Abstracts of Papers Presented

Human Rights & Tax in an Unequal World
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List of Authors


Avi-Yonah, Reuven S. and Gianluca Mazzoni — Taxation and Human Rights: A Delicate Balance

Bankman, Joseph — Determinants of Advisor Behavior

Blank, Joshua — The Timing of Tax Transparency

Braumann, Céline — Re-Humanizing International Tax Policy: ECHR Litigation as a Tool for Tax Justice

Christians, Allison — The Search for Human Rights in Tax

Cobham, Alex — Procuring profit-shifting: The State role in tax avoidance


Cosgrove, Mary — Exposing State Responsibility for Tax Abuse – Is spillover analysis the key?

Crawford, Bridget J. and Carla Spivack — For Women, Tampons are not a Luxury: How Sales Taxes on Menstrual Hygiene Products Violate Human Rights

Dayle Siu, Erika — Building Human Rights into the International Tax Architecture

Dean, Steven — Tax Cooperation in the Time of Brexit

De Schutter, Olivier — Taxation as a tool for the realization of economic, social and cultural rights: conceptual and practical challenges

Fredman, Sandra — Taxation as a Human Rights Issue: Gender and Substantive Equality

Hemel, Daniel — Basic Income as a Right?

Kane, Mitchell — Tax and Human Rights: The Moral Valence of Entitlements to Tax, Collectives, and Sovereignty

Kaye, Tracy A. — The United States’ Responsibility to Promote Tax Transparency

Kleinbard, Edward — Capital Taxation in an Age of Inequality
Lahey, Kathleen — *From ‘Tax Cuts for Growth’ to ‘Taxing for Equality’ – Fiscal Policies, Human Rights, Gender Equality, Poverty, and Income Inequalities*

Lusiani, Nicholas — *A Strange Alchemy: Embedding human rights into tax policy spillover assessments*

Martner, Ricardo and Michael Hanni — *Inequality, taxation and public transfers in Latin America*

Lennard, Michael —

Moran, Beverly — *Labor, Capital, Human Rights*

Oguttu, Annet W. and Monica Iyer — *Tax Abuse and Implications for Human Rights in Africa: Are the OECD’s international tax reform efforts effective in ensuring multinational enterprises pay their fair share of taxes in Africa?*


Shaviro, Dan — *Interrogating the Relationship between “Legally Defensible” Tax Planning and Social Justice*

Smith, Andre L. — *Recent Cases of Regressive and Racially Disparate Taxation*

Stewart, Miranda — *The Who, What, Why and How of Transparency*

Turina, Alessandro — *Towards More Transparent Tax Systems: Challenges for Tax Administrations and the Plight of Developing Countries*

Waris, Attiya — *Developing an International, Continental and Domestic Legal Framework for the Accountability of Actors in Cross-border Tax Crime based on its Impact on Human Rights in Developing and Developed Countries*

Ylönen, Matti — *Who’s to Blame for the money drain? The demise of analyses of corporate power and the rise of the anti-corruption agenda*
Government Accountability, Taxation and the Paris Principles: The Role of National Human Rights Institutions in the Global South

In her report on human rights and fiscal policy, the former Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, recommended, among others, that the capacity of the judicial system and national human rights institutions (NHRIs) to address fiscal policy be strengthened to ensure accessible channels for accountability and to remedy the negative human rights impact of fiscal policy. This paper explores aspects of this recommendation by considering examples of how NHRIs have engaged governments on fiscal and tax policy to ensure the realization of human rights.

Drawing on purposefully selected case studies from India, Paraguay, and South Africa, this paper finds that NHRIs adopt three approaches when engaging their respective governments on fiscal and tax policy that are (i) deferential, (ii) policy oriented, or (iii) critical in nature. While all three NHRI’s considered in this study are compliant with the Paris Principles and accredited as A-status institutions by the International Coordinating Committee of National Human Rights Institutions, these institutions approach human rights and tax policy in varying ways.

The National Human Rights Commission of India (NHRCI) tends to adopt a deferential approach to its government’s distribution of resources and spending on education and healthcare. This is despite the fact that the Indian Commission is critical of its government on matters of unlawful detention, police brutality and access to healthcare. The Ombudsman of the Republic of Paraguay leans toward a more policy oriented approach by working alongside its government to institute fiscal reforms. These reforms have included public information legislation introduced by the Ombudsman in 2003. The South African Human Rights Commission adopts a more critical approach to its government’s tax and fiscal policies when compared to its counterparts from India and Paraguay. In a series of reports and engagements with the government on access to water and sanitation, the South African Commission called for greater transparency and monitoring of government expenditure and has been increasingly critical of government spending on socio-economic rights.

While NHRIs have demonstrated their willingness to engage questions of inequality through the lens of human rights and tax policy, their approaches differ significantly. Consequently, recommendations that draw on the policy oriented approach of the Paraguayan Ombudsman and the critical approach of the South African Commission, are suggested for further consideration. These recommendations include, (i) developing the internal capacity of NHRIs to conduct human rights assessments of fiscal policy; (ii) ensuring greater access to data and information on fiscal policy, government revenues and expenditure; (iii) raising awareness and building capacity of communities on fiscal policy to ensure the realization of human rights; and (iv) working alongside the government to develop policy recommendations, indicators and accountability mechanisms.
Avi-Yonah, Reuven S. and Mazzoni, Gianluca

*Taxation and Human Rights: A Delicate Balance*

The intersection of tax law and human rights can be viewed from two opposing perspectives. On the one hand, the ability of rich residents of developing countries and multinational corporations operating in those countries to evade or avoid taxation is directly linked to violations of human rights in those countries, especially from the perspective of social and economic rights like health and education. Providing such countries with the means to fight back and collect adequate revenues is essential in advancing such rights. On the other hand, some of the techniques used to achieve adequate revenue collection, like automatic exchange of information (AEoI) and country by country reporting, risk violating other human rights like privacy and the legitimate protection of trade secrets. This paper seeks to discuss both aspects and the need to find a reasonable balance between them.

The first part will be dedicated to the compatibility of reporting obligations under the US Foreign Account Tax Compliance Act (FATCA) and the OECD Common Reporting Standard (CRS) with the EU harmonized framework on privacy and data protection as enshrined in the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union (CFREU) and Directive 95/46/EC. It will be argued that AEoI under FATCA and CRS go beyond what is strictly necessary to achieve the goal of fighting against offshore tax evasion. For example, reporting obligations apply even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with tax evasion. In the authors’ opinion, low-risk accounts should be exempted from reporting. The question is how to identify those financial institutions and accounts that present a low risk of being used to evade taxes in order to exclude them from the scope of reporting obligations. To this extent, the authors suggest an enhancement of due diligence procedures through the elaboration of a list of subjective and objective “anomaly indicators” as provided under the anti-money laundering legislation. That list would facilitate not only the detection of those accounts that present a high risk of tax evasion, but also of a reasonable balance between the AEoI and the right to privacy and to the protection of personal data.

