 33, at 1598 n.91.
[52] DEP'T OF FIN. CAN., TAX EXPENDITURES AND EVALUATIONS 2010, at 21 (2010) [hereinafter TAX EXPENDITURES]; DEP'T OF FIN. CAN., TAX EXPENDITURES: NOTES TO THE ESTIMATES/PROJECTIONS 2010, at 77–78 (2010).
[53] COMMONWEALTH OF AUSTL., TAX EXPENDITURES STATEMENT 2010, at 68–69, 72, 205–06 (2011).
[54] Pozen, *supra* note 49, at 652 n.41 (citing OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2008: ANALYTICAL PERSPECTIVES 316 (2007), and Boris I. Bittker, *Accounting for Federal 'Tax Subsidies' in the National Budget*, 22 NAT'L TAX J. 244, 250 n.15 (1969)).
[55] TAX EXPENDITURES, *supra* note 52, at 16.
[56] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2012: ANALYTICAL PERSPECTIVES 241, 257 (2010); STAFF OF JOINT COMM. ON TAXATION,

If recast as tax expenditures, both the credit and exemption methods of mitigating double taxation may be seen as providing a benefit to source countries. For instance, if the United States in its capacity as a residence country were to allow its citizens and residents no more than a deduction for income taxes levied by a source country, then it would deter investment abroad by its citizens and residents. Under such a regime for the mitigation of double taxation, U.S. citizens and residents would not invest capital abroad unless the foreign investment produced an after-foreign-tax return greater than the pretax return on a U.S. domestic investment.[57] Accordingly, the more generous methods of mitigating double taxation (i.e. the foreign tax credit and exemption methods) facilitate or even encourage investment abroad when compared to a deduction baseline and, from that perspective, provide a form of foreign aid to source countries.

Wearing their tax blinkers, commentators contributing to the internation equity debate generally ignore the larger foreign policy framework in which the international tax rules are situated. They concomitantly ignore the possibility that a nation's international tax rules can operate to provide foreign aid or assistance to other countries—whether intentionally or unintentionally and whether consistently or inconsistently with the nation's larger foreign policy framework. Ignoring this larger context, they (like their counterparts in U.S. domestic tax equity debates) tend to focus on a single (economic) dimension of nations—per capita income—when considering questions of internation equity.

B. Removing the tax blinkers

NO. JCS-3-10, 111TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2010–2014, at 32, 34 (Comm. Print 2010).

[57] Musgrave & Musgrave, *supra* note 1, at 70.

By framing discussions of redistribution solely in terms of relative per capita income, commentators replicate on the international level a U.S. domestic tax equity debate rendered insipid by its one-dimensional focus on economic class. The only difference between these debates about redistribution is that commentators contributing to the international debate speak of high- and low-income 'nations' rather than high- and low-income 'taxpayers'. This may lend the terms of the international debate a comfortable feel and, by focusing on numbers, may even lend it the veneer of objectivity that so many tax academics seem to yearn for. Nevertheless, a narrow focus on per capita income is both problematic and outdated.

As Klaus Vogel long ago explained, 'equity reasoning can never be based on a single set of presumptions. In a complex world, it is necessary to consider multiple aspects'.[58] By removing our tax blinkers, we can recognize that internation equity is just one component of each country's foreign policy framework, and, more specifically, of its development policy. Furthermore, Vogel's words echo those of contributors to the development literature who have argued in favor of expanding its own traditionally narrow focus on economic growth to encompass additional dimensions in an effort to make the idea of development more meaningful.

For example, Amartya Sen singles out 'identifying development with the growth of gross national product . . . or with the rise in personal incomes' as examples of 'narrower views of development'.[59] Instead, Sen persuasively argues that:

> … An adequate conception of development must go much beyond the accumulation of wealth and the growth of gross national product and other

[58] Klaus Vogel, *The Search for Compatible Tax Systems*, *in* TAX POLICY IN THE TWENTY-FIRST CENTURY 76, 84 (Herbert Stein ed., 1988).
[59] AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999).

income-related variables. Without ignoring the importance of economic growth, we must look well beyond it.

The ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, 'merely useful for the sake of something else.' For the same reason, economic growth cannot sensibly be treated as an end in itself. Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy. Expanding the freedoms that we have reason to value not only makes our lives richer and more unfettered, but also allows us to be fuller social persons, exercising our own volitions and interacting with—and influencing—the world in which we live.[60]

Comment [aci2]: extract

IV. Expanding the horizon

Other participants in debates over development policy have expanded their horizons beyond economic growth and per capita income. For example, in the first Human Development Report (HDR) in 1990, an independent team working under the auspices of the United Nations Development Program (UNDP) introduced the Human Development Index (HDI) in an effort to move past the development literature's narrow focus on economic growth and expand the scope of development

[60] *Id.* at 14–15; *see id.* at 3, 8–9, 90, 131, 290–92.

measures.[61] The 1990 HDR stated that '[t]he basic objective of development is to create an enabling environment for people to live long, healthy and creative lives'.[62]

The 2010 HDR contains a more refined conceptualization of human development:

> Human development is the expansion of people's freedoms to live long, healthy and creative lives; to advance other goals they have reason to value; and to engage actively in shaping development equitably and sustainably on a shared planet. People are both the beneficiaries and drivers of human development, as individuals and in groups.[63]

Comment [aci3]: extract

This people-centered conceptualization of human development is strongly grounded in Amartya Sen's capability approach,[64] which focuses on 'the "capabilities" of persons to lead the kind of lives they value—and have reason to value'.[65] Applying this approach to the development context, Sen 'treats the freedoms of individuals as the basic building blocks'.[66]

---

[61] Amartya Sen, *Introduction* to U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 2010, at vi, vi (2010) [hereinafter 2010 HDR]. The HDRs typically contain a caveat that they do not necessarily reflect the views of the UNDP but only those of the team that produced them. For example, the 1990 HDR contains the following caveat in its foreword: 'The views expressed in this Report are those of the team and not necessarily shared by UNDP or its Governing Council or the member governments of UNDP. The essence of any such report must be its independence and its intellectual integrity'. William H. Draper III, *Foreword* to U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 1990, at iii, iv (1990). The independence of the authors of the HDRs is considered to be one of the great strengths of these reports. Desmond McNeill, *'Human Development': The Power of the Idea*, 8 J. HUM. DEV. 5, 11–12 (2007).
[62] 2010 HDR, *supra* note 61, at 12.
[63] *Id.* at 22.
[64] *Id.* at 16; *see* Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993).
[65] SEN, *supra* note 59, at 18.
[66] *Id.*

Sen views individual freedoms as having both a constitutive and an instrumental role in development.[67] He explains the constitutive role of freedom as follows:

> The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The substantive freedoms include elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on.[68]

Comment [aci4]: extract

But freedom is not only the '*primary end*' of development but also its '*principal means*'.[69] Thus, freedoms also have a role to play in contributing, 'directly or indirectly, to the overall freedom people have to live the way they would like to live'.[70] Sen groups instrumental freedoms into five basic categories: political freedoms (e.g. civil rights, democracy and freedom of the press), economic facilities ('opportunities … to utilize economic resources for the purpose of consumption, or production, or exchange'), social opportunities (e.g. education and health care), transparency guarantees (i.e. the openness necessary for mutual trust), and protective security (i.e. social safety net).[71]

A. The human development index

To better measure human development in keeping with Sen's approach, the HDI combines information along three different dimensions. Recognizing that

---

[67] *Id.* at 18–19, 36–40, 246.
[68] *Id.* at 36.
[69] *Id.*
[70] *Id.* at 38.
[71] *Id.* at 38–40.

income has a role (but not the only role) to play in development, the HDI considers (1) per capita income, (2) schooling (both mean years of schooling and expected years of schooling), and (3) health (life expectancy at birth).[72] The HDI is meant to rival 'the handy usability of the crude GNP', 'but, unlike GNP, without being oblivious of everything other than incomes and commodities'.[73] Yet, as Sen himself cautions, 'the huge breadth of the human development approach must not be confused, as it sometimes is, with the slender limits of the HDI'.[74]

The 2010 HDR marked the twentieth anniversary of the HDI's introduction. The team writing the 2010 HDR took this occasion to engage in some retrospection and found that there 'is the lack of a significant correlation between economic growth and improvements in health and education'.[75] For instance, the 2010 HDR compared and contrasted two countries—China and Tunisia—to demonstrate the disconnect between economic growth and improvements in health and education:

> In 1970 a baby girl born in Tunisia could expect to live 55 years; one born in China, 63 years. Since then, China's per capita GDP has grown at a breakneck pace of 8 percent annually, while Tunisia's has grown at 3 percent. But a girl born today in Tunisia can expect to live 76 years, a year longer than a girl born in China. And while only 52 percent of Tunisian children

[72] 2010 HDR, *supra* note 61, at 13 fig.1.1, 15 box 1.2.
[73] Sen, *supra* note 61, at vi.
[74] *Id.*
[75] 2010 HDR, *supra* note 61, at 4; *see id.* at 46–64 (explaining the data and reasoning supporting this conclusion). The 2010 HDR draws a distinction between levels of income and health and education, on one hand, and changes in income and health and education, on the other. There is a positive correlation between a nation's level of income and its level of health and education; however, there is no significant correlation between change in income and change in health and education. *Id.* at 47.

were enrolled in school in 1970, today's gross enrolment ratio is 78 percent, considerably higher than China's 68 percent.[76]

Comment [aci5]: extract

These findings confirm Sen's insights more than a decade earlier regarding 'the dissonance between income per head . . . and the freedom of individuals to live long and live well'.[77] In fact, the 2010 HDR concluded that 'human development is different from economic growth and … substantial achievements are possible even without fast growth'.[78]

But economic measures may not only be limiting but also misleading. Per capita income, for instance, is nothing more than a country's average income. Averages such as this can mask as much—or sometimes more—than they reveal.[79] In the case of income, averaging can mask profound levels of inequality in a society—and, of course, will completely miss inequalities along other lines (e.g. health, education, employment and social acceptance).[80] Indeed, in discussing the ways in which average income can be misleading, the 2010 HDR points to the United States as an example of a country where 'mean income is almost a third higher than median income, and the gap is growing'.[81] The 2010 HDR further points to gaps of similar size in Italy and New Zealand and even larger gaps in Côte d'Ivoire, Liberia and Zambia.[82]

B. Additional dimensions

[76] *Id.* at 47.
[77] SEN, *supra* note 59, at 5; *see id.* at 5–6, 43–49, 108–10, 285.
[78] 2010 HDR, *supra* note 61, at 5.
[79] *Id.* at 87.
[80] SEN, *supra* note 59, at 107–10.
[81] 2010 HDR, *supra* note 61, at 72.
[82] *Id.*

To address such concerns, the 2010 HDR introduced a refined version of the HDI—the Inequality-adjusted HDI (IHDI).[83] After taking inequality into account, 'the global HDI of 0.62 in 2010 would fall to 0.49, which represents a drop from the high to the medium HDI category'.[84] In 2010, the average loss in HDI due to inequality was 22%, and the losses ranged from a low of 6% to a high of 45%.[85]

A few examples may help to underscore the impact of inequality on measuring human development. Taking inequality into account, the United States would see its HDI drop by more than 11% (from 0.902 to 0.799), and it would fall nine places in the HDI ranking.[86] The Republic of Korea, another high-income country and member of the Organization for Economic Co-operation and Development,[87] would see its HDI drop by nearly 17% (from 0.877 to 0.731), and it would fall 18 places in the HDI ranking.[88] Brazil, an upper-middle income country,[89] would see its HDI drop by 27% (from 0.699 to 0.509), and it would fall 15 places in the HDI ranking.[90]

The 2010 HDR also introduced a more refined measure of gender inequality—the Gender Inequality Index (GII).[91] The GII takes account of three dimensions: (1) women's reproductive health (through maternal mortality ratios and adolescent fertility rates), (2) women's empowerment (through national parliamentary representation and educational attainment), and (3) women's labor

---

[83] *Id.* at 7.
[84] *Id.*
[85] *Id.* at 87.
[86] *Id.* at 152.
[87] World Bank, *World Bank List of Economies* (2011).
[88] 2010 HDR, *supra* note 61, at 152.
[89] World Bank, *supra* note 87.
[90] 2010 HDR, *supra* note 61, at 153.
[91] *Id.* at 89–94.

force participation.[92] As measured by the GII, the average loss in achievement for the ten countries closest to gender equality was 23% while the average loss in achievement for the ten countries farthest from gender equality was 79%.[93]

Again, a few examples will help to underscore the impact of gender inequality on measuring human development. The United States ranks fourth in the HDI but only 37th in the GII, with a 40% loss in achievement due to gender inequality.[94] Qatar, a high-income country,[95] ranks 38th in the HDI (placing it in the very high human development category) but ranks 94th in the GII, with a 67% loss in achievement due to gender inequality.[96] More startlingly, Saudi Arabia, a high-income country,[97] ranks 55th in the HDI (placing it in the high human development category) but ranks 128th in the GII, with a 76% loss in achievement due to gender inequality.[98] Mexico, an upper-middle-income country,[99] ranks 56th in the HDI (also placing it in the high human development category) but ranks 68th in the GII, with a nearly 58% loss in achievement due to gender inequality.[100]

There is a strong correlation 'between gender inequality and the loss due to inequality in the distribution of the HDI'.[101] Yet, this measure fails to capture other dimensions of gender inequality, including occupational segregation, the gender

---

[92] *Id.* at 91 fig.5.3.
[93] *Id.* at 93.
[94] *Id.* at 156.
[95] World Bank, *supra* note 87.
[96] 2010 HDR, *supra* note 61, at 156.
[97] World Bank, *supra* note 87.
[98] 2010 HDR, *supra* note 61, at 157.
[99] World Bank, *supra* note 87.
[100] 2010 HDR, *supra* note 61, at 157.
[101] *Id.* at 93.

wage gap, and the experience of non-elites as well as women's 'time use, access to assets, domestic violence and local-level empowerment'.[102]

C. Yet further dimensions

The 2010 HDR candidly recognizes the limits of its measures, stating that, 'as with any aggregate measure and international comparison, it simplifies and captures only part of what human development entails'.[103] Thus, the purpose of the HDI and the related measures discussed above 'is not to build an unassailable indicator of well-being—it is to redirect attention towards human-centred development and to promote debate over how we advance the progress of societies'.[104] Among other dimensions that the 2010 HDR acknowledges are important to human development are human rights and the political and social empowerment of groups of people, sustainability of production and impact on the environment, well-being, the availability of decent work and addressing threats to the human development that has been achieved.[105] In fact, the 2010 HDR included six new statistical tables that cover these additional dimensions.[106]

Other contributors to development debates have also underscored the importance of these additional dimensions to human development—in particular, the importance of human rights. For example, recent empirical research from the World Bank indicates that economic growth does not guarantee advances in human rights. Put differently, 'political/civil liberties and good governance are not a "luxury good": the process of economic development does not itself automatically ensure

[102] *Id.* at 92, 94.
[103] *Id.* at 13.
[104] *Id.*
[105] *Id.* at 17–19, 22, 85 tbl. 5.1.
[106] *Id.* at 137.

improved governance, civil liberties, and control of corruption'.[107] Indeed, this research supports the conclusion that '[t]he causality direction is from improved governance to economic development, not vice versa'.[108] Consequently, there is no 'automatic virtuous circle', and 'specific interventions and policies on governance and [first-generation human rights] are required at every stage'.[109]

Similarly, the Organization for Economic Co-operation and Development (OECD) has highlighted the increasing recognition that 'development and human rights are interdependent and mutually reinforcing'.[110] It has identified a clear trend among aid agencies to adopt, develop, and refine human rights and development policies.[111] In collecting and reviewing the experiences of a number of these aid agencies with human-rights-based approaches to development,[112] the OECD recognized the advantages of a human rights perspective in development work.[113]

Demonstrating the links between tax and human development that we will turn to next, the OECD noted in its review how human rights have impacted tax reform—and interindividual equity—in developing countries.[114] The OECD called attention to the work of the UK Department for International Development (DFID) in Peru. As part of a larger project addressing the causes of poverty in Peru, DFID promoted 'a focus on equity and accountability–rather than simply efficiency–into revenue policy and administration' by 'promoting the perspective that when citizens

---

[107] Daniel Kaufmann, *Human Rights and Governance: The Empirical Challenge*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 352, 382 (Philip Alston & Mary Robinson eds., 2005).
[108] *Id.*
[109] *Id.*
[110] ORG. FOR ECON. CO-OPERATION & DEV., THE DEVELOPMENT DIMENSION: INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT 17 (2006).
[111] *Id.* at 26.
[112] *Id.* at 3–4.
[113] *Id.* at 20–21.
[114] *Id.* at 19, 43.

pay taxes, not only is it a duty but it also creates rights'.[115] Thus, DFID 'set out to ensure that resources reached excluded groups, on the expenditure side; and promoted the perspective that paying taxes is not only a duty but also creates rights, on the revenue-creation side'.[116]

V. Tax and Human Development

Although 'there is no consensus about development policy', it is clear from the discussion in the previous section that 'new trends are emerging'.[117] There is an increasing recognition both that there is more to development than economic growth and per capita income and that 'captur[ing] the "missing" dimensions . . . is increasingly feasible'.[118] The time has come for these new trends to penetrate the internation equity debate.

To begin expanding our horizons, commentators must first leave behind tax exceptionalism and recognize that discussions of redistribution and internation equity are no more than the tax aspect of a larger debate about development policy. Our blinkered debates about internation equity—like debates about development policy before them—have traditionally focused on per capita income. But, as the new trends in the development debate highlight, per capita income is just one of many lines of difference among nations that should be considered in formulating international tax policy. Moreover, not only can participants in the internation equity debate come to better appreciate the importance of the multiple dimensions of

[115] *Id.* at 44; *see id.* at 117–22.
[116] *Id.* at 120.
[117] 2010 HDR, *supra* note 61, at 19.
[118] *Id.* at 20.

human development, but, as the 2010 HDR illustrates, there are measures available for them to actually incorporate the human development approach into proposals intended to further internation equity.

In keeping with the human development approach, the redistributive aspect of internation equity can—and ought to—involve more than the shifting of financial resources from higher-income 'developed' countries to lower-income 'developing' countries in an effort to shore up their per capita incomes. And expanding the focus of internation equity beyond economic growth requires more than simply fashioning arguments for enhanced forms of redistribution that incorporate noneconomic (e.g. feminist, social or strategic) considerations.[119] Such arguments still operate within the linear framework of redistribution from higher- to lower-income countries.

In the remainder of this section, I offer proposals that embody a notion of internation equity that promotes human development. These proposals are an initial step toward fashioning a more robust notion of internation equity within the context of the extant international tax regime. Others could—and, hopefully, will—craft further proposals that advance human development in more ambitious ways. Indeed, the principal aims of this Chapter are to influence the direction of the internation equity debate and to lay the groundwork for future work integrating tax and development policy. With that background, let us turn to a discussion of the proposals.

A. Reality check

[119] *E.g.*, Brooks, *supra* note 35; Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT'L ECON. L. 45 (2002).

A single assumption undergirds both of these proposals; namely, that, given our extant international tax regime, nations can already be seen as providing development assistance to each other through tax expenditures embedded in their international tax rules.[120] As discussed above, both departures from a source country's nonresident withholding tax and a residence country's mitigation of double taxation through the foreign tax credit or exemption methods can be conceptualized as tax expenditures that provide aid to other countries. In this light, we will consider exercises of source and residence taxing jurisdiction in turn, with related proposals advanced for each.

Before reaching that discussion, however, it is important to state a caveat. Once it is recognized that countries can provide foreign aid through their international tax rules, each country must decide whether it is in a position to provide such aid. Especially for countries that (1) underperform in terms of human development and (2) provide little (if any) direct foreign development assistance, it may be that scaling back or eliminating international tax expenditures is the most appropriate step to take. The foregone revenue may be better spent furthering development at home rather than abroad. If, however, tax expenditures that provide 'hidden' foreign aid are to continue, then it will be necessary to consider how these rules might better target assistance to further human development.

---

[120] This is, of course, not to say that development assistance should be run through tax expenditures rather than provided directly, but rather to (1) acknowledge that such assistance may already be provided through the tax laws and (2) where appropriate, encourage better targeting of that assistance so as to further human development. *Cf*. Avi-Yonah, *supra* note 33, at 1640; Brooks, *supra* note 48, at 549; Brauner, *supra* note 48, at 312. It is also not to say that these proposals could not be adopted even were it concluded that these provisions do not constitute tax expenditures at all. *See supra* note 50.

Furthermore, though I have, on occasion, used the United States as an example in this Chapter, these proposals are drafted broadly and are not meant to be limited in their application to any one country. In fact, the incentive created by these proposals for all countries (regardless of income level) to advance human development will only grow more powerful as more countries adopt them. Concomitantly, the pressure will grow on nonadopting countries (assuming that they choose to retain their international tax expenditures) to adhere to an emerging international tax norm of targeting 'hidden' foreign assistance so as to further human development.

B. Source taxation

In considering how much tax to levy on nonresidents, a source country might choose to adopt a sliding scale of withholding tax rates that varies depending on how the taxpayer's country of residence does in terms of advancing human development. As a first step, this sliding scale could be implemented through domestic law. A short target time frame could be specified within which all existing tax treaties would be renegotiated to comport with the sliding scale—perhaps based on bands of withholding tax rates built into the statutory sliding scale in order to accommodate some reduction in the statutory rate as a treaty concession without crossing from one level in the statutory sliding scale to another. Naturally, future tax treaties would be negotiated from the outset to comport with the sliding scale.[121]

---

[121] Indeed, the treaty negotiation process could provide an additional means for expanding the web of countries adopting these proposals. A treaty partner's firm resistance to adopting the sliding scale approach would not, however, present a problem because reciprocity in withholding rates is by no means an inexorable feature of tax treaties. *See, e.g.*, Convention for the Avoidance of Double Taxation, the Prevention of Fiscal Evasion with Respect to Taxes on Income, and the

As described below, such a sliding scale could easily be tied to the measures of human development in the annual HDRs, such as the HDI, the IHDI, and the GII. These indices, though neither perfect nor all-encompassing in their scope, provide a measure of human development that is just as handy as, but more meaningful than, per capita income.[122] An added benefit of these measures is that they are produced by a team that works independently of the United Nations, thereby limiting concerns about political influence in the creation of the indices.[123] And, of course, these indices can always be replaced or supplemented as more refined or complete measures of human development arise.

For instance, the source country could afford the lowest withholding tax rates to residents of countries that (1) appear in the HDI's 'very high human development' category (to reward those already doing well) or are among the highest scorers in the 'HDI improvement rank' (to reward those making the greatest strides even if they are not yet among the best overall) and (2) experience losses in HDI due to inequality (as measured by the IHDI) and in achievement due to gender inequality (as measured by the GII) below a specified threshold.[124] This would result in the source country ceding more of the national gain (i.e. providing more foreign aid) to the residence country as it performs better in the HDR's human development

---

Encouragement of International Trade and Investment, U.S.-Trin. & Tobago, art. 12, Jan. 9, 1970, 22 U.S.T. 164, 177–78 (limiting the Trinidad and Tobago tax on dividends to a maximum rate of 25%, but imposing no limit on the U.S. statutory withholding tax rate on dividends).

[122] *See* Gustav Ranis et al., *Human Development: Beyond the Human Development Index*, 7 J. HUM. DEV. 323 (2006) (demonstrating that a broader set of measures is necessary to assess a fuller definition of human development than the basic one employed for purposes of the HDI, but concluding that the HDI is superior to both per capita income and under-five mortality rates as a measure of a fuller definition of human development).

[123] *See supra* note 61.

[124] 2010 HDR, *supra* note 61, at 143–60.

measures. In this way, the source country would encourage all countries whose residents invest capital there to work to advance human development.

Conversely, the highest withholding tax rates could be applied to residents of countries that either (1) appear in the HDI's 'low human development' category and fare poorly in the 'HDI improvement rank' or (2) experience losses in HDI due to inequality (as measured by the IHDI) and in achievement due to gender inequality (as measured by the GII) above a specified threshold. This would result in the source country retaining a greater share of the residence country's national gain as it performs more poorly in the HDR's human development measures. This would serve as encouragement to the affected residence countries to pay greater attention to advancing human development. Withholding tax rates in between the highest and lowest rates could be applied to residents of countries falling in between these extremes.

Countries would move among the different levels of withholding tax rates as the measure of their human development changes over time.[125] Accordingly, as a country whose residents were subject to the highest withholding tax rates improved in the various measures of human development, the withholding tax rates imposed on its residents would be reduced under the sliding scale. Some underperforming countries might not (at least initially) respond to this encouragement any more than they respond to the segments of their own populations who are bearing the brunt of

---

[125] There is little reason to be concerned about complexity arising from the possibility of annual changes in withholding rates. For instance, the Internal Revenue Service annually publishes treaty-rate withholding tables for use by withholding agents and could do the same for a sliding scale of rates. I.R.S. Publ'n No. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities (2011). Moreover, governments can combat abusive 'rate shopping' through stringent limitation on benefits provisions similar to those already employed to combat 'treaty shopping'.

their lack of human development. Residents of these countries would be punished for this inaction by being subject to persistently high withholding tax rates—and appropriately so. The marginalized and disadvantaged in these countries are not likely to be among those making investments abroad. To the contrary, only those with wealth and advantage—who are, directly or indirectly, benefiting from their country's underdevelopment—would be making investments abroad. Perhaps the tangible, personal effect of a penalty tax on the segments of the population more likely to be heard by those in power (or to themselves be part of the power structure) will eventually serve as an incentive for change.

Once change is made and the measure of a country's human development improves, the withholding tax would be correspondingly reduced. At first blush, there seems to be an 'upside-down' quality to the aid provided through this sliding scale of withholding rates, as the benefit of reduced rates goes to those who are wealthy enough to make investments abroad. But keep in mind that the benefit of these lower rates only comes if those with wealth and power ensure that the lot of the disadvantaged in their countries is improving. In this way, it is the necessary obverse of the penalty tax imposed on those same individuals when they fail to improve the lot of the disadvantaged in their countries. More importantly, by ceding a greater share of the national gain, the source country allows the residence country to claim a greater share of the gain through taxation for use in ongoing development efforts.

C. Residence taxation

A similar sliding scale could be applied by residence countries to their own citizens and residents when determining how to mitigate double taxation. A number

of methods exist for mitigating double taxation. A residence country can (1) adopt worldwide taxation accompanied by a credit for foreign taxes paid, (2) exempt foreign source income from tax, or (3) provide a deduction for foreign taxes paid.[126] Some countries, like the United States, use a combination of these methods.[127]

In their 1972 essay, the Musgraves asserted that internation equity concerns only source-based (and not residence-based) taxing jurisdiction. Yet, as Peggy Musgrave later noted, 'the country of residence, as the residual taxing authority, has control over the total tax burden on the foreign-source income of its resident taxpayers'.[128] How a residence country divides the residual national gain from foreign investment between the taxpayer and its treasury will undoubtedly influence where its residents invest.[129] In this way, the residence country can affect which source countries will be able to lay claim to a portion of the national gain generated by its residents' foreign investments. This channeling effect of residence taxation impacts the redistributive aspect of internation equity.

A residence country could encourage investment in source countries doing well in terms of human development by exempting income sourced in those countries from tax. It could discourage investment in source countries doing poorly in terms of human development by providing no more than a deduction for foreign taxes paid (or for the worst offenders, by denying relief from double taxation). For countries falling in between these extremes, it could choose among the following options:

1. Provide a foreign tax credit;

---

[126] Paul R. McDaniel, *The U.S. Tax Treatment of Foreign Source Income Earned in Developing Countries: A Policy Analysis*, 35 GEO. WASH. INT'L L. REV. 265, 267 (2003).
[127] I.R.C. §§ 164(a)(3); 901(a), (j); 911.
[128] Musgrave, *Combining Fiscal Sovereignty*, *supra* note 22, at 168–69.
[129] Mihir A. Desai & James R. Hines, Jr., *Evaluating International Tax Reform*, 55 NAT'L TAX J. 487, 491 (2003).

2. Provide an exemption from tax, but take the exempt income into account in determining the rates applicable to the resident's taxable income—so-called exemption with progression;[130]
3. Employ some form of tax sparing; or
4. Some combination of these (or other) methods.

In this way, the residence country would encourage all source countries seeking capital investments from its residents to work to advance human development.

As with the sliding scale of nonresident withholding tax rates, this sliding scale of methods for mitigating double taxation would reward (i.e. target aid to) countries doing well in terms of human development and encourage underperfomers to pay greater attention to advancing human development. Naturally, some lower-income (and even some higher-income) countries might not fare well in terms of the amount of 'hidden' aid received under a sliding-scale system for mitigating double taxation. (At this juncture, it is worth recalling the earlier examples of higher-income countries that have fared poorly in the IHDI and GII, including the United States and some of its major trading partners.[131]) Again, this may be an entirely appropriate result. If a country is not significantly advancing human development, it is not likely to be an appropriate target for (direct or indirect) development assistance, given the strong possibility that any assistance might not actually be used to advance development.

Furthermore, given the lack of a significant correlation between economic growth and advancing human development (recall the comparison of China and

---

[130] Kaufman, *Fairness*, *supra* note 23, at 150 n.31.
[131] *See supra* text accompanying notes 86–90 and 94–100.

Tunisia above),[132] any reduction in assistance should not unduly limit a country's ability to achieve real advances in human development and obtain more favorable treatment under the sliding scale, leading to greater levels of 'hidden' aid that could then be used to even further advance human development. Thus, far from creating a vicious circle in which low levels of human development lead to tax deterrents to foreign investment that impede advances in human development, this sliding scale can create a virtuous circle in which advances that cost little in monetary terms can lead to foreign direct investment that can increase the resources available to devote to development efforts.

As mentioned above, more ambitious countries might take into account additional dimensions of human development not captured by the HDI, IHDI, and GII. These countries could turn to the HDR's additional statistical tables containing information regarding empowerment, sustainability and vulnerability, human security, perceptions of individual well-being, measures of civic and community well-being and decent work—especially if those measures are further refined in coming years.[133] Other sources of relevant information include Amnesty International's annual human rights report and the International Lesbian, Gay, Bisexual, Trans and Intersex Association's (ILGA) annual report on state-sponsored homophobia.

Whatever metrics a country chooses, some value judgments will necessarily be involved—whether they are judgments made by others (e.g. if the HDR's indices and statistical tables are used) or by the country itself (e.g. if Amnesty International's or ILGA's raw data is used). As Amartya Sen has explained, this is

[132] *See supra* text accompanying note 76.
[133] 2010 HDR, *supra* note 61, at 164–83, 188–91.

not a drawback—but a strength—of the human development approach.[134] Even real-income measures entail value judgments, however concealed or implicit they might be.[135] In a similar vein, Kim Brooks observes, 'That the application of a concept of inter-nation equity requires value judgments is rarely explicitly recognized in the literature, and yet the lack of traction that the concept has had for policy-makers and scholars must be at least partly explained by that realization.'[136] She continues, 'The mistake, then, is thinking that inter-nation equity is something other than a tool for beginning that conversation'.[137] In this regard, the advantage of the human development approach is in rendering these value judgments transparent and explicit so that they can be subjected to 'public scrutiny, criticism, and correction'.[138]

VI. Advantages of an expanded horizon

In closing, I describe several of the advantages of widening the focus of the internation equity debate to encompass both economic *and* noneconomic lines of difference among nations in an effort to promote human development.

First, a wider focus would make the internation equity debate more meaningful. As described above, economic growth may be a means of furthering human development, but it is not the end of human development. Yet, the tax literature too often ignores other aspects of human development in favor of a nearly

---

[134] SEN, *supra* note 59, at 30–31, 79–81; Amartya Sen, *Development Thinking at the Beginning of the XXI Century*, *in* ECONOMIC AND SOCIAL DEVELOPMENT INTO THE XXI CENTURY, at 531, 542–44 (Louis Emmerij ed., 1997).
[135] SEN, *supra* note 59, at 30–31, 79–81; Sen, *supra* note 134, at 542–44.
[136] Brooks, *supra* note 2, at 492.
[137] *Id.* at 493.
[138] Sen, *supra* note 134, at 544.

exclusive focus on economic growth.[139] By refocusing the debate on the ends to be achieved through development, commentators will better be able to locate the tax aspects of development in the larger human development picture.

Second, embracing multiple lines of difference among nations represents a welcome break from the linear view of internation equity as being concerned only with redistribution from higher- to lower-income countries. In this linear view, higher-income 'developed' countries (who are assumed to have already arrived at the end of the development path) pass money back to the lagging, lower-income 'developing' countries to aid them in their progress toward the ultimate destination of being 'developed' (i.e. having high per capita income). In contrast, advancing human development is a concern for *all* countries.

Amartya Sen has clearly made the case that human development is not only a concern for lower-income countries but for all countries, including higher-income countries.[140] We are all engaged in the process of advancing human development along different tracks and in different ways.[141] That is precisely why the reform proposals considered in the previous section make no distinction between countries based on their status as high- or low-income; rather, each country adopting a sliding scale would apply that scale to *all* other countries. Given its inclusion as a component of the HDI (and IHDI), income would be a factor in determining where a country falls in the sliding scale, but, importantly, it would only be one among a number of different factors influencing that position.

---

[139] *E.g.*, Brauner, *supra* note 48, at 280, 291–307, 321.
[140] SEN, *supra* note 59, at 6, 21–24.
[141] *Id.* at 126–27, 240–42, 285, 297–98.

Third, even though the human development approach applies to all countries, it 'is first and foremost an ally of the poor' and disadvantaged.[142] As described above, averages (like per capita income) homogenize populations and can mask profoundly disturbing levels of inequality in a society. For instance, high-income countries (e.g. Saudi Arabia and Qatar) show some of the greatest losses in achievement due to gender inequality. In contrast to such averages, the human development approach 'put[s] people at the centre'.[143] Given the social justice focus of redistribution and internation equity, it is important that the human development approach helps us to bring the most vulnerable—for example, the poor, the disabled, women, ethnic and racial minorities and sexual minorities—out of the shadows and into the center of the internation equity debate.[144]

Fourth, situating the internation equity debate in a wider context allows us to quickly address two criticisms that have been leveled at the notion of international redistribution. These two criticisms relate to: (1) the lack of a normative basis for redistribution and (2) the inability to differentiate between 'worthy' and 'unworthy' recipients of assistance.[145] Both of these criticisms are products of the unduly narrow focus on per capita income in the extant internation equity debate.

Once the internation equity debate is situated in the broader development context, it becomes clear that normative grounding for a more robust notion of internation equity can be found in Sen's capability approach and his related

---

[142] *Id.* at 144.
[143] 2010 HDR, *supra* note 61, at 2; *see also* SEN, *supra* note 59, at 18.
[144] *See* 2010 HDR, *supra* note 61, at 5–6.
[145] Benshalom, *supra* note 25; Ring, *supra* note 19, at 586–89.

exposition of the advantages of a freedom-based approach to development.[146] In addition, the OECD has observed that '[t]he intrinsic value of human rights offers development actors an explicit normative and analytical framework, grounded in a consensual global legal regime. The framework can be adapted to different political and cultural environments'.[147] Moreover, '[a]ll states party to the relevant international human rights instruments have a duty to promote and protect human rights, including through international co-operation'.[148]

In terms of differentiating between 'worthy' and 'unworthy' recipients of assistance, Ilan Benshalom has posited the problem as follows:

> Simply put, in a world where North Korea can spend money without asking Japan for any authorization and can even use it to prepare for a war against Japan, the Japanese will not be willing to engage in any cross-border redistribution of wealth, regardless of North Korean poverty and the reasons for it.[149]

Comment [aci6]: extract

A more robust notion of internation equity that aims at advancing human development could be used to sort out 'worthy' from 'unworthy' recipients of development assistance. Those with a record of promoting advances in human development (as evidenced in the HDI, IHDI, GII or other measures) could easily be targeted for greater aid than those without such a record.[150]

---

[146] SEN, *supra* note 59, at 54–86; *see id.* at 18–19.
[147] ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 110, at 20.
[148] *Id.* at 28.
[149] Benshalom, *supra* note 25, at 5–6.
[150] This approach also has an advantage over Kim Brooks's suggestion to provide negotiated assistance through tax treaties with countries that evidence a commitment to the Millennium Development Goals (MDGs). Brooks, *supra* note 35, at 296–97. The MDGs are too narrow in their focus because they concentrate on selected human development priorities and completely ignore others (e.g. 'inequality and process freedoms'). 2010 HDR, *supra* note 61, at 17. Furthermore, Brooks seems

As noted above, there is still no consensus regarding development policy, and the UNDP's Human Development Reports and their formulation of the HDI and other measures are not without controversy.[151] However imperfect these measures might be, using them to take account of additional dimensions of human development beyond just economic growth is a step in the right direction, especially when per capita income is itself far from a perfect measure of human development. Moreover, the lack of a broad consensus on development policy is no reason to ignore the emerging trend toward recognizing that there is more to human development than just economic growth and per capita income and that 'captur[ing] the "missing" dimensions . . . is increasingly feasible'.[152]

Tax commentators do not shy away from discussions of efficiency merely because there are competing notions of international efficiency (i.e. capital-export, capital-import, national and 'capital-ownership' neutrality) and a lack of consensus about which notion should prevail.[153] To the contrary, commentators routinely advocate policy prescriptions based on their preferred version of international efficiency in an effort to persuade others of their correctness. There should be a similar lively debate in which commentators air their competing ideas about how internation equity and development fit together.

After all, Sen has underscored the importance—and great benefit—of public dialogue about human development:

---

to contemplate targeting assistance based on a 'commitment' to the MDGs, whereas using the HDI, IHDI, GII and other output-based measures could facilitate targeting development assistance to countries that are already successfully advancing human development (rather than merely promising to do so at some point in the future).

[151] 2010 HDR, *supra* note 61, at 15–22.

[152] *Id.* at 19–20.

[153] CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 20–22 (2011).

> In line with the importance I [i.e. Sen] attach to the role of public discussion as a vehicle of social change and economic progress . . ., this work is presented mainly for open deliberation and critical scrutiny. . . . If my arguments arouse any interest, and lead to more public discussion of these vital issues, I would have reason to feel well rewarded.[154]

Comment [aci7]: extract

I can only express a similar hope for a rewarding public discussion regarding the formulation of a more robust notion of internation equity—one that advances the interests of all people, especially the traditionally disadvantaged, and not just the interests of some homogenized 'average' person who inhabits a one-dimensional economic plane of existence.

[154] SEN, *supra* note 59, at xiii–xiv.