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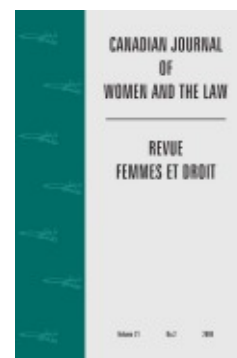
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## **Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation**

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# Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation

Kim Brooks

*Le présent article a pour modeste objectif de susciter un dialogue partagé entre les féministes et les spécialistes progressistes en matière de fiscalité internationale, dialogue sur l'importance de protéger et d'améliorer les rôles de l'État dans le processus consistant à amasser des fonds et à les distribuer sur le plan international. À cette fin, l'article passe en revue certaines recherches féministes et des analyses critiques élaborées par les communautés racialisées (critical race scholarship) qui peuvent aider les spécialistes en fiscalité internationale et les personnes chargées d'établir les politiques en matière de distribution internationale des revenus. On y explique le rôle des traités fiscaux dans l'allocation des revenus d'imposition entre les nations, en appliquant une analyse féministe au problème du projet d'allocation des revenus sur le plan international et en offrant certaines ébauches d'idées quant à une approche féministe visant à octroyer une plus grande part des revenus d'imposition internationale aux pays à faible revenu.*

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*This article has a modest aim—to engage feminists and progressive international tax scholars in a shared dialogue about the importance of protecting and enhancing the state's revenue-raising and international revenue distribution roles. To this end, the article reviews some of the feminist and critical race scholarship that might assist international tax scholars and policy makers concerned with issues of international revenue distribution; explains the role of tax treaties in allocating tax revenues between nations; applies a feminist analysis to the problem of this international revenue allocation project; and offers some tentative thoughts about a feminist approach to allocating a greater portion of international tax revenues to low-income countries.*

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## *The Aligned Interests of Feminists and Progressive International Tax Scholars*

The prediction that nation states will be unable (or unwilling) to impose regulatory frameworks on the economic lives of their residents (whether individual or corporate) in the face of the pressures created by globalization has enormous implications for the redistributive project undertaken by some feminist scholars as well as for the future of international tax systems. Despite the shared interest of feminists and progressive international tax scholars in protecting the state's revenue-raising and redistribution roles, feminist scholarship steers far from international taxation and progressive international tax scholarship draws virtually nothing from feminism. The most basic claim of this article is that these scholarly streams might learn from each other.

On a domestic level, many feminists have expressed concerns that redistributive schemes such as public pensions, health care, education, and social assistance regimes have been left vulnerable to claims that they are no longer viable in the face of increased transnational competition and neo-liberal ideology. Canadians have witnessed the state's retreat from its redistributive commitments in a number of regulatory areas. It has eroded or eradicated national standards in social assistance provision, reduced universal free access to health care, ignored pay equity commitments, cut civil legal aid, and abandoned close-to-free secondary education. These examples illustrate just a few sites where neo-liberalism has driven government policy making.<sup>1</sup>

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1. The importance of the *Canadian Journal of Women and the Law* as a feminist forum for discussion and debate cannot be overstated. As the only national, bilingual, scholarly journal focused on issues of women and the law, the journal has become a critical site for the development of feminist legal theory and praxis. References supporting the argument set out in the two first parts of this article draw primarily on work published in this journal, in part to reveal the journal's critical role documenting the evolution of Canada's redistributive regulation from a feminist perspective.

For discussions of some of the consequences of globalization and the neo-liberal state on Canadian social programs, see Gillian Calder, "Recent Changes to the Maternity and Parental Leave Benefits Regime as a Case Study: The Impact of Globalization on the Delivery of Social Programs in Canada" (2003) 15 *Canadian Journal of Women and the Law* 342; Rachel Chagnon, Lucie Lamarche, and Francine Tougas, "La loi canadienne sur l'équité en matière d'emploi et les femmes: Crier 'Victoire' ou crier 'Au loup . . .?'" (2004) 16 *Canadian Journal of Women and the Law* 317; and Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8 *Canadian Journal of Women and the Law* 371. See also Janine Brodie and Isabella Bakker, *Where Are the Women? Gender Equity, Budgets and Canadian Public Policy* (Ottawa: Canadian Centre for Policy Alternatives, 2008), <<http://www.policyalternatives.ca/reports/2008/09/reportsstudies1962/>>; Susan Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997); Shelley A.M. Gavigan and Dorothy E. Chunn, "From Mothers' Allowance to Mothers Need Not Apply: Canadian Welfare Law as Liberal and Neo-Liberal Reforms" (2007) 45 *Osgoode Hall Law Journal* 733; Dorothy E. Chunn, Susan Boyd, and Hester Lessard, eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007); Brenda

The state justifies these changes in part, at least, through reference to a familiar narrative about the global imperative to pay down Canada's debt and a corollary requirement that Canada cut spending and taxes to become a smaller, more competitive state.<sup>2</sup> While there have been some changes to the state's involvement in the private sector as a consequence of the economic downturn, to date, this involvement can scarcely be characterized as significantly enhancing any of Canada's public redistributive programs.

The courts have similarly failed to safeguard Canada's redistributive regulatory framework. For example, the Supreme Court of Canada has denied a dignified level of assistance for low-income Canadians<sup>3</sup> and has used

Cossmann and Judy Fudge, eds., *Privatization, Law and the Challenges to Feminism* (Toronto: University of Toronto Press, 2002).

It should be emphasized that the state's redistributive mechanisms have never been ideal nor idealized by feminists. See, for example, Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 *Canadian Journal of Women and the Law* 174. See also Mary Condon and Lisa Philipps, "Transnational Market Governance and Economic Citizenship: New Frontiers for Feminist Legal Theory" (2005) 28 *Thomas Jefferson Law Review* 105; and Mary Condon, "Gendering the Pension Promise in Canada: Risk, Financial Markets and Neoliberalism" (2001) 10 *Social and Legal Studies* 83.

2. For a sense of how powerful the rhetoric of competition can be (and for amusement), see Canada, Competition Policy Review Panel, *Compete to Win* (June 2008) at 1, <[http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h\\_00040e.html](http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00040e.html)>. The report, authored by a panel charged with reviewing Canada's competition and investment policies, endorses competition as the way forward for Canada and includes many statements of its benefits. In the executive summary, the authors underscore that "[the] report is about one simple proposition: raising Canada's overall economic performance through greater competition will provide Canadians with a higher standard of living." Naturally, the authors of the report make no effort to evaluate the effect of their proposed recommendations on women.
3. See *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 429. For commentary on the decision, see, for example, Margot Young et al., eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007); Martha Jackman, "Sommes-nous dignes? L'égalité et l'arrêt *Gosselin*" (2005) 17 *Canadian Journal of Women and the Law* 161. See also Reem Bahdi, "Litigating Social and Economic Rights in Canada in Light of International Human Rights Law: What Difference Can It Make?" (2002) 14 *Canadian Journal of Women and the Law* 158 (for an optimistic assessment of the possibility of litigation); Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 *Canadian Journal of Women and the Law* 185 (which argues that a substantive concept of equality rights would require governments to remedy the poverty of women).

Scholars and activists writing for the *Canadian Journal of Women and the Law* have also identified the ways in which the courts have failed to support redistribution, thereby disadvantaging women. See, for example, Judy Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases" (1989) 3 *Canadian Journal of Women and the Law* 246 (which reviews some of the early *Canadian Charter of Rights and Freedoms* cases and concludes that the court's decisions support the efforts of the state to shift the cost of child rearing to the private sphere); Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16 *Canadian Journal of Women and the Law* 106 (reporting that many cases brought by Aboriginal, Inuit, and Métis women have been unsuccessful but that there are some important reasons for continuing to use the courts as a tool for women's equality). For a creative exercise in rewriting some of Canada's judicial decisions from a feminist perspective, see *Canadian Journal of Women and the Law* special issue, "Rewriting Equality" (2006) 18 *Canadian Journal of Women and the Law*.

pressures on government fiscal resources as a justification for failing to provide basic redistributive programs to women and other economically vulnerable groups.<sup>4</sup> As a consequence of both increasing market stratification and decreasing state redistribution, recent evidence suggests that although family income became more equal through the 1980s, between 1989 and 2006 income inequality rose.<sup>5</sup>

Progressive tax scholars have identified similar concerns about the Canadian state's reduced use of the tax system as a redistributive tool. For example, recent years have seen income tax cuts—most particularly, cuts to corporate tax rates. These cuts are often justified on the basis that Canada needs to be internationally competitive.<sup>6</sup> For policy makers and pundits offering this justification, being competitive usually means being a desirable place for businesses to operate (as measured by government taxes and fees levied or imposed). As noted earlier, income inequality has risen in Canada over the last fifteen years. As progressive tax scholars argue, Canada's tax system has not served adequately to counter increasing market income inequality.<sup>7</sup>