If any legal uncertainty arising from any conflict between the AEoI and the right to respect for private life and to data protection is not rapidly removed, there is a great risk that large parts of the edifice erected for AEoI might be struck down by the CJEU with the undesirable consequence that national tax authorities will not have, at their disposal, the necessary measures to provide their residents the abovementioned social and economic rights of health and education.
This paper identifies three interrelated ways in which to understand, or model, the role professionals play in aggressive or unethical tax planning. First, professionals can be seen as motivated only risk-adjusted expected monetary payoffs. Though the determinants of utility in this model are few, the determination of the payoff structure is complex. In the context of aggressive corporate tax planning, tax professionals are agents of their firm, and serve as agents of corporate tax directors, who in turn are agents of other officers, their board and shareholders. This purely monetary, economic view of professionals is the dominant view in the existing literature. It has proven extremely fruitful, and will become even more useful as it is modified to more accurately incorporate the complicated payoff structure produced by the agent-principal relationships.

Second, professionals may be motivated in part by what might be called moral considerations. Under this view, professionals engage in a form of reasoned deliberation about the morality of their actions, and desire to act in accordance with their values. Professionals are heterogeneous in their definition of, and weight placed upon, morality. Those who write about or emphasize the role of moral considerations also acknowledge the role of economic payoffs. Their scholarship can be incorporated in a model in which monetary payoffs and moral considerations interact with each other, particularly over time. Moral considerations affect firm selection (here viewing government as a firm), and firm selection and economic payoffs affect the professional's definition of morality.

Third, professionals may be motivated by psychological factors. Psychological factors such as conformity bias, cognitive dissonance and confirmation bias can help explain how a professional's views change over time and mediate the interaction between moral and economic considerations. In addition, psychological personality traits such as empathy help explain why some professionals place little weight on their role as gatekeepers and instead adopt more client-centric goals. This may be particularly true in the small business sector, where there is some evidence that professionals characterized as warm and caring are more willing to help taxpayers underreport income.

This paper proposes an experimental test of the role of empathy in aggressive tax advice. In the experiment, a group of professionals will be given a series of hypotheticals posing ethical dilemmas in tax planning, and a standard, empirically validated, self-assessment of empathy. The experiment will measure the relationship between empathy and client-centric aggressive planning.
The Timing of Tax Transparency

Fairness in the administration of the tax law is the subject of intense debate in the United States. As recent headlines reveal, the Internal Revenue Service has been accused of failing to enforce the tax law equitably in its review of tax-exempt status applications by political organizations, the international tax structures of multinational corporations, and the estate tax returns of millionaires, among other areas. Many have argued that greater “tax transparency” would better empower the public to hold the IRS accountable and the IRS to defend itself against accusations of malfeasance. Mandatory public disclosure of taxpayers’ tax return information is often proposed as a way to achieve greater tax transparency. Yet, in addition to concerns regarding exposure of personal and proprietary information, broad public disclosure measures pose potential threats to the taxing authority’s ability to enforce the tax law.

Given the competing values of accountability and enforcement, what tax return information should be observable by the public? This Article argues that timing matters. The IRS continually engages in enforcement actions ex post, after taxpayers have pursued transactions and claimed tax positions, such as by conducting audits or settlements. But it also frequently engages in actions ex ante, before taxpayers pursue transactions and claim tax positions, by issuing advance tax rulings to and entering into agreements with specific taxpayers. While current law appears to require public disclosure of certain types of ex ante tax administration, many forms of ex ante tax administration remain concealed from public view. This Article argues that documents related to a specific taxpayer’s tax affairs that reflect ex ante tax administration should be publicly accessible as a means of accountability, but that documents that reflect ex post tax actions should remain private in order to preserve effective tax enforcement. Further, this Article proposes that the public should have access not only to ex ante tax administration actions where the taxing authority grants taxpayers’ requests, but also to those actions where the taxing authority denies such requests, even if it does so without issuing an official written determination, a concept it defines as “dual tax transparency.”

The Article then applies this analysis to several types of ex ante tax administration that are currently obscured by the curtain of tax privacy: withdrawn private letter ruling requests, adverse tax-exempt determination letters and advance pricing agreements. It concludes by exploring approaches to improving the accountability of the IRS regarding its ex post tax enforcement other than public disclosure of tax return information.
Braumann, Céline

*Re-Humanizing International Tax Policy: ECHR Litigation as a Tool for Tax Justice*

Granting selective tax rulings is a prevalent and purportedly legal way for governments to incentivize multinational corporations to do business in their countries. This paper questions the legality of such tax incentives by scrutinizing a concrete tax ruling as a potential violation of the prohibition of discrimination under the ECHR.

As the European Court of Human Rights has not yet considered selective tax rulings, the paper first lays a foundation for the following analysis; it examines the Convention’s articles on the prohibition of discrimination, their interpretation and the Court’s relevant case law. Subsequently, the paper introduces and explains the test case: a tax ruling, effectively a tax exemption, Luxembourg granted a McDonald’s subsidiary in 2009.

The heart of the paper discusses how the ECHR could be applied to the test case and walks the reader through the stages of the case. The analysis takes the case law and the test case’s evidentiary hurdles into account to extract the case’s strengths, weaknesses and to arrive at a realistic prognosis.

While flagging the thorniest issues of the case, the last section also considers the potential benefits of strategic ECHR litigation on tax rulings; judicial scrutiny would require governments to offer justifications and transparency for tax rulings and, especially if the tax rulings were found discriminatory, could compel states to reconsider their tax policies. The paper concludes that the Court is sufficiently likely to find a violation of the Convention to render the suggested litigation worthwhile.

Christians, Allison

*The Search for Human Rights in Tax*

The Latin phrase “Ubi Jus, Ubi Remedium” states ambitiously that for every wrong, the law provides a remedy. Many observers of the modern international tax order observe great wrongs—a global system that perpetuates vast wealth disparities by consistently serving the interests of the world’s richest people, companies, and countries, at a high cost to everyone else. Some scholars and advocates have turned to human rights law in search of legal recourse, yet the available legal structures to date have proven inapposite to the task. Why is that, and is the campaign to find human rights in tax doomed to fail? Using a case study to illustrate the scope and magnitude of issues involved, this essay examines five conceivable ways that claims about human rights in tax could be raised and analyses why each is frustrated in practice owing to both domestic and international legal structures surrounding rights and remedies. Inter-governmental agreement has the potential to resolve the impasse, but practical and political barriers make such a resolution very unlikely. Accordingly, the essay concludes that advocates’ goals of finding remedies for observed wrongs will continue to be frustrated until major changes come about in the way societies conceptualize who has rights, and against whom.
Cobham, Alex  

*Procuring profit-shifting: The State role in tax avoidance*

International anger at the scale of tax avoidance by multinationals led the G20 group of countries to provide the OECD with a mandate to deliver the Base Erosion and Profit Shifting (BEPS) Action Plan during 2013-2015. Countries pursuing perceived national interests have undermined the ambition of BEPS, but the clarity of its single aim – to reduce the misalignment between taxable profits, and the location of real economic activity – provides a valuable yardstick at least. On this basis, even with the problematic data that is currently available, it is possible to identify much of the behaviour of States in deliberately procuring profit-shifting on the basis of real economic activity taking place elsewhere. This in turn provides the basis for a discussion of the likely costs imposed by different States – which might in turn be of value in considering potential litigation strategies.

Cockfield, Arthur J.  

*Designing Optimal Cross-border Tax Information Exchange Laws and Policies*

There are increasing policy concerns that aggressive international tax avoidance and offshore tax evasion significantly reduce government revenues. In particular, for some low income countries the amount of capital flight (where elites move and hide monies offshore in tax havens) exceeds foreign aid. Governments struggle to enforce their tax laws to constrain these actions, but are inhibited by a lack of information concerning international capital flows. The main international policy response to these developments has been to promote global financial transparency through heightened cross-border exchanges of tax and financial information (including via the Foreign Account Tax Compliance Act, Tax Information Exchange Agreements, Country-by-Country Reporting, and the Common Reporting Standard for the automatic exchange of information). The paper discusses the possible design of optimal cross-border tax information exchange laws and policies by focusing on three key challenges: information quality, taxpayer privacy, and enforcement. Relatedly, the paper discusses how the exchange of automatic ‘big tax data’ combined with data analytics can assist tax authorities with risk assessment to better target audits and investigations.
Cosgrove, Mary

Exposing State Responsibility for Tax Abuse – Is spillover analysis the key?

While there is an acceptance that human rights in the global south are adversely impacted by low tax takes, attempts to assign responsibility have been contested. The refrain of Multinational Enterprises (MNEs) is that they acting within the law while governments blame the MNEs and other countries’ rules for creating tax avoidance opportunities. However, recent high profile cases show that some tax avoidance structures are designed by governments or not closed off when exposed. In 2011 a report produced for the G20 by the IMF, OECD, UN and World Bank recommended that all G20 countries carry out an analysis of the impact of their tax policies on developing nations (a “spillover” analysis). This recommendation was seized upon by NGOs such as ActionAid, ChristianAid and Oxfam as a means of making governments in the global north accountable for their role in the under-resourcing of the global south. To date there been little critical consideration of what such spillover analysis can add to the debate on human rights and tax.

This paper outlines the evolution of tax spillover analysis from the recommendations in the 2011 report, the detailed 2014 IMF staff report “Spillovers in International Corporation Taxation”, and up to the only state level reports produced so far (by the Netherlands and Ireland). The paper addresses;

- How tax spillover analysis has been defined;
- The scope of spillover analysis called for by civil society;
- The scope of the spillover analysis undertaken by the IMF, the Netherlands and Ireland;
- The methodologies used in the different reports;
- The gaps in information exposed by these reports; and
- The outcomes of the spillover analysis undertaken.

The paper argues that states have an obligation to consider the impact of their tax policies on other countries, particularly developing nations. Consequently, spillover analysis is required, not just for changes to tax policy but to assess current tax policies and practices. However, as such an analysis is likely to expose policies and practices that contribute to inequality between the global north and the global south, there is little political incentive to undertake this process. It is therefore not surprising that no G20 states have carried out a spillover analysis and the Irish and Dutch have significant limitations. Due to gaps in the definitions, guidance and available information, spillover analysis as currently defined and implemented does little to make states more accountable for their human rights obligations but instead may be used as a fig leaf for governments.

Tax spillover analysis was not specifically intended to aid human rights and the weaknesses in relation to definition, methodology and uptake have resulted in a limited contribution to date. However the human rights potential of tax spillover analysis could still be realised if given greater impetus by international organisations. There are roles for both the OECD BEPS project and the UN Human Rights bodies in mandating tax spillover analysis that provides reliable data on the impact of policies on the global south and consequently hold states accountable for the resulting human rights violations.
Crawford, Bridget J. and Spivack, Carla

For Women, Tampons are not a Luxury: How Sales Taxes on Menstrual Hygiene Products Violate Human Rights

Over half the world’s population must use tampons or sanitary napkins for multiple days every month for at least 30 years, yet many countries’ tax systems treat these items as luxuries and not necessities. Activists across the globe recently have drawn attention to the inequities of the “tampon tax” through campaigns such as “Don’t Tax My Period” in Australia and the multinational “Bloody Disgrace” movement. In early 2016, a popular YouTube interviewer even asked a somewhat surprised President Obama for his views on the tax, which he explained as a consequence of the absence of women from legislatures. This explanation is partial at best. The lack of attention to the sales tax imposed on menstrual hygiene products (while condoms and male baldness treatment products, for example, are tax-free) has roots in the social and legal invisibility of menstruation, hostility to women's physicality, and stereotypes about women as consumers. By understanding access to affordable tampons and sanitary napkins as a human rights issue, the sales tax is revealed as a key obstacle to gender equality and human flourishing.

Part I of this paper provides an overview of the sales tax imposed on tampons and sanitary napkins in a variety of countries including the United States, the United Kingdom, many countries in the the European Union, Australia, Malaysia, Jamaica, Nigeria, Lebanon, and Kenya. In these jurisdictions, local or national sales taxes (or their equivalent) on menstrual hygiene products range from zero to 27%. That determination depends on each jurisdiction’s classification of these materials as nonessential “luxury items” versus medical necessities.

Part II explains why access to menstrual hygiene products – and the tampon tax – are properly understood as human rights issues. In UN Resolution 70/169, the United Nations called for specific measures that will reduce the burdens on girls and women in matters of water and sanitation access and management. A sales tax on tampons and sanitary napkins inappropriately increases the cost of such items, making it more difficult for the most vulnerable women to maintain personal hygiene. Access to menstrual hygiene products is also a key component of girls’ rights to education. In countries such as India and Kenya, cultural attitudes toward menstruation, combined with lack of access to tampons and sanitary napkins, is a major reason that girls drop out of school.

Part III considers what steps national, state and local governments could take to eliminate the tampon tax and to make menstrual hygiene products more readily available. In Kenya, the government has experimented with the free distribution of these materials. New York City recently passed legislation that would make tampons and sanitary napkins available at no cost in all public schools, jails, and homeless shelters. For governments that cannot or will not provide these materials for free, jurisdictions should both eliminate the sales tax and ensure in public accommodations that that girls and women have access to running water, separate toilets and adequate disposal facilities.
Part IV considers what remedies might be available to women who have paid a sales tax in jurisdictions that have since eliminated it or who continue to pay sales tax on tampons and sanitary napkins. A class action recently filed in the State of New York argues that the now-abolished sales tax on menstrual hygiene products violated women’s right to equal protection under the law, and seeks retroactive relief. In the European context, tampon tax cases might expose a tension in Article 1, Protocol 1 to the European Convention on Human Rights (Protection of Property) and might require a refund of these taxes if they are found to have been wrongly imposed. To the extent that such a tax is imposed on women only and makes it more difficult for women to lead healthy and educated lives, human rights advocates may wish to consider a broad-based legal challenge to the tampon tax.

Dayle Siu, Erika

*Building Human Rights into the International Tax Architecture*

Most countries largely depend on tax revenues to fund essential goods and services, social protection and poverty reduction measures. In recent years several significant barriers to mobilizing tax revenues have received increased attention from international organizations and donor countries. At the domestic level insufficient tax administration capacity, informal (and untaxed) sectors, increasing tax incentives, and decreasing corporate tax rates impede greater collections. At the international level secrecy provisions allow residents of one country to evade taxation of income from assets held abroad. At the same time uncoordinated and/or ineffective rules enable widespread corporate tax avoidance, also known as ‘base erosion and profit-shifting’. The Group of Twenty countries (“G20”) is leading the current push to remove these barriers to tax collection with support from the international organizations (“IOs”) of the Platform for Collaboration on Tax (“PCT”), but not necessarily with human rights fulfillment as a primary concern. Although barriers to domestic level tax collections deserve attention, this essay focuses on the international tax architecture, and specifically, how a human-rights based approach would affect its design. First, this essay presents the international legal and institutional frameworks for both tax and human rights. The next part examines the international tax architecture juxtaposed with the international human rights framework. And the last section concludes with policy recommendations.
Dean, Steven

*Tax Cooperation in the Time of Brexit*

The international tax regime's aspirations have never seemed more out of sync with the prevailing political currents. Conflict, not cooperation, carried the day in Britain's vote to leave the European Union. Given that even the value of international trade no longer seems self-evident, the future of international tax cooperation might not seem particularly bright. In fact, international tax cooperation has long been a surprisingly bare-knuckled affair, favoring the strong over the vulnerable. As a result, it remains far from clear how increasing skepticism regarding cross-border cooperation will change the game.

De Schutter, Olivier

*Taxation as a tool for the realization of economic, social and cultural rights: conceptual and practical challenges*

This paper will assess the contribution that the Committee on Economic, Social and Cultural Rights could make to ensure that States parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopt tax policies that comply with the requirements of the Covenant. It will highlight the key requirements of the Covenant that are relevant to the issue of taxation. It will then propose and develop a conceptual framework to analyze taxation policies as part of a broader analysis of public budgets. Locating the discussion on taxation within that broader framework is necessary for three reasons. First, in order to assess whether a State party to the Covenant is discharging its duty to progressively implement Covenant rights to the maximum of its available resources, *resource mobilization* should be considered jointly with *spending*, and both dimensions should in turn be related to *outcomes*, i.e. to the effective levels of enjoyment of economic, social and cultural rights. Second, while resource mobilisation for the funding of programmes in support of Covenant rights includes taxation, others sources of public income could be used, and it is important to assess the tradeoffs involved in defining a strategy for domestic resource mobilization. Third, domestic efforts shall be insufficient without international cooperation, and particularly without a collective efforts by governments to address illicit financial flows and tax secrecy. The paper will end with a suggestion as to how the Committee on Economic, Social and Cultural Rights could most effectively contribute to the debate on taxation and the realization of economic, social and cultural rights.
Fredman, Sandra

*Taxation as a Human Rights Issue: Gender and Substantive Equality*

The persistence of deeply gendered roles in societies across the globe means that taxation systems have important gendered consequences. Most importantly, the continued ascription to women of primary child-caring roles has significant implications for their role in the paid workforce. While women are entering the paid workforce in increasing numbers, they continue to perform the bulk of unpaid domestic and child-care work, with the result that their participation in the paid workforce is often intermittent, precarious and low paid. In developing countries, where the formal workforce is still only a relatively small proportion of the total labour market, women form the majority of workers in the informal sector. Women also predominate among family and domestic workers, with the growing number of migrant domestic workers reflecting the globalisation of female low paid work. On the other hand, women are important beneficiaries of public spending, both through their use of public services and as recipients of welfare benefits, and because many are employed in the public sector.

These patterns have close interactions with taxation systems. For example, the balance between income tax and consumer taxes has important implications. Although the fact that they tend to be low paid means that women workers may pay less by way of personal income tax, as consumers of essential products they may pay more in consumer taxes. Similarly, the extent to which national insurance payments are linked to formal employment has ramifications for gender equality. As casual and precarious workers, many women may not have the benefit of employment related national insurance contributions, affecting their social insurance rights and in particular their pensions. Equally importantly, systems which attach tax and national insurance consequences to formal employment might encourage a reconfiguration in favour of casual and precarious employment. Indeed, the movement towards flexibilisation of the paid workforce has been one of the primary sources of the increasing precarity of women’s employment. The structure of personal allowances and taxation exemptions might similarly entrench gendered roles. Taxation systems which provide tax exemptions for pensions are likely to favour formal, often male, employment. Systems which require joint filing or focus on the household as a single unit may operate as disincentives to women taking up paid employment. Moreover, tax avoidance and evasion which reduce the revenue base and lead to cuts in public services clearly affect women, not only as workers and as users, but also because such cuts often increase their responsibility for unpaid caring and domestic work.

This paper aims to explore the application of human rights standards, particularly the right to equality, to the gendered implications of taxation systems and their administration. The right to equality is centrally implicated in taxation systems, both in their implications for revenue raising and in their role in reinforcing or changing behaviours. However, a straightforward notion of equality as equal treatment will not illuminate the complex ways in which gendered social relations are affected by taxation systems. Indeed, equal treatment in taxation has obvious regressive consequences, as the move towards sales and service taxes to compensate for loss of trade taxes in the current global economy demonstrates. Instead, drawing on CEDAW and previous work of the author, the paper develops and applies a conception of substantive equality based on four dimensions: redressing disadvantage; addressing stigma, stereotyping, prejudice
and violence; facilitating participation; and transforming gendered social structures. Since taxation systems differ in their detail and conception in different countries, the aim is not to prescribe any particular solution. Instead, it aims to use the framework of substantive equality in order to illuminate and address the ways in which taxation systems might breach the right to equality and how they should be modified to address such breaches. Examples will be drawn from different jurisdictions to illustrate the way in which these principles might be used without attempting to be comprehensive.

The paper will also briefly touch on the question of who has responsibility for respecting, protecting and fulfilling rights. In this global world, there is a powerful argument that for a strong duty of co-operation. In addition the duty to protect includes a duty to prevent third parties, such as multinationals from avoiding tax. The more challenging question is the extent to which multinational corporations should be responsible in their own right.

**Daniel Hemel**

**Basic Income as a Right?**

An emerging literature on tax and human rights emphasizes the obligations of states to confront tax evasion and tax avoidance. The focus is on the flow of funds from taxpayers to states, and the obligations of states to ensure that taxes are paid. This essay examines the nature of financial obligations running in the opposite direction: from states to citizens (and, possibly, to non-citizen residents). It asks whether political communities with the fiscal capacity to provide a minimum income to their members also have an obligation to do so. The essay concludes that an argument for a basic income rooted in individual rights and state obligations is plausible, although not without considerable difficulties.
Bringing human rights law to bear on extant approaches to tax policy (particularly in an international context) faces immediate, obvious hurdles. Chief among these are the rigidly consequentialist framework of the dominant public finance paradigm which leaves little clear space for rights-based analysis and the thoroughly nationalistic framing of tax policy which is at immediate odds with the universalist aspirations of human rights discourse. This paper explores a number of channels in which one might begin to build bridges between human rights law and tax policy analysis. First, the paper analyzes the historical way in which the source and residence entitlements to tax have been taken to have co-equal valence as a conceptual matter. Resolutions of overlapping tax entitlement have thus been understood as implicating pragmatic considerations only. Might a rethinking of the primacy of the residence and source entitlements as a theoretical matter connect the tax policy space to human rights? Second, the paper considers the near universal assumption among tax scholars that corporations have no moral valence. How does this assumption fit alongside developments in human rights law under which non-state collectives can stand as potential violators of human rights? Third, the paper considers the general acceptance from a tax policy standpoint that internal questions of revenue raising and distribution do not implicate sovereign interests of other nations. How does this acceptance relate to developments in human rights law that hold state actors responsible for states of affairs that would have once been considered matters of wholly domestic concern? The answers provided to these questions are preliminary but perhaps suggest there are greater connections between tax and human rights than is commonly thought.
The United States’ Responsibility to Promote Tax Transparency

The International Bar Association’s Human Rights Institute Task Force’s report on tax abuses, poverty and human rights concludes that “[a]ctions of states that facilitate tax abuses” could violate international human rights. Offshore investment accounts can be such a tax abuse, contributing to the tax gap in developing countries by allowing wealthy individuals and companies to evade taxes on monies held offshore. The global tax transparency movement seeks to remedy this situation by encouraging jurisdictions to commit to implementing the Common Reporting Standard for Automatic Exchange of Information (CRS). This international standard will ensure effective exchanges of tax information and aid tax authorities in combatting tax evasion. Over one hundred jurisdictions have committed to implementing CRS in 2017 or 2018 but the United States is not one of them.

The U.S. is falling behind its peers with respect to tax transparency due to legislative and regulatory inaction. The Foreign Account Tax Compliance Act (FATCA) provisions are in effect with over 200,000 foreign financial institutions having registered with the Internal Revenue Service. However, despite the U.S. pledge of reciprocal information sharing in its intergovernmental agreements with more than fifty jurisdictions, the U.S. is legally only able to exchange the amount of interest paid to foreign recipients (residents of thirty-four specified countries), instead of the more detailed information required by FATCA. For example, FATCA requires foreign financial institutions to ascertain the substantial U.S. owners of certain legal entities while the U.S. is only reporting on the individual accounts of foreign residents. Thus, information exchange is easily avoided by holding the bank account in the name of a shell corporation.

This article discusses legislative and regulatory changes that are necessary for the U.S. to fully participate in the global tax transparency movement. This includes the collection of beneficial ownership information for any legal entities formed in the United States. The unavailability of beneficial ownership information has been heavily criticized by the international community and has led to the U.S. being labeled a tax haven. This failure to prevent tax abuses by private actors can be considered a breach of the United States’ international human rights obligations. All efforts to include tax transparency in the human rights agenda should be encouraged. This will increase the pressure on the U.S. to join the global movement for increased tax transparency. This article concludes that the U.S. must participate fully in the global tax transparency movement if it is to properly implement the United Nation’s Guiding Principles on Business and Human Rights.
Kleinbard, Edward

**Capital Taxation in an Age of Inequality**

The standard view in the U.S. tax law academy remains that capital income taxation is both a poor idea in theory and completely infeasible in practice. But this ignores the first-order importance of political economy issues in the design of tax instruments. Taxing capital income is responsive to important political economy exigencies confronting the United States, including substantial tax revenue shortfalls relative to realistic government spending targets, increasing income and wealth inequality at the top end of distributions, and the surprising persistence of dynastic wealth.

More surprisingly, a flat-rate (proportional) income tax on capital has attractive theoretical and political economy properties that can be harnessed in actual tax instrument design. As a proportional tax, it applies at the same marginal and effective rates to both income and losses, thereby preserving the symmetry on which rests the theoretical analysis of returns to risk. A progressive consumption tax, by contrast, abandons this, and in doing so can burden the returns to waiting. Moreover, a flat-rate capital income tax is a progressive tax in application: because only high-ability taxpayers or those who are the beneficiaries of gifts and bequests can afford to defer consumption indefinitely, the increasing “tax wedge” on savings over time introduces a measure of top-bracket progressivity along the margin of time. In other words, what some see as the fatal flaw of capital income taxation in fact is a feature, not a bug.

The separation of a taxpayer’s income into capital and labor components, and the application of separate rate schedules to each, are hallmarks of “dual income tax” instruments, of the sort explored in practice most comprehensively by several Nordic countries. Building on earlier work on dual tax systems and capital income tax structures, I propose a novel and reasonably accurate flat rate tax on capital income that builds on well-understood tax policies, that achieves integration between corporate and investor income, and that successfully distinguishes capital from labor income. I term this tax instrument the Dual Business Enterprise Income Tax, or Dual BEIT. Its virtues also include minimizing the relevance of the realization doctrine, eliminating distinctions across different forms of capital investment, and offering business enterprises a consumption tax environment in which to operate.

To make the project more tractable, the two themes just advanced – the why and the how of the Dual BEIT – are each the subject of a separate paper. This is the “why” paper. Together, the two demonstrate that the Dual BEIT satisfies theoretical concerns, once those are filtered through the political economy imperatives of the quotidian world, and is straightforward to implement and administer.
Lahey, Kathleen

*From ‘Tax Cuts for Growth’ to ‘Taxing for Equality’ – Fiscal Policies, Human Rights, Gender Equality, Poverty, and Income Inequalities*

For decades, national and transnational tax policy units have collaborated in implementing the ‘tax cuts for growth’ agenda at the expense of women, those living on low or no incomes, and other marginalized groups in countries rich and poor. Counter-discourses have however successfully linked specific fiscal provisions to specific human rights instruments, with the result that there is now a small but growing body of national and international legal decisions that can be used to seek redress of egregious violations in countries at all levels of development. This paper uses selected case studies to examine how crucial decisions such as the recent CEDAW decisions in *Blok* (2014) and *Canada* (2015) lay a broad basis for complaints in contexts ranging from deliberate impoverishment of the most vulnerable through recklessly designed consumption taxes to deliberate state collaboration in aggressive tax planning that hides tax revenues from state tax authorities and family property from women and children. The paper concludes by demonstrating how human rights to gender equality, dignified life and wellbeing, and income equality can be deployed to mandate ‘taxing for equality’ standards.

Lusiani, Nicholas

*A Strange Alchemy: Embedding human rights into tax policy spillover assessments*

In the face of growing concern over the fiscal, distributive and governance consequences of cross-border tax abuse, an unintentional and uneasy coalition of international financial institutions, United Nations experts, development practitioners, tax justice advocates, and human rights activists have called on governments to analyze the impact of their tax systems overseas. In no time, this seemingly simple and innocuous idea of conducting tax ‘spillover’ assessments has risen to the peak of the international tax agenda – advocated by civil society, supported by the G-20, the IMF, the OECD, the UN and the WB, implemented in the Netherlands and Ireland, and finding implicit consensus amongst governments worldwide in the recent Addis Ababa Action Agenda on financing for development. In parallel, this tax spillover tool has drawn interest from international human rights lawyers and scholars interested in better delineating the respective State responsibilities of financial secrecy jurisdictions largely based in the global North for cross-border tax avoidance largely in the global South. Yet, what effect has this expert tool for uncovering adverse impacts of tax policy had in practice? And how might embedding human rights guiding principles into its purposes, processes and methods better recognize responsibilities, engender responsiveness and instill a measure of accountability over the unequally distributed power to tax the global economy?

Drawing on interviews with a cross-section of tax experts and advocates, this article seeks to understand the empirical and normative effects of the tax spillover assessments conducted to date. The article explores how the current tax spillover methodologies may unintentionally cover up, rather than un-cover, wrongs, re-affirming rather than unsettling the distribution of taxing rights between countries. Drawing on lessons from recent practice conducting policy-oriented
social, environmental and human rights impact assessments, the article explores the limitations—both technical and political—of those spillover studies carried out to date. As an illustrative case study for the emerging scholarship on the usefulness of invoking human rights norms in the complex and technical process of tax policy administration, the article further explores the potential normative, technical, political and practical added-value of embedding human rights principles into tax spillover assessments. The article concludes with a series of ongoing methodological and political challenges to ensuring the right balance between empirical and normative objectives of tax spillover assessments, and identifies various gaps for future research.

Martner, Ricardo and Hanni, Michael

Inequality, taxation and public transfers in Latin America

Extreme income concentration and inequality in Latin America is confirmed by the analysis of the incidence of direct taxes on personal income. ECLAC estimates that the average effective tax rate for the richest 10% amounts to only 5% of their gross income. In addition, the region’s tax systems tend to be biased towards labour income instead of capital gains and usually lack property and inheritance taxes, thus increasing wealth concentration, which is even greater than that of income.

At the same time, in adopting the Sustainable Development Goals, the region’s governments have made significant commitments – at a time of economic deceleration and fiscal consolidation – to further basic human rights through the abolition of poverty, the provision of universal access to quality education and healthcare, as well as social protection including pensions. While ECLAC’s estimates confirm that public expenditures in these areas can be highly redistributive, they also highlight that all too often this is due to a flight from public services by those who can afford to purchase private services.

Unfortunately poorly designed tax systems, tax evasion and tax avoidance are costing Latin America billions of dollars in unpaid tax revenues —revenues which could and should be invested in meeting these commitments. Additionally, an archaic and dysfunctional international tax system also provides wealthy companies and individuals with ample scope and opportunity to avoid paying their fair share of taxes. It is therefore incumbent on all governments to take concerted and coordinated action to build tax systems fit for the twenty-first century. Governments must put in place more progressive tax systems at home, and they must strengthen global and regional cooperation to reduce harmful tax competition between countries.

In this paper, we estimate for 16 countries of Latin America the incidence of personal income taxation and government transfers, both monetary and in-kind, on inequality. Our estimations highlight that targeted public expenditures offer much greater leverage on reducing inequality than changes to the tax system alone, though the latter are crucial in generating higher revenues need to finance the former. We also shed light on the fiscal losses from tax evasion and illicit financial flows derived from the mis invoicing of goods trade.
Lennard, Michael

This presentation examines the current architecture(s) for the development and implementation of international tax norms, including the commonalities between them but also the different approaches and inherent tensions. It explores what is inside and outside the "tent" of the OECD/G20 BEPS project, and the issue of commitment by non OECD/G20 countries to BEPS outcomes. The presentation considers the UN role in tax norm development as well as other relevant roles. It concludes by addressing what this means for developing countries going forward, and for the tax and human rights debate.

Moran, Beverly

*Labor, Capital, Human Rights*

The United States tax system sharply favors property over labor. Income from labor is taxed immediately (with an exception for pensions) while property is sometimes tax free for generations. The tax rate on labor is double the rate on property with no opportunity to reduce tax liability based on the laborer’s physical decline. In contrast, property can reduce its owner’s tax bill even as its value is rising based on the fiction that it is wasting away. Even the social security retirement and disability system — i.e., the tax system meant to compensate for our deteriorating bodies — originally set eligibility ages so high that most recipients died before they could collect. Even now there is growing pressure to raise the eligibility age for the retirement benefit at the same time that disability insurance is increasingly difficult to get.

This paper recognizes that rectifying the unequal distribution of income and wealth is both a tax problem and a human rights imperative. In that spirit, the paper injects tax analysis into human rights scholarship by asking: What would the United States look like if labor and capital were treated equally; what if the United States abandoned an income tax completely for a wealth tax; and, how might shifting tax liability away from labor and toward property and wealth further human rights and human dignity?
Ogutu, Annet W. and Iyer, Monica

**Tax Abuse and Implications for Human Rights in Africa: Are the OECD’s international tax reform efforts effective in ensuring multinational enterprises pay their fair share of taxes in Africa?**

Generating adequate tax revenues is essential for fulfillment of a state’s goals and obligations, but this need often conflicts with taxpayers’ efforts to minimize their tax contributions. In recent years global attention has turned particularly to the impact of tax avoidance strategies by large multinational enterprises (MNEs), which are able to exploit the differences between tax laws in different countries. Accordingly, the international community, in an effort spearheaded by the Organization for Economic Cooperation and Development (OECD) has sought to minimize the possibilities for this kind of tax abuse, through the OECD’s Base Erosion and Profit Shifting (BEPS) Project. But is the OECD, a club of developed nations, best situated to comprehensively address the tax avoidance issues that plague countries all over the world? This paper examines international corporate tax avoidance from an African perspective. After a brief introduction to the importance of corporate tax revenues to development and human rights in Africa and the history of international efforts to combat tax avoidance, it turns to a critical evaluation of the BEPS Project from an African perspective, and finally zeroes in on three specific types of taxable income that illustrate how the BEPS project fails to tackle the issues that are most important to African states.

Sarin, Radhika; Boerrild, Troels; Kohonen, Matti; Livingston, Ewan and Johnston, Barry

**Creating a Human Rights Framework for Mapping and Addressing Corporate Tax Abuses**

The introduction to this paper looks at shifting international tax norms that are responding to public expectations about aligning taxes paid with economic value creation, and locating responsibility for tax policy at the Board level. The treatment of a company as a unitary or a consolidated firm in tax law also allows it to be examined in the context of the UN Guiding Principles on Business and Human Rights (UNGPs). In the second part, the paper examines the human rights impacts of tax-related corporate decisions, which are categorised as state-mediated human rights impacts and non-state mediated human rights impacts. Examples of tax-related business decisions with potential human rights impacts include companies chasing discretionary tax holidays that reduce the likelihood of investing in local infrastructure and creating high-skilled jobs; or tax-motivated debt financing that artificially depresses the profits of a particular subsidiary potentially leading to wage reductions and affecting local minority shareholders. A company may also seek secretive company-specific tax stabilisation or advance pricing agreements (APAs), which the public has great difficulty in scrutinising – thus reducing citizen

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accountability and impacting good governance. The third section proposes a framework for companies to voluntarily address adverse human rights impacts of their tax arrangements. It also looks at how voluntary and mandatory approaches are complementary in tackling tax abuses and tax avoidance as potential human rights abuses, giving examples of the dynamics between voluntary and mandatory processes of change. This involves a three stage approach of: a) being radically and proactively transparent; b) assessing and publicly reporting on tax-related impacts; c) taking steps to improve the impact of tax behaviour on sustainable development and human rights.

**Shaviro, Dan**

*Interrogating the Relationship between “Legally Defensible” Tax Planning and Social Justice*

Large-scale tax avoidance by wealthy individuals and large companies that is legally defensible under relevant national tax laws can nonetheless have major adverse effects on social justice and/or public morale. However, its legal defensibility complicates analyzing its ethical implications, as compared to the more straightforward case of committing tax fraud. Legal defensibility also complicates the analysis of the extent to which advocates of human rights principles and policies should focus on such desiderata as “good corporate tax behavior” and the ethics of tax professionals.

Much of this complexity pertains to (1) issues of ex ante legal uncertainty regarding whether a defensible position would actually be upheld if closely scrutinized, (2) the multifaceted character both of tax professionals’ ethical obligations and of their incentives, and (3) the ambiguity of people’s personal ethical obligations to act altruistically, rather than just self-interestedly. It also is hard to judge the tactical questions associated with focusing on these issues, rather than on the tax rules’ content. Ethical challenges may help to undermine social acceptance of current practices, but also may distract from legal reform efforts.
Smith, Andre L.

Recent Cases of Regressive and Racially Disparate Taxation

“Recent Cases of Regressive and Racially Disparate Taxation” asks whether there is a national trend of balancing state and local budgets by levying taxes both formal and informal that disproportionately burden poor, black people. After situating “critical race tax theory” within the traditional rubric of tax fairness, this chapter criticizes the “Philadelphia soda tax” as an example of a racially regressive formal tax, because, as designed, it will not likely have a meaningful effect on public health nor will it reduce the amount Philadelphians pay in the long run for increasing incidences of diabetes. It will transfer more of the burden of funding local government onto the citizens who can least afford or avoid the tax. This chapter then examines the Department of Justice report on Ferguson, Missouri to criticize “policing for profit”—the concentration of law enforcement and court systems on revenue generating activities—in predominantly black jurisdictions as racially regressive informal taxation. It concludes with a request for a thorough empirical analysis of these dynamics.

Stewart, Miranda

The Who, What, Why and How of Transparency

Transparency has attracted unprecedented attention since the 1990s. It has been variously argued to end corruption; discipline governments and strengthen markets; build participatory democracy; protect human rights; support economic development; and increase tax collections. During the 1990s, transparency was focused on governments. Transparency International was established in 1993. In 1996, the IMF called for more transparency of governmental fiscal policy while NGOs fought to open budgets. In the late 1990s, the Asian financial crisis led to the overturning of secrecy at the IMF and other international organisations, while the worldwide web made mass transparency possible. In the last decade, attention turned to transparency about the financial and tax affairs of private actors. Yet it was not until the Global Financial Crisis of 2008 that any serious action was taken for transparency in sharing tax information between governments, let alone with the public. An exception was the Extractive Industries Transparency Initiative, a joint initiative of governments, community and resource companies for transparency of resource revenues. Only since 2012 has the OECD-G20 BEPS project launched a new wave of government to government tax transparency including automatic data sharing and country by country reporting for multinational corporations and high wealth individuals, again made possible through technology but still subject to numerous caveats and limitations. Today, the public reporting of taxes paid by multinationals is on the agenda, prompted by Panama Papers and Lux Leaks but increasingly mandated by law. This paper explores these governmental, private and community initiatives and examines the shifts in meaning and targets of transparency, which are supported by different and sometimes conflicting arguments about the legitimacy of transparency goals. Finally, this paper considers what transparency can and should achieve in the current era.
One of the most apparent trends in international taxation is the unprecedented rise in cross-border co-operation between tax administrations. This phenomenon has led to the emergence of “global transparency standards” and the consolidation of cross-border regulatory networks of tax administrators.

More recently, especially in the scholarly field, an opposing and, in many ways, complementary narrative has been emerging, hinting at the challenges associated with such developments and identifying the protection of taxpayers’ rights subject to exercises of international exchange of tax information as a missing keystone in the sustainable development of the current global tax transparency agenda.

In the author’s view, the juxtaposition of the need to increase the information-gathering prerogatives of tax administrations on the one hand and the plea to enhance the safeguard of taxpayers’ rights on the other hand may be examined through a different lens and, in particular, by setting forth a more balanced understanding of “transparency” in the light of the conceptual categories of “global administrative law”. Although “global administrative law” is in itself a fairly established stream of scholarship in many areas of international legal studies, international taxation appears a comparatively neglected field of inquiry for the testing of this conceptual tool.

As it is generally acknowledged, one of the chief preoccupations of global administrative law lies with criteria shaping the regulatory decision-making of the concerned global administrations: among such a criteria, the notion of “transparency” appears germane.

On the theoretical plane, one of the goals of this paper would be to ascertain whether any link between this very notion of transparency and the kind of transparency invoked by the global tax transparency agenda can be observed. It would seem that this inquiry should be solved in the negative, as it appears that, in the tax domain, an understanding of transparency as “making information available to tax administrations”.

The paper attempts to reconstruct an alternative narrative of tax transparency more in line with what may be observed in other areas of global administrative law. This objective would also provide a conceptual background to the reconciliation of the need for tax administrations to gather information and for taxpayers to enjoy adequate safeguards in the domestic and cross-border setting.

Against this background, the paper is especially concerned with the role tax administrations play in developing countries vis-à-vis the need to ensure the transparency of their decision-making and tax policy implementation prerogatives. The underlying assumption is that, although the earlier mentioned reconstruction of the notion of global tax transparency has to be distinguished from the domestic plane, it can indeed favor some positive spill-over on the transparency features of domestic tax systems.
In this regard, the paper addresses some fundamental issues of particular concern for developing countries, most notably the plague of corruption and the criticalities posed by the practice of lobbying, which in some industries appears to be prevalent also in the tax sphere.

Further attention is devoted to issues of “fair and impartial application of the law”: this dimension often proves critical in many developing countries especially in the area of the granting of tax incentives and special tax regimes, including the very critical phenomenon of the so-called “stability agreements” often offered to foreign investors.

In this regard, the paper attempts to isolate some key benchmarks for the transparency of the “administrative review” process, placing emphasis on those critical points of friction that may directly impact on some of the prerogatives of the concerned taxpayers. Identified issues are addressed by comparing different approaches adopted in a selected pool of developing and emerging countries in order to isolate possible “sustainable best practices”.

Waris, Attiya

*Developing an International, Continental and Domestic Legal Framework for the Accountability of Actors in Cross-border Tax Crime based on its Impact on Human Rights in Developing and Developed Countries*

Tax scholars looking at human rights from the perspective of taxation often critique the weaknesses in human rights. There is an innate vagueness in human rights, the term ‘rights require resources’ although growingly recognised, remains as yet elusive in human rights treaties and documentation. In taxation, however treaties including bilateral and multilateral treaties, are treated as almost sacrosanct as in the case of the OECD model treaty on the one hand but on the other hand the weaker enforcement of human rights treaties such as the ICCPR and ICESCR means that the inequality in these separate fields of law when now bumping up next to each other cause more difficulty in methodologically assessing the impact of these laws, policies and regimes. The question then arises in capturing human rights consequences of tax abuses what would be the purpose. There are several approaches: firstly, to hold the abusers criminally responsible; secondly to hold the abuser civilly responsible and ask for restitution or to assess the impact and use it to make changes in laws and policies. We are overdue in adding cross cutting terms into tax treaties including the BITs, BIAs and DTAS to justify the collection of resources and that the repercussions will have consequences and the doing the same for human rights treaties. This paper will explore the differences in the ways DTAs and bilateral agreements are enforced as opposed to the human rights obligations that states have undertaken and will explore the way these clauses ought to be phrased in order that really and enforceable solutions be provided in both tax and human rights to ensure that the actors engaged in activities surrounding MNEs not only act in accordance with these provisions but also be held responsible if they do not.
Fighting corruption has been one of the most prominent goals of development policy since the late 1990s. However, the emergence of an anti-corruption agenda was not the result of a particular increase in corruption at that time, but rather was the result of a multitude of political forces. In this article, I argue that one important factor that enabled the rise of the anti-corruption agenda was the demise of the analytical and policy framework focusing on corporate power over states, which was championed by the United Nations Centre for Transnational Corporations (UNCTC) in the 1970s. The UNCTC’s project faced severe hardships in the 1980s amidst the changing global political and intellectual climate, resulting in the destruction of its epistemic community and ultimately the dissolution of the UNCTC in 1993. I maintain that the resulting intellectual vacuum created an environment for analyses and policy frameworks that focused on the role of developing countries’ public sectors in draining the resources of development. One result of this was that the development policy community ignored the role played by financial intermediaries, tax havens, and the “pinstripe infrastructure” in corruption for more than two decades. It was only with the rise of the tax justice agenda after the 2007–2009 financial crisis that corruption watchdogs began to recognize these drivers of corruption. However, this awakening has remained half-hearted, as most of the discussions around corruption still focus solely on public officials and politicians.