While feminists and tax scholars have grappled with the domestic implications of the neo-liberal state and its proclivity to reduce government revenues and redistribution, comparatively less attention has been focused on the implications for revenue redistribution internationally. Yet, at the international level, the problems of income inequality and poverty are perhaps even more significant. Clearly, one of the most urgent problems facing the world is the gulf in living standards and every other indicia of human

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4. See, for example, *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381 [N.A.P.E.]. For commentary on *N.A.P.E.*, see, for example, Efrat Arbel, "Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (N.A.P.E.)" (2004) 16 Canadian Journal of Women and the Law 386 at 393–7.
  5. Andrew Heisz, *Income Inequality and Redistribution in Canada: 1976 to 2004* (Ottawa: Statistics Canada, May 2007); and Lars Osberg, *A Quarter Century of Economic Inequality in Canada: 1981–2006* (Toronto: Canadian Centre for Policy Alternatives, 2008).
  6. See, for example, Ministry of Finance, *Budget 2009: Canada's Economic Action Plan* (Ottawa: Public Works and Government Services Canada, 2009) at 166, <<http://www.budget.gc.ca/2009/pdf/budget-planbudgetaire-eng.pdf>>, where the government recounts: "A competitive business tax system is essential for encouraging new investment, growth and job creation in Canada. Since 2006, the Government has legislated significant reductions in corporate taxes, including the reduction of the general corporate income tax rate from 22.12 per cent (including the corporate surtax) in 2007 to 15 per cent by 2012. The Government is committed to moving ahead with these tax reductions, which include a reduction in the general corporate income tax rate to 19 per cent as of January 1, 2009. As a result, Canada will have the lowest overall tax rate on new business investment in the Group of Seven (G7) countries by 2010."
  7. See Neil Brooks and Thaddeus Hwong, *The Social Benefits and Economic Costs of Taxation: A Comparison of High- and Low-Tax Countries* (Ottawa: Canadian Centre for Policy Alternatives, 2006), <[http://www.policyalternatives.ca/documents/National\\_Office\\_Pubs/2006/Benefits\\_and\\_Costs\\_of\\_Taxation.pdf](http://www.policyalternatives.ca/documents/National_Office_Pubs/2006/Benefits_and_Costs_of_Taxation.pdf)>; Marc Lee, *Eroding Tax Fairness: Tax Incidence in Canada, 1990 to 2005* (Ottawa: Canadian Centre for Policy Alternatives, 2007), <[http://www.policyalternatives.ca/documents/National\\_Office\\_Pubs/2007/Eroding\\_Tax\\_Fairness\\_web.pdf](http://www.policyalternatives.ca/documents/National_Office_Pubs/2007/Eroding_Tax_Fairness_web.pdf)>.

development that exists between high- and low-income countries.<sup>8</sup> Income inequality between the richest and poorest nations in the world has been increasing.<sup>9</sup> As in the domestic case, activists, governments, policy makers, non-governmental organizations, and scholars have raised concerns not only about income inequality but also about the problems resulting from high levels of global poverty.<sup>10</sup> Apprehensions about the lack of resources and supports for residents of many countries have sparked widespread interest in the world's progress against the United Nations's Millennium Development Goals (MDGs). These goals are focused on eradicating poverty, promoting education, eliminating discrimination against women, decreasing both infant and maternal mortality rates, combating the spread of diseases, encouraging environmental sustainability, and increasing global aid.<sup>11</sup> To the extent that some movement in the direction of achieving the MDGs has been made, the food price crisis and the economic downturn have had a decimating effect on the ability of low-income people in all countries to maintain, let alone increase, their standard of living. Food crises have had particularly devastating effects for women.<sup>12</sup> Coming within range of the MDGs will require renewed and sizeable efforts by all countries to distribute the world's resources more equitably. The likelihood of such collaborative efforts seems remote.

Despite the acknowledged need for new resources to address the MDGs, the financing proposals outlined in the 2002 *Monterrey Consensus on Financing for Development* (a United Nations document addressing the challenges of financing for development) rely heavily on private sector activity, including

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8. Although some scholars refer in the tax literature to developing and developed countries, in this article the language of high- and low-income countries is preferred because it highlights the purpose of distinguishing between countries in this article: to consider the relative income levels of their populations.
  9. Branko Milanovic, *Worlds Apart: Measuring International and Global Inequalities* (Princeton: Princeton University Press, 2005). See also American Political Science Association, "The Persistent Problem: Inequality, Difference, and the Challenge of Development" (July 2008), Task Force on Difference, Inequality and Developing Societies, <[http://www.apsanet.org/~globalinequality/content\\_52493.cfm](http://www.apsanet.org/~globalinequality/content_52493.cfm)>; and Darrel Moellendorf and Thomas Pogge, *Global Justice: Seminal Essays* (St. Paul: Paragon House, 2008) at xvi-xvii.
  10. On 26 August 2008, the World Bank released its latest numbers of people living below US \$1.25 a day in 2005. It estimates that 1.4 billion people are living at that level of extreme poverty. See World Bank, "World Bank Updates Poverty Estimates for the Developing World" (26 August 2008), Research at the World Bank, <<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:21882162~pagePK:64165401~piPK:64165026~theSitePK:469382,00.html>>.
  11. See generally Department of Public Information, United Nations, "Millennium Development Goals," End Poverty 2015 <<http://www.un.org/millenniumgoals/>>.
  12. For an illustration, see Food and Agriculture Organization of the United Nations, "High Food Price Impacts: The Gender Dimension," in *Soaring Food Prices: Facts, Perspectives, Impacts and Actions Required* (April 2008) at 40-41, Food and Agricultural Organization, <[http://www.fao.org/fileadmin/user\\_upload/foodclimate/HLCdocs/HLC08-inf-1-E.pdf](http://www.fao.org/fileadmin/user_upload/foodclimate/HLCdocs/HLC08-inf-1-E.pdf)>; and Sheri D. Weiser et al., "Food Insufficiency Is Associated with High-Risk Sexual Behavior among Women in Botswana and Swaziland" (October 2007) 4 PLOS Medicine 1589.

micro-credit, foreign direct investment, and international trade.<sup>13</sup> This emphasis is echoed in the 2008 *Doha Declaration on Financing for Development (Doha Declaration)*.<sup>14</sup> Remarkably little of the text in these documents is focused on the need to strengthen domestic tax systems, facilitate international tax co-operation and collection, or use international tax systems to distribute income to low-income countries. Taxes are only referred to in two paragraphs of the *Doha Declaration*, one of which is focused on calls to balance taxation with private investment and to avoid double taxation, suggesting that the emphasis is on private financing for development.<sup>15</sup>

Given the significant levels of international income inequality, which has well-documented negative implications for women of the global South, feminists and progressive international tax scholars have a shared interest in exploring ways in which states might be urged to take seriously their roles as important players in the design and enforcement of regulatory regimes that enable revenue to be raised and redistributed. The remainder of this article proceeds as follows. The first section reviews some of the feminist and critical race literature that might assist international tax scholars and policy makers concerned with issues of international redistribution. It provides a brief overview of how some feminists and critical race scholars have broached issues of domestic and international redistribution. The second section of the article turns to the preoccupations of international tax scholars, focusing squarely on the role of tax treaties in allocating (or distributing) tax revenues between nations. The third section brings a feminist analysis to the problem of international tax revenue allocation as it is understood by international tax

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13. See United Nations, *International Conference on Financing for Development: Monterrey Consensus on Financing for Development* (Monterrey, Mexico: United Nations, March 2002), <<http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf>> .

14. United Nations, *International Conference on Financing for Development, Doha Declaration on Financing Development* (Doha: University-based Nursing Education South Africa, 2009), <[http://www.un.org/esa/ffd/doha/documents/Doha\\_Declaration\\_FFD.pdf](http://www.un.org/esa/ffd/doha/documents/Doha_Declaration_FFD.pdf)> [*Doha Declaration*].

15. See *Doha Declaration, ibid.* at paras. 16 and 25. This practice of focusing on market solutions to poverty and inequality has been a popular approach to this problem over the last twenty years. Awarding the Nobel Peace Prize to Muhammad Yunus (who is widely credited with the popularization of micro-credit) reveals the widespread recognition that these privatizing “solutions” have had. For a brief feminist analysis of micro-credit, see Susan F. Feiner and Drucilla K. Barker, “Microcredit and Women’s Poverty: Dollars and Sense” (November/December 2006) 5, *Dollars and Sense* <<http://www.dollarsandsense.org/archives/2006/1106feinerbarker.html>> . Similarly, it was not surprising in the wake of the United Nations’ meeting in New York in 2008 to see Jeffrey Sachs lauding corporations for their assistance (and berating governments for their lack thereof). See Jeffrey D. Sachs, “The World’s Poor: A Broad Alliance Is Trying to Help” *New York Times* (27 September 2008), <<http://www.nytimes.com/2008/09/29/opinion/129aid.html?partner=permalink&exprod=permalink>> (“[n]o one is standing still waiting for the missing aid from rich-country governments. Leading companies like Ericsson, General Electric, Sumitomo Chemical, Monsanto, Yara and Pepsico have joined low-income governments and N.G.O.’s in the effort. When the long-promised aid finally arrives, millions of lives will be saved, and the world will become considerably safer and more prosperous”).



scholars, arguing that feminists could reconceptualize much of the current debate to increase the possibilities for using tax treaties as an instrument to improve women's equality globally. The article concludes by suggesting a feminist approach to the theory that justifies allocating a greater portion of international tax revenues to low-income countries.

### *The Groundwork for a Feminist Analysis of International Tax Distribution*

Despite the importance of the international redistributive project for women and the potential role for international tax law in this project, international tax has managed to stand beyond the reach of feminist analysis. The only author who has squarely addressed international technical tax design from a feminist perspective is Kathleen Lahey.<sup>16</sup> Lahey presents a framework for the gendered analysis of fiscal policy and looks carefully at the gendered impacts of the taxation of both outward and inward foreign direct investment. Other scholars and activists have urged governments in international fora to implement gender-budgeting initiatives. This line of public policy inquiry and scholarship speaks to how governments might analyze their domestic legislation, including tax law, and urges governments to apply a gender analysis to all of its legislation (including, presumably, their international tax law and tax treaties).<sup>17</sup> However, those scholars and activists have yet to offer a feminist analysis of international tax law itself.

Although a feminist analysis of international tax law and its redistributive potential is nascent, there is a rich literature upon which this analysis could be based. Any conceptualization of the available research will be under-inclusive and arbitrary. However, for the sake of locating the roots of the analysis that

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16. See Kathleen A. Lahey, "International Transactions, Taxation, and Women: The Critical Role of Gender Analysis," *UBC Law Review* [forthcoming] [on file with author].

17. See Helena Hofbauer, "Gender-Sensitive Budget Analysis: A Tool to Promote Women's Rights" (2002) 14 *Canadian Journal of Women and the Law* 98. See also Isabella Bakker, *Alternative Federal Budget 2006 Technical Paper 1: Gender Budget Initiatives: Why They Matter in Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2005); Isabella Bakker, "Fiscal Policy, Accountability and Voice: The Example of Gender Responsive Budgeting Initiatives," *Human Development Report Office Occasional Paper* (2002), United Nations Development Programme, <[http://hdr.undp.org/docs/publications/background\\_papers/2002/Bakker\\_2002.pdf](http://hdr.undp.org/docs/publications/background_papers/2002/Bakker_2002.pdf)>; Diane Elson, "Integrating Gender Issues into National Budgetary Policies and Procedures: Some Policy Options" (1998) 10 *Journal of International Development* 929. There are also numerous webpages designed by non-government organizations that address gender budget initiatives. See, for example, United Nations Development Fund for Women, "Gender Responsive Budgeting," UN Development Fund for Women, <<http://www.gender-budgets.org/>>; UN Platform for Action Committee (UNPAC) Manitoba, "Gender Budget Project" (2006), UNPAC, <<http://unpac.ca/gender/index.html>>; Canadian Feminist Alliance for International Action (FAFIA/AFAI), "Gender Budget Initiatives: A Global Overview" (2007), FAFIA/AFAI, <[http://www.fafia-afai.org/en/gender\\_budget\\_initiatives\\_a\\_global\\_overview](http://www.fafia-afai.org/en/gender_budget_initiatives_a_global_overview)>.

follows, four strands of research are identified. First, in their analysis both of the technical tax system (the rules designed to raise revenue fairly from all Canadian residents according to their ability to pay)<sup>18</sup> and of tax expenditures (spending programs that are delivered through the tax legislation), feminist tax scholars in Canada have risen to the challenge of identifying the redistributive consequences of tax system design for women domestically.<sup>19</sup> These scholars

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18. These rules are usually classified as serving five goals: (1) defining the tax base (as an example of the imposition of a head tax on Chinese immigrants to Canada, see Renisa Mawani, "'Cleansing the Conscience of the People': Reading Head Tax Redress in Multicultural Canada" (2004) 19 *Canadian Journal of Law and Society* 127); (2) rate (see, for example, Marjorie E. Kornhauser, "Choosing a Tax Rate Structure in the Face of Disagreement" (2005) 52 *UCLA Law Review* 1697; Marjorie E. Kornhauser, "The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction" (1987) 86 *Michigan Law Review* 465; Marjorie E. Kornhauser, "What Do Women Want: Feminism and the Progressive Income Tax" (1997) 47 *American University Law Review* 151); (3) unit (see, for example, Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada, 2001) at 63–89; Dorothy A. Brown, "Race, Class, and Gender Essentialism in Tax Literature: The Joint Return" (1997) 54 *Washington and Lee Law Review* 1469; Louise Dulude, "Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law" (1985) 23 *Osgoode Hall Law Journal* 67; Judith E. Grbich, "The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship" (1991) 4 *Canadian Journal of Women and the Law* 512; Lily Kahng, "Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability" (2004) 49 *Villanova Law Review* 261; Marjorie E. Kornhauser, "Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return" (1993) 45 *Hastings Law Journal* 63; Kathleen Lahey, "The Tax Unit in Income Tax Theory," in Diane E. Pask et al., eds., *Women the Law, and the Economy* (Toronto: Butterworths, 1985) 277; Lisa Philipps, "Cracking the Conjugal Myths: What Does It Mean for the Attribution Rules?" (2002) 50 *Canadian Tax Journal* 1031); (4) period; or (5) setting out the requirements for the administration of the tax legislation.
19. For examples of tax scholarship analyzing domestic tax expenditures, see Anne L. Alstott, "The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform" (1995) 108 *Harvard Law Review* 533; Maureen Donnelly, "The Disparate Impact of Pension Reform on Women" (1993) 6 *Canadian Journal of Women and the Law* 419; Donna Eansor and Christopher Wydrzynski, "'Troubled Waters': Deductibility of Business Expenses under the Income Tax Act, Child Care Expenses and Symes" (1993) 11 *Canadian Journal of Family Law* 249; Mary Louise Fellows, "Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures" (1998) 10 *Yale Journal of Law and Feminism* 307; Christa Freiler et al., *Mothers as Earners, Mothers as Carers: Responsibility for Children, Social Policy and the Tax System* (Ottawa: Status of Women Canada, 2001), Status of Women Canada, <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662655206/index\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662655206/index_e.html)>; Francine J. Lipman, "Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives" (2003) 53 *American University Law Review* 393; Lisa Philipps, "Disability, Poverty, and the Income Tax: The Case for Refundable Credits" (2001) 16 *Journal of Law and Social Policy* 77; Faye L. Woodman, "Women and Children in the Economy: Reflections from the Income Tax System" (1998) 47 *University of New Brunswick Law Journal* 311; Claire F.L. Young, "Child Care and the Charter: Privileging the Privileged" (1994) 2 *Review of Constitutional Studies* 20; Claire F.L. Young, "Child Care: A Taxing Issue?" (1994) 39 *McGill Law Journal* 539; Claire F.L. Young, "(In)visible Inequalities: Women, Tax and Poverty" (1995) 27 *Ottawa Law Review* 99; Claire F.L. Young, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs through the Tax System* (Ottawa: Status of Women Canada, 2000), Status of Women Canada, <[http://www.swccfc.gc.ca/pubs/pubspr/066265028X/index\\_e.html](http://www.swccfc.gc.ca/pubs/pubspr/066265028X/index_e.html)>.

have proposed creative policy prescriptions with the aim of using tax as an instrument to produce a more equal society.<sup>20</sup> Feminist tax scholars have also focused their critical lens on tax issues that have less obvious redistributive consequences, including, for example, the alienating discourse of taxation in both domestic and international contexts.<sup>21</sup>

Since this article focuses on a feminist analysis of the technical international tax system, the feminist analysis of the domestic technical tax system is the most directly applicable. For tax scholars, the traditional evaluative criteria for the technical tax system include neutrality,<sup>22</sup> equity, and administrability.<sup>23</sup> Much of the feminist analysis of the technical system focuses on the tax policy criterion of equity.<sup>24</sup> Scholars in other disciplines and even other areas of law might describe this conception of equity as “thin.”<sup>25</sup> In the domestic tax context, “equity” as an evaluative criterion is easily defined. It involves comparing two individuals on the basis of their income. If individuals with the same incomes are taxed the same, the horizontal equity criterion is satisfied; if individuals with different incomes are taxed differently (with the higher earner taxed more), the vertical equity criterion is satisfied. Deciding whether a particular tax system is equitable turns crucially on the definition of that system’s base. As a result, in the income tax system, an important part of deciding whether the tax system is equitable turns on an analysis of what constitutes income.<sup>26</sup> Tax scholars, including feminist tax scholars, have spent

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20. For a review of the appropriate choice of policy instrument to achieve feminist goals (whether through the tax system or some other instrument), see Anne L. Alstott, “Tax Policy and Feminism: Competing Goals and Institutional Choices” (1996) 96 *Columbia Law Review* 2001.
  21. Lisa Philipps, “Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy” (1996) 11 *Canadian Journal of Law and Society* 141 at 146; and Miranda Stewart, “Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries” (2003) 44 *Harvard International Law Journal* 139.
  22. The goal of a good technical tax system is to ensure that tax law does not unnecessarily change taxpayers’ behaviours.
  23. Tax systems should be easy to administer, hard to avoid, and so on.
  24. For a recent essay on the tax policy debates about the concept of equity and an effort to reinvigorate tax debates about fairness, see Anthony C. Infanti, “Tax Equity” (2008) 55 *Buffalo Law Review* 1191.
  25. However, there have been efforts by some feminist scholars to propose alternative evaluative criteria for the technical tax system. See, for example, Young, “(In)visible Inequalities,” *supra* note 19 (arguing for adding equality as an evaluative criterion); and Ellen B. Zweibel, “Child Support Policy and Child Support Guidelines: Broadening the Agenda” (1993) 6 *Canadian Journal of Women and the Law* 371 (evaluating Canada’s child support policy through reference to its effect on the economic distribution after separation, on women’s independence and substantive equality, and the relationship between state and family in supporting children).
  26. Feminist tax scholars have done some work on alternative tax bases. See, for example, Kathleen Lahey’s analysis of the carbon tax, sales taxes, and property tax proposals in New Brunswick, “What about Women: Gender Analysis of Discussion Paper on New Brunswick’s Tax System” (2008) at 30–7, <<http://www.acswccf.nb.ca/english/documents/What%20About%20Women.pdf>>; Claire Young, “Introduction of a Goods and

a substantial amount of time debating the margins of the concept of income. Feminist tax scholars raise particularly fascinating questions about the implications of defining income to include (or exclude) particular items in the definition of income. They have analyzed, for example, difficult questions around whether to count activities performed for another person but unremunerated (activities that might have a market-compensated equivalent, such as services that are provided in the home or business-related services provided for free to one's professional spouse) and self-performed services (such as undertaking home improvements); whether to count costs that might be considered at the margins of the business/personal divide (as with, for example, paying someone to care for your children so you can return to work); and whether to count psychic satisfactions (for example, imposing taxes based on enjoyment of a particular job).<sup>27</sup>

Second, some scholars, largely those located in the United States, have bridged traditional tax policy scholarship and critical race theory. Much of this work analyzes provisions of the United States' tax code,<sup>28</sup> concluding that the code provisions often benefit whites at the expense of other racialized groups, particularly African Americans. Karen Brown is notable as a pioneer of work that takes this analysis beyond the US borders. She examines the implications of racial bias for US international tax law and policy.<sup>29</sup> In addition, there is some critical race scholarship in the third world approach to international law literature from which insights about the implications of international tax systems, and other international policy, for women in the third world might be drawn.<sup>30</sup>

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Services Tax: The Canadian Experience" (1991) 8 Australian Tax Forum 1. However, most feminist work has focused on the income tax.

27. See, for example, Maureen Maloney's discussion of implementing a tax on household services at "Women and the Income Tax Act: Marriage, Motherhood, and Divorce" (1989) 3 Canadian Journal of Women and the Law 182 at 195-203; Lisa Philipps, "There's Only One Worker: Toward the Legal Integration of Paid Employment and Unpaid Caregiving," in Law Commission of Canada, ed., *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2003) 3; Nancy E. Shurtz, "Critical Tax Theory: Still Not Taken Seriously" (1998) 76 North Carolina Law Review 1837; and Nancy C. Staudt, "Taxing Housework" (1996) 84 Georgetown Law Journal 1571.
28. See, for example, Dorothy Brown, "Race, Class and the Obama Tax Plan" (2009) 86 Denver University Law Review 575; Dorothy Brown, "Race and Class Matters in Tax Policy" (2007) 107 Columbia Law Review 790; Beverly Moran and Stephanie M. Wildman, "Race and Wealth Disparity: The Role of Law and the Legal System" (2007) 34 Fordham Urban Law Journal 1219; Beverly I. Moran, "Exploring the Mysteries: Can We Ever Know Anything about Race and Tax?" (1998) 76 North Carolina Law Review 1629; and Beverly I. Moran and William C. Whitford, "A Black Critique of the Internal Revenue Code" (1996) 4 Wisconsin Law Review 751.
29. See, for example, Karen B. Brown, "Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?" (2002) 23 University of Pennsylvania Journal of International Economic Law 45.
30. See particularly Jalia Kangave, "'Taxing' TWAIL: A Preliminary Inquiry into TWAIL's Application to the Taxation of Foreign Direct Investment" (2008) 10 International Community Law Review 389.

Third, the feminist (legal) theory literature that has concerned itself with a wide range of issues related to international relationships might inform a feminist analysis of what international tax law is. Feminists writing this literature have grappled with the impact of the international allocation of resources on women, the imposition of Western or Northern norms on women of the South,<sup>31</sup> and the inability of women (and particularly scholars and government actors) from high-income countries to listen to, and adequately support, the aims of women from low-income jurisdictions.<sup>32</sup> Feminist scholars have also struggled with the devastating effects of immigration and refugee claims processes,<sup>33</sup> the difficulties of seeking gender equality for women in transit,<sup>34</sup> the impact of trade agreements between countries

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31. Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" (1988) 30 *Feminist Review* 61 (Mohanty was one of the first to question the tendency of Western feminist writers to incorrectly and patronizingly group "third world women" into one homogeneous entity).
  32. Adrian Howe, "White Western Feminist Meets International Law: Challenges/Complicity, Erasures/Encounters" (1995) 4 *Australian Feminist Law Journal* 63 (arguing that for "white" or Western feminism to make a more valuable impact on international law it must examine its own place in situating the other, particularly with respect to women within different cultural heritages); Vasuki Nesiah, "Towards a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship" (1993) 16 *Harvard Journal of Law and Gender* 189 (examining the conflicting understandings of a feminist perspective on international human rights and using these debates to inform a more globally inclusive feminism); Archana Parashar, "Re-conceptualisations of Civil Society: Third World and Ethnic Women," in Margaret Thornton, ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) (arguing that women are twice relegated to the private sphere both by the international legal system and their national legal systems and suggesting the need for a complete restructuring of the international legal system by removing the gendered public/private divide and questioning its claim to universality). For an interesting domestic analogy, see the introduction to Patricia A. Monture-OKanne's translation "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Ya-Gah" (1993) 6 *Canadian Journal of Women and the Law* 119 at 119–23 (English), 123–9 (French).
  33. See, for example, Agnes Calliste, "Women of 'Exceptional Merit': Immigration of Caribbean Nurses to Canada" (1993) 6 *Canadian Journal of Women and the Law* 85 (reporting on her study of the immigration of Caribbean nurses to Canada in the 1950–62 period and the differential standards and effects of that policy for black nurses compared to their white counterparts); Catherine Dauvergne et al., *Gendering Canada's Refugee Process* (Ottawa: Status of Women Canada, 2006), Status of Women Canada, <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662435621/index\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662435621/index_e.html)> (a comprehensive examination of Canada's refugee process and the policies, laws, and personal realities that compose this largely inhospitable system); Nicole LaViolette, "Les revendications du statut de réfugié fondées sur le sexe: constats et orientations nouvelles" (2001) 13 *Canadian Journal of Women and the Law* 285 (reviewing the effect of gender-related persecution for other groups of persecution, including sexual orientation); and Sherene Razack, "Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender" (1995) 8 *Canadian Journal of Women and the Law* 45 (arguing that women's claims for asylum are more successful when those claims conform to racist constructs about the experiences of refugee women).
  34. Anna Carline and Zoe Pearson, "Complexity and Queer Theory Approaches to International Law and Feminist Politics: Perspectives on Trafficking" (2007) 19 *Canadian Journal of Women and the Law* 73 (using complexity and queer theory to address the stiff and exclusive categories in law and to re-examine women's rights, international law, and feminist politics in an inclusive and diverse manner).

that result in the continued exploitation of women, workers, and the environment,<sup>35</sup> the development of meaningful human rights and international criminal justice mechanisms,<sup>36</sup> and the consequences of capitalism and neo-liberalism for women's exclusion from—or exploitation by—development initiatives.<sup>37</sup> Feminist legal theorists have also made efforts to articulate more generally what feminist theory or feminist methodology is in the context of international law.<sup>38</sup> This work has not, however, broached international tax policy in any way, and only a few of the authors touch explicitly on questions of international redistribution.

Fourth, and finally, the feminist economics literature provides some grounding for a feminist analysis of international tax regimes. On the

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35. See Fiona Beveridge, "Feminist Perspectives on International Economic Law," in Doris Buss and Ambreena Manji, eds., *International Law: Modern Feminist Approaches* (Oxford: Hart, 2005) 196 (examining the need for a grounding of the feminist perspective in international economic law and situating gender within economic and development discourse).
36. Lucie Lamarche, "Le Pacte international relatif aux droits économiques, sociaux et culturels, les femmes et le droit à la sécurité sociale: des considérations et des propositions pour un droit 'universel' à la sécurité sociale" (2002) 14 *Canadian Journal of Women and the Law* 53 (arguing for a feminist approach to the understanding of the guarantee to social security, including social assistance, in the International Covenant on Economic, Social and Cultural Rights); Dianne Otto, "'Gender Comment': Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women" (2002) 14 *Canadian Journal of Women and the Law* 1 (arguing for the need for a substantive approach to equality in the UN Committee on Economic, Social and Cultural Rights' general comment on women's equality). See also Shelagh Day et al., "The Montreal Principles: Needed Clarity on Women's Right to the Equal Enjoyment of Economic Social and Cultural Rights" (2004) 22 *Nordic Journal of Human Rights* 345.
37. Jenny Beard, "Representations of the Liberal State in the Art of Development" (2001) 10 *Griffith Law Review* 6 (challenging the leading development models and critiquing the current politically and economically situated understanding of "development"); Anne Orford, "Feminism, Imperialism and the Mission of International Law" (2002) 71 *Nordic Journal of International Law* 275 (examining questions arising from attempting a feminist analysis of the current international legal system and the danger of adopting a feminist conception that is based on the historically hegemonic, Western concept of women in the developing world); Sundhya Pahuja, "Post-Colonial Approaches to the Conditionality of the International Monetary Fund," in Johan G. Lammers, ed., *Hague Yearbook of International Law*, volume 13 (Hague: Martinus Nijhoff, 2000) 123 (examining the conditionality requirements imposed by the International Monetary Fund (IMF) and the effects that the particular discursive form of the IMF has had on the relationship between the North and South); Shelley Wright, "Women and the Global Economic Order: A Feminist Perspective" (1994) 10 *American University International Law Review* 861 (offering a comprehensive examination of women's place in globalization, particularly as the exploited foundation of the international economic order and of the need to re-examine and redefine economic rights within a feminist analysis).
38. See, for example, Hilary Charlesworth, "Feminist Methods in International Law" (1999) 93 *American Journal of International Law* 379 (outlining a feminist perspective that calls for the reconfiguration of the male-dominated "impartial" paradigm in which international law is now situated); Ruth Buchanan and Sundhya Pahuja, "Collaboration, Cosmopolitanism and Complicity" (2002) 71 *Nordic Journal of International Law* 297 (exploring the possibility of feminist theory to allow further insights into an arguably parochial Northern conception of international law).

international level, this scholarship has been primarily concerned with evaluating the impact of structural adjustment programs,<sup>39</sup> debt and debt-forgiveness programs (both on the macro and micro levels),<sup>40</sup> women's paid and unpaid labour practices,<sup>41</sup> and the effect of trade liberalization (and neo-liberalism more generally) on low-income countries and women.<sup>42</sup> As with the feminist literature on international law, the economics literature also grapples with what a feminist approach to economics entails.<sup>43</sup>

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39. Diane Elson, "Structural Adjustment: Its Effects on Women," in Tina Wallace and Candida March, eds., *Changing Perceptions: Writings on Gender and Development* (Oxford: Oxfam Print Unit, 1991) 39 (an exploration of the way in which the international economy excludes women, with an emphasis on using structural adjustment programs, which have been highly criticized in the past, as a tool in the reconfiguration of the priorities in the economies of developing countries).
40. See Noeleen Heyzer, "Introduction: Market, State and Gender Equity," in Noeleen Heyzer and Gita Sen, eds., *Gender, Economic Growth and Poverty: Market Growth and State Planning in Asia and the Pacific* (New Delhi: Kali for Women, 1994) 3 (suggesting development programs should focus more resources on poor women and increase the access to credit in a way that would encourage participation and foster empowerment among women). See also a recent study on the differential costs of credit for women and men despite no evidence that women are riskier "bets" for loans. Alberto Alesina, Francesca Lotti, and Paolo E. Mistrulli, "Do Women Pay More for Credit? Evidence from Italy," Harvard Institute of Economic Research Discussion Paper no. 2159 (London: Harvard Institute of Economic Research, 2008).
41. Lourdes Benería, *Gender, Development and Globalization: Economics As If All People Mattered* (New York: Routledge, 2003) (suggesting that women's issues need to be placed within the conversation of the economic policies of globalization in order to enable the creation of alternative inclusive policies).
42. Isabella Bakker, "Introduction: Engendering Macro-economic Policy Reform in the Era of Global Restructuring and Adjustment," in Isabella Bakker, ed., *The Strategic Silence: Gender and Economic Policy* (London: Zed Books, 1994) 1 (noting that issues of gender have not had the place they should within the current economic transformation of the global community, which continues to operate within gender neutral guidelines that do not have gender neutral outcomes); Noeleen Heyzer and Gita Sen, eds., *Gender, Economic Growth and Poverty: Market Growth and State Planning in Asia and the Pacific* (New Delhi: Kali for Women, 1994); and Naila Kabeer and John Humphrey, "Neo-Liberalism, Gender and the Limits of the Market," in Christopher Colclough and James Manor, eds., *States or Markets? Neo-Liberalism and the Development Policy Debate* (Oxford: Clarendon Press, 1991) 78 (explaining the limits of neo-liberal policies that do not deliver for women and cautioning against state intervention that does not prioritize women's interests); Stephanie Seguino, "Gender Inequality in a Globalizing World," Working Paper no. 426 presented at UNRISD Conference, New York, 7 March 2005, Levy Economics Institute of Bard College, <[http://www.levy.org/pubs/wp\\_426.pdf](http://www.levy.org/pubs/wp_426.pdf)> (advising that economic regulation, "gender sensitive" spending, and economic policies are essential to the progress towards gender equality); and Gita Sen, "Gender Mainstreaming in Finance Ministries" (2000) 28 World Development 1379 (exploring three avenues for change that would force finance ministries to recognize the place of gender in the economy).
43. Lourdes Benería, "Towards a Greater Integration of Gender in Economics" (1995) 23 World Development 1839. See also Benería, *supra* note 41 (assessing how feminist analysis and development theories have made inroads into global finance and have also led to a shift from a focus on micro to macro economics).

## *The Role of Tax Treaties in Allocating Tax Revenues between Nations*

Having provided a general sense of the feminist and critical race literature that might inform an analysis of international tax design, the next part of this article turns to look squarely at the problem confronted by international tax scholars and policy makers: how should tax revenue generated from cross-border trade and cross-border workers be shared between multiple nations, each of whom might have a justifiable claim to it?<sup>44</sup> It begins with a review of the problem of conflicting jurisdictional claims to tax revenue from transnational investment and transit, moves to a discussion of the traditional resolution of this conflict, and concludes with an articulation of a potentially emergent (and evolving) solution to this conflict. According to traditional international tax policy scholars (as the review that follows demonstrates), this problem is apparently genderless.

### *Multiple State Claims to the Tax Revenue Arising from Transnational Investment and Work*

It is a widely recognized norm of international tax law that countries should have the jurisdiction to tax individuals or separately recognized entities (such as corporations) that are resident in their jurisdiction on their worldwide income. For example, Canada maintains the right to tax its residents on all of their income, whether earned in the United Kingdom, Canada, or South Africa. At the same time, it is also recognized that countries should have the jurisdiction to impose a tax on all income that has a source within its jurisdiction even if the owner is not resident there. Canada, thus, asserts the right to tax residents of other countries on the income they earn that has some connection to, or geographic source in, Canada.

Both of these jurisdictional claims—a state's right to tax those who are resident in its territory on their worldwide income and a state's right to tax those who engage in activities with a source in their territory—are predicated on a simple underlying concept: namely, states have the right to tax individuals and entities with an economic connection to their jurisdiction.<sup>45</sup> These

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44. Other scholars have made significant contributions to the tax policy literature on the use and effectiveness of international tax treaties as well as on the implications of tax treaties on inter-nation equity and international redistribution. See, for example, Allison D. Christians, "Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study" (2005) 71 *Brooklyn Law Review* 639; and Reuven S. Avi-Yonah, "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" (2000) 113 *Harvard Law Review* 1575.

45. Although the idea that economic allegiance might serve as a basis for taxation preceded a 1923 report authored by four prominent economists for the League of Nations, the report has served as the modern touchstone for the general acceptance of the proposition. League of Nations, Economic and Financial Commission, *Report on Double Taxation Submitted to*



competing jurisdictional rights to tax give rise to the well-known international double taxation problem. If a person or corporation resident in one country earns income in another country, it could be taxed in both the country in which the person is resident and in the country in which the income is earned or sourced.<sup>46</sup>

Scholars and policy makers who consider international tax design confront the difficult problem of determining which countries should have the jurisdiction to tax the income from cross-border investment and work. Put another way, how should two nations, each with a possibly justifiable claim to tax income, allocate the right to tax it between them? What does equity between nation-states mean in this context?

### *The Traditional Solution to Double Taxation through the Use of Tax Treaties: Source Countries Reduce Their Scope for Taxation*

From the outset of modern income tax systems in the early 1900s, the generally accepted unilateral way of avoiding international double tax was for the residence country to provide a tax credit to the source country for the taxes paid. In other words, where both a residence state and a source state had a justifiable claim to tax the income associated with cross-border investment or work, the source country would collect tax on the income earned in its state, and the residence state would provide a credit for the tax paid to the source state, thereby reducing the amount of tax owing (possibly to zero) to the residence state. That is, it has always been widely recognized that the source country should have the first claim to tax income earned in its jurisdiction. Assuming that countries could agree on where taxpayers were resident and in what jurisdiction income was earned, this simple system could avoid all double taxation problems and could be implemented unilaterally by all states through their domestic tax legislation.

However, because of the disparate rules between countries relating to residence and source, and because the possibility of multiple taxation was seen as hindering international trade and commerce, as international commerce increased, industrialized countries began to consider the adoption of bilateral tax treaties in the 1920s to prevent double taxation. The simplest way to avoid

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*the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp, League of Nations Document no. E.F.S.73.F.19 (Geneva: League of Nations, 1923) (reprinted in United States, Joint Committee on Internal Revenue Taxation, Legislative History of United States Tax Conventions, volume 4 (Washington, DC: US Government Printing Office, 1962) 4003–55).*

46. It might be noted that scholars and public policy commentators often refer to double taxation as a problem in and of itself. Of course, whether or not policy makers should care about double taxation turns entirely on the purposes and consequences of the imposition of the taxes.

international double tax was to enter into a bilateral tax treaty agreement that essentially limited the source countries' ability to tax. This decision made sense for two reasons. First, residence-based tax became a default approach in tax treaties because it was generally easier (when most transactions were entered into by individuals) to find individuals than it was to find the source of their income. Second, residence-based tax supports an important aim of modern income tax systems—to tax individuals equitably and according to their ability to pay based on their entire income, regardless of where that income is earned. As long as the countries subject to the tax treaty had roughly equal flows of income between them, providing a preference for residence as opposed to source taxation was irrelevant since neither choice would result in a difference in the amount of taxes collected by the two jurisdictions that were party to the treaty. However, it was always understood that if income flows were not equal, then restricting source country taxation would reduce the revenues of source countries (usually capital importing and generally low-income countries) and increase the tax revenues of resident countries (usually capital exporting and generally high-income countries).<sup>47</sup>

This consensus among high-income countries is captured in the Organisation for Economic Co-operation and Development's (OECD) model tax treaty,<sup>48</sup> which was first released in draft in 1963.<sup>49</sup> The OECD subsequently released revisions of this model treaty, but its basic structure has

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47. “There appear to be several reasons for the emphasis on residence in tax agreements between developed countries. Probably the fundamental reason is that the emphasis on residence represents the more favorable alternative for the country with the stronger bargaining position. Frequently countries have an interest in capital, technology and services possessed by the taxpayers of other countries. In such instances, the ‘interested’ country is the potential source country and the other is the potential residence country. As between the two countries, the potential residence country thus has the stronger economic position and the evidence indicates that it has used its superior position to ‘persuade’ the source country to forgo tax revenues so as to insure availability of the desired capital, technology and services. This apparently is what happened immediately after World War II between the countries of Western Europe and the United States. At that time, the Western European countries were very interested in attracting United States capital and technology to rebuild and modernize their war-ravaged economies. In order to ensure the unfettered flow of such capital and technology into their economies, these countries accepted tax agreements with the United States with a heavy emphasis on the residence principle.” Charles R. Irish, “International Double Taxation Agreements and Income Taxation at Source” (1974) 23 *International and Comparative Law Quarterly* 292 at 294.

48. Organisation for Economic Co-operation and Development (OECD), “OECD’s 30 Members,” *Members and Partners* (2009), <[http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761800\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html)> (there are thirty members of the OECD, and they are generally perceived to be the rich states, although they are not necessarily the most powerful economies since India and China are not members).

49. *1963 OECD Draft Income and Capital Tax Convention, Convention between (State a) and (State B) for the Avoidance of Double Taxation with Respect to Taxes on Income Capital* (OECD, 30 July 1963).

remained the same since 1963.<sup>50</sup> Generally speaking, this treaty restricts the source country's ability to tax business and services income by requiring that the business have a permanent establishment (or fixed, generally physical, presence) in the source country before tax can be imposed on the activities in the source state and restricts source country taxation of investment income (dividends, interest, and royalties) by imposing a maximum withholding tax rate on that income.

Recognizing that the OECD model treaty was biased in favour of high-income countries, the United Nations convened a group of experts in 1967 to consider an alternative model tax treaty designed to be more favourable to source states. The United Nations released a model treaty in 1980.<sup>51</sup> This treaty tracks the OECD model treaty in its general form,<sup>52</sup> but most of the articles allocate slightly more jurisdiction to the source state. Based on the traditional design of international tax systems, where taxation is generally predicated on the degree of economic connection of the state to the income, it has been possible for tax scholars who are either sympathetic to the low-income countries' need for revenue, or who are convinced of the economic importance of the source state, to argue in favour of using tax treaties to ensure a reasonable allocation of taxing jurisdiction to low-income countries. Since tax treaties do not themselves impose taxes—they simply allocate the taxing rights—the decision whether or not low-income countries decide to actually impose tax is up to them.

Tax policy scholars have argued, therefore, that a larger share of the taxing jurisdiction should be left in the hands of the capital importing state on the basis that that state has a strong economic connection to the income because: (1) it arose from the use of property in that jurisdiction; (2) the source state provides important benefits to investors or workers, including the benefit of infrastructure, government stability programs, an educated workforce, health care benefits for workers, intellectual property protections, as well as basic contract and property protections, communications infrastructure, the ability

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50. Without question, the OECD model treaty has become the dominant force for international tax treaty design. The OECD has an enormous influence more generally on international tax design. See, for example, Arthur J. Cockfield, "The Rise of the OECD as Informal 'World Tax Organization' through National Responses to E-Commerce Tax Challenges" (2006) 8 *Yale Journal of Law and Technology* 136.

51. United Nations, *Model Double Taxation Convention between Developed and Developing Countries*, UN Doc. ST/ESA/102 (1980).

52. See, for example, Sol Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (London: Weidenfeld and Nicolson, 1992) at 56 ("[t]he UN Guidelines did not make any new departure in the approach to tax treaties. They took as their starting point the 1963 OECD draft, and merely noted the differing views expressed by experts . . . Neither the Guidelines, the Manual nor the Model Treaty could be said to challenge the basic principles of the OECD model. Although the report of the UN experts stressed the primacy of taxation at source, this was not expressed in any general principle").

to incorporate separate legal entities, and so on; (3) the source state provides a market; and (4) the source state provides economic rents.<sup>53</sup> Some scholars claim that these arguments, which are rooted in traditional tax policy, provide a strong rationale for permitting source countries to retain some of the tax revenues associated with activities in their jurisdiction on fairness or international equity grounds. Canada's tax treaty negotiators have been persuaded by some of these arguments, at least more so than their American counterparts. While it is not common for Canada to follow the UN model tax treaty provisions, which allocate a greater share of the tax revenue to source states, Canada has agreed in at least some cases to leave more tax revenue in the hands of low-income treaty partners than it would have had the treaty partner been a high-income state.<sup>54</sup>

Whether or not scholars characterize these kinds of arguments as promoting redistribution or as a just allocation of tax revenue depends on their perspective about the normatively correct allocation of income between two countries with differential trade flows. It might be argued that since the residence state could tax the entire international income without granting a credit, the resident state's willingness to sacrifice some revenue to the source state is a form of redistribution (to a low income state). On the other hand, one could argue that the source state is entitled to tax all of the income, and therefore its sacrifice of some revenue to the residence state is a form of redistribution (to the high-income state). Regardless, traditional tax policy approaches to international tax leave room for debate about the appropriate characterization of the allocation function served by tax treaties.

### *The Emerging Solution to Double Taxation: Countries Stop Taxing Income Earned in Transnational Business Transactions*

As outlined earlier, the traditional solution for many countries, including Canada, to the competing claims of two jurisdictions to tax the income earned from cross-border investment and work was for the residence country to unilaterally grant a tax credit for the taxes paid to the source country. When

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53. Economic rent is the difference between what factor of production would need to be paid to stay in its current use and what it actually is paid. If a business engages in mining and earns \$100 a year, but needs only \$80 to stay in business, \$20 is the economic rent associated with the mining activities. The accepted wisdom is that you can tax a business on its economic rent without it changing its behaviour at all, because it has extra-normal rates of return. The Economist.com, *Research Tools* (2008), <<http://www.economist.com/research/Economics/searchActionTerms.cfm?query=economic+rent>>.

54. See a review of these specific provisions in Kim Brooks, "Canada's Evolving Tax Treaty Policy toward Low-Income Countries," in Arthur Cockfield, ed., *Globalization and the Impact of Tax on International Investments* (Toronto: University of Toronto Press [forthcoming]); and Alexander J. Easson, "The Evolution of Canada's Tax Treaty Policy since the Royal Commission on Taxation" (1988) 26 Osgoode Hall Law Journal 495.

the nations agreed to enter into a tax treaty, the source country reduced its scope for taxation. However, recent proposals by several governments suggest that the approach to resolving the allocation of taxing jurisdiction may be changing.

Another approach to resolving international double taxation is simply for the residence country to exempt the income earned offshore from tax altogether (usually referred to as an “exemption” system). No high-income country has ever had a pure exemption system or a pure credit system: most are an amalgam of the two. Canada, for example, has a credit system to recognize foreign taxes paid on some types of income in circumstances with accrual taxation—that is, taxation in Canada regardless of whether the income is actually repatriated to Canada. Sometimes the Canadian taxpayer is able to defer Canadian tax until the foreign income is actually repatriated to Canada.

Canada also has an exemption system that simply avoids imposing a second layer of tax on other types of income. An exemption system applies to dividends from foreign affiliates (foreign corporations that meet a Canadian ownership threshold) if the foreign affiliate is resident in a country with which Canada has a tax treaty and if the dividend is paid out of active business income. In other words, where a Canadian corporate resident earns active business income through a foreign affiliate resident in a country with which Canada has a tax treaty, no Canadian tax is paid on that income, even when it is repatriated to Canada. Since Canada has close to 100 tax treaties, the scope for earning foreign business income without Canadian taxation is significant and growing.<sup>55</sup>

The rationale for the Canadian exemption system for active business income earned in a country with which Canada has a tax treaty has been the subject of some dispute in Canada. Some commentators suggest that Canada’s exemption system is meant to act as a proxy for a foreign tax credit system. The theory is that Canada only exempts income earned in countries that have a tax system (including tax rates) similar to Canada’s.<sup>56</sup> Others have argued that the purpose of the Canadian exemption system is to implement the principle of capital import neutrality—a principle that suggests Canada should not tax Canadian corporations’ foreign business income so as to enable Canadian corporations to compete on a level playing field with corporations operating domestically in countries with which Canada has a treaty.<sup>57</sup> Whatever the rationale for the exemption system, it is clear that Canada has a number of

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55. Department of Finance Canada, *Notices of Tax Treaty Developments*, <[http://www.fin.gc.ca/treaties-conventions/treatystatus\\_eng.asp#developments](http://www.fin.gc.ca/treaties-conventions/treatystatus_eng.asp#developments)>.

56. Brian J. Arnold, “Unlinking Tax Treaties and the Foreign Affiliate Rules: A Modest Proposal” (2002) 50 *Canadian Tax Journal* 607.

57. Angelo Nikolakakis, “Response; Exempt Surplus: What’s the Problem? A Reply to Brian Arnold” (2002) 50 *Canadian Tax Journal* 1354.

treaties with countries in which active business income is taxed at much lower rates than it would be in Canada.<sup>58</sup>

The exemption for active business income earned through a foreign affiliate has been growing as Canada's tax treaty network grows. However, this system has recently been expanded legislatively as well. In 2007, the federal government announced its intention to expand the countries eligible for exemption status. The legislation has been changed so that Canadian corporations with foreign affiliates may earn active business income without Canadian taxation not only in countries with which Canada has a tax treaty, but also in countries with which Canada has negotiated a tax information exchange agreement. As a third potential expansion of Canada's exemption system, in the 2007 budget the Conservative federal government announced its plans to create a panel to review Canada's system of international taxation. This panel released its report in December 2008, and it recommends expanding Canada's exemption system to all countries.<sup>59</sup> This recommendation is reportedly inspired by similar initiatives in other countries—initiatives that suggest a general move towards increased reliance on exemption systems for active business income.<sup>60</sup>

The move to a greater role for an exemption system in Canada's international tax system has revenue consequences for low-income countries that are difficult to predict with any certainty. On the one hand, the move might be welcomed by low-income countries that are confident that they will be able to attract additional investment by having tax rates that are lower than the tax rates of high-income countries. On the other hand, when a significant number of high-income countries stop taxing business income earned outside their borders, low-income countries have an incentive to reduce their tax rates more and more to attract high-income country investment away from other low-income jurisdictions. Therefore, on some level, exemption systems may support tax competition among low-income states, reducing their tax revenues. In the most extreme circumstance, all low-income countries would reduce their

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58. See, for example, Canada's tax treaties with Barbados, Cyprus, Luxembourg, Ireland, the Netherlands, and Switzerland, even though all of those countries have special regimes and/or impose low rates of tax.

59. See Advisory Panel on Canada's System of International Taxation, *Final Report: Enhancing Canada's International Tax Advantage*, Recommendation 4.1 (December 2008) at 100, <[http://www.apcsit-gcrfci.ca/07/cp-dc/pdf/finalReport\\_eng.pdf](http://www.apcsit-gcrfci.ca/07/cp-dc/pdf/finalReport_eng.pdf)> [Final Report].

60. See, for example, Office of Tax Policy, US Department of the Treasury, *Approaches to Improve the Competitiveness of the U.S. Business Tax System for the Twenty-First Century* (20 December 2007), <[http://www.ustreas.gov/press/releases/reports/hp749\\_approaches-study.pdf](http://www.ustreas.gov/press/releases/reports/hp749_approaches-study.pdf)>; H.M. Treasury and H.M. Revenue and Customs, *Taxation of Companies' Foreign Profits: Discussion Document* (June 2007), <[http://www.hm-treasury.gov.uk/d/consult\\_foreign\\_profits020707.pdf](http://www.hm-treasury.gov.uk/d/consult_foreign_profits020707.pdf)>; Policy Advice Division of Inland Revenue and the New Zealand Treasury, *New Zealand's International Tax Review: Developing an Active Income Exemption for Controlled Foreign Companies* (October 2007), <<http://taxpolicy.ird.govt.nz/publications/files/intnlip1.pdf>>.

tax rates to zero in an effort to attract high-income country investment, forgoing tax revenue, only to discover that other low-income nations have engaged in the same behaviour and therefore that they are not attracting any additional investment by presenting a more desirable tax environment than their “competitors.” This is an illustration of the classic “race to the bottom” problem—the major beneficiaries would be international businesses that would no longer pay tax in any country.

### *Applying a Feminist Lens to the Negotiation and Design of International Tax Treaties*

This section envisions a feminist approach to the question of how tax revenues might be allocated between two states, each of which has a justifiable claim to that revenue. It offers three feminist reflections on the problem described earlier, namely that feminists should: (1) push for the presence of more women at the tax treaty negotiating table; (2) explore whether tax treaties might be used or useful as instruments to temper the effects of neo-liberalism; and (3) require states to be accountable for distributive inequities.

### Could Women Tax Administrators Make a Difference?

Feminists have been enormously successful at identifying areas where women are not represented.<sup>61</sup> It is not surprising that looking at tax treaties through the lens of women’s representation would lead one to at least ask some new questions about tax treaty negotiations.<sup>62</sup> Tax treaty negotiation, like tax practice generally, is undertaken primarily by men. Tax treaties are usually negotiated in the executive branch of government, normally by government officials associated with the department of finance (or the policy branch of the

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61. See, for example, Madam Justice Bertha Wilson, “Will Women Judges Really Make a Difference? The Fourth Annual Barbara Betcherman Memorial Lecture” (1992) 30 Family Court Review 13; Mary Jane Mossman, “Defining Moments for Women as Lawyers: Reflections on Numerical Gender Equality” (2005) 17 Canadian Journal of Women and the Law 15; James Stribopoulos and Moin A. Yahya, “Does a Judge’s Party Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario” (2007) 45 Osgoode Hall Law Journal 315; Peninah Thomson, Jacey Graham, and Tom Lloyd, *A Woman’s Place Is in the Boardroom: The Roadmap* (London: Palsgrave Macmillan, 2008); Sumru Erkut, Alison M. Konrad, and Vicki M. Kramer, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance (Executive Summary)* (2006), Wellesley Centers for Women, <[http://www.wcwonline.org/component/page,shop.getfile/file\\_id,21/product\\_id,1113/option,com\\_virtuemart/Itemid,175/](http://www.wcwonline.org/component/page,shop.getfile/file_id,21/product_id,1113/option,com_virtuemart/Itemid,175/)>.

62. For a discussion of how women tax legislators might make a difference in tax legislation, see Marjorie Kornhauser, “A Legislator Named Sue: Re-Imagining the Income Tax” (2002) 5 Journal of Gender, Race and Justice 289. For a discussion of the role of ministries of finance in perpetuating women’s inequality, see Sen, *supra* note 42.

tax administration). As a starting point, feminists would demand an answer to the question of why there are so few women at the negotiating table.

A review of the membership of the OECD and UN committees reveals the preponderance of men engaged in high-level tax policy work, including work on tax treaties.<sup>63</sup> For example, the OECD Committee on Fiscal Affairs—the committee that brings together senior officials from OECD member countries to work on the formulation and implementation of the OECD’s tax policies—has very few women members. Each OECD member state has a representative on this committee. The committee has a chair, a deputy-chair, and three vice-chairs. Of those five leadership positions on the committee, one position is held by a woman (a vice-chair position). The OECD’s Committee on Fiscal Affairs has five active working parties (with one focused on tax treaties), only one of which is chaired by a woman (the working party that focuses on the taxation of multinational enterprises).<sup>64</sup> The United Nations’s committee of experts on international co-operation in tax matters, which is charged with reviewing and updating the UN model tax convention as well as other international tax co-operation, development, and capacity-building issues, has twenty-five members, four of whom are women.<sup>65</sup> The UN committee of experts on international co-operation in tax matters has six subcommittees and two working groups, and only two of those seven bodies are co-ordinated by a woman.<sup>66</sup> It might be noted that it is the same woman who co-ordinates both a UN committee and a working group. She also is one of the women on the UN committee of experts on international co-operation in tax matters.

Would it make a difference to the *content* of tax treaty agreements—and, in particular, to the way they serve an international distributive function—if there were women at the table? The answer is not obvious.<sup>67</sup> As noted earlier, traditional tax policy analysis emphasizes three evaluative criteria—equity, neutrality, and administrability. These criteria are routinely employed in the analysis of domestic tax rules. Perhaps not surprisingly, in the context of international tax, equity is rarely discussed, and the majority of the literature

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63. This pattern is replicated in other areas of international organizational structure as well. See, for example, Hilary Charlesworth, Christine Chinkin, and Shelley Wright, “Feminist Approaches to International Law” (1991) 85 *American Journal of International Law* 613 at 621–5.

64. OECD, *Members and Partners*, OECD’s Membership list, <<http://www2.oecd.org/oecdgroups/>> .

65. See United Nations Department of Economic and Social Affairs, *Committee of Experts on International Cooperation in Tax Matters*, <<http://www.un.org/esa/ffd/tax/members.htm>> .

66. See United Nations Department of Economic and Social Affairs, *Committee of Experts on International Cooperation in Tax Matters, Current Subcommittees and Working Groups*, <[http://www.un.org/esa/ffd/tax/subcomm\\_wg.htm](http://www.un.org/esa/ffd/tax/subcomm_wg.htm)> .

67. Scholars have also differentiated between the differences women make versus the difference feminists make. See Manon Tremblay and Réjean Pelletier, “More Feminists or More Women?: Descriptive and Substantive Representations of Women in the 1997 Canadian Federal Elections” (2000) 21 *International Political Science Review* 381.



on international tax is focused on evaluating the tax rules through reference to some version of the efficiency or neutrality criterion. Only a small handful of articles in the international tax literature have addressed the requirements of inter-nation equity in significant detail, arguing that some share of the tax revenue should be allocated to source (or low-income) states. The first two articles in this category rely on the traditional tax principles reviewed earlier. They were both written by women—one by Peggy Musgrave (in the public finance tradition) and the other by Nancy Kaufman (in the legal scholarship tradition).<sup>68</sup> The third article in this category is an article written by Gillian Brock, a philosophy scholar, who addresses a range of taxes that might be imposed internationally, including, for example, a carbon tax, currency transaction tax, and air-ticket tax, and used to promote global justice.<sup>69</sup>

It seems that our understanding of equity in the international context is currently in a state of crisis. For example, the 2008 report from the Advisory Panel on Canada's System of International Taxation does not apply the equity criterion at all, focusing instead on a level playing field for business.<sup>70</sup> Ignoring the equity analysis means that the report misses tax fairness issues for individuals. The design of the international tax system (and the tax status of foreign income) has a significant impact on whether individual Canadians with the same incomes are equally taxed (horizontal equity). If high-income individuals who are able to invest outside of Canada are not subject to tax on their income in Canada, or are subject to tax at preferential rates, then their tax status is more advantageous than the tax status of a Canadian who cannot avoid income tax by investing abroad. The analysis also fails to address vertical equity considerations. Presumably, it is primarily high-income taxpayers who earn significant returns on foreign income. If this income is not subject to tax, the progressivity of Canada's tax system is compromised.

The absence of any equity analysis also means that the report ignores altogether any consideration of the equity of the international tax system in a world where income is unequally distributed (global equity). There is no recognition that the tax system might quite appropriately be used as something other than as an instrument to facilitate investment. It is possible that if more

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68. Peggy B. Musgrave, *United States Taxation of Foreign Investment Income: Issues and Arguments* (Cambridge: Law School of Harvard University, 1969) at 130–3; and Nancy H. Kaufman, "Fairness and the Taxation of International Income" (1998) 29 *Law and Policy in International Business* 145. However, also see the article authored by Peggy Musgrave with her husband Richard Musgrave, "Inter-Nation Equity," in Richard M. Bird and John G. Head, eds., *Modern Fiscal Issues: Essays in Honor of Carl S. Shoup* (Toronto: University of Toronto Press, 1972) chapter 4. And see the forthcoming chapter by Jinyan Li in Arthur Cockfield, ed., *Globalization and the Impact of Tax on International Investments* (Toronto: University of Toronto Press [forthcoming]).

69. Gillian Brock, "Taxation and Global Justice: Closing the Gap between Theory and Practice" (2008) 39 *Journal of Social Philosophy* 161.

70. *Final Report*, *supra* note 59 at 16.

women would write in the international tax area, and if more women had access to the tax-negotiating table with power to influence the process, we would start to see a much richer analysis of fairness and equity. This analysis would take into account the importance of government revenue for all states, but particularly for low-income states, and take seriously the use of international allocation/distribution regimes for women.

### A Role for Tax Treaties in the Project of Discouraging Market Abuses

As the earlier narrative reveals, tax treaties can serve (and have historically been designed to serve) primarily as an instrument that facilitates cross-border investment and work. The pressures on policy makers drafting international tax rules (and on tax treaties as one element of those systems) to reduce barriers to international investment have increased as governments embrace neo-liberal policies. The characteristics of a neo-liberal state include the familiar list of attributes: a shift to a more market-oriented economic system including increased trade liberalization, privatization, decreasing government regulation of capital, suppression of workers, use of export-oriented development strategies, a heightened focus on the rational self-reliant individual as the assumed subject of policy, and the greater involvement of corporations in all aspects of economic and political life. Feminists have been understandably wary of neo-liberal trends that tend to further devalue or ignore the caregiving and “unproductive” work of women in the home and result in a decrease or stagnation of wages in government workplaces (workplaces often dominated by women) coupled with an outsourcing of those jobs to the private sector, a withdrawal of government funding for historically public services (including services such as health care, education, social assistance, and child care), and an unrelenting attention to the needs of big business.<sup>71</sup>

With attention to some of the ways that neo-liberalism exposes women to real and potential disadvantages, what might feminists think about the use of tax treaties as a way of distributing resources between nations? 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

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71. See, for example, Claire F.L. Young and Susan B. Boyd, “Feminism, Law, and Public Policy: Family Feuds and Taxing Times” (2004) 42 *Osgoode Hall Law Journal* 545. See also Margaret Thornton, “Feminism and the Changing State: The Case of Sex Discrimination” (2006) 21 *Australian Feminist Studies* 151. One might criticize this list of attributes by noting, for example, that neo-liberal governments increasingly rely on unpaid caregiving work. I argue that this is quite different from valuing it.

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.

First, tax treaties might be seen as an important way to rectify at least some of the inequalities produced by the under-regulated movement of capital between nations. If high-income countries are going to encourage their corporations to underpay labour and neglect labour rights, strip natural resource entitlements, and exploit the unpaid work that women of the South provide to sustain their households (often in the paid workforce), they could at least allow low-income governments to claim some portion of the proceeds of the income that is produced by this continued economic colonization by high-income states.

Second, feminists might counter the emphasis placed on using tax treaties as an instrument to facilitate investment by trying to better integrate the economic aims of tax treaties with the treaties' possible social and political aims. To this end, research on tax treaties has been primarily focused on their economic impact on trade flows. The objects of tax treaties, as the opening portion of almost every tax treaty states, are to eliminate double taxation and to encourage investment. In other words, the ultimate goal of tax treaties, historically speaking, is to assist in ensuring that tax barriers do not stand in the way of international capital flows. There is also a small literature on how tax treaties might be used to ensure that taxes are collected by at least one state. This literature sees tax treaties as providing a mechanism for the enforcement of the collection of taxes rather than as a trade-liberalizing device, or at least it does not see tax treaties solely as trade liberalizing devices.

Feminists might analyze the possibilities for an explicitly social and political role for tax treaties. We might ask how tax treaties facilitate the political citizenship of those who fall under their scope—for example, by giving more legitimacy to international corporations who become tax “persons” when they are subject to tax in other jurisdictions. Or we might ask how tax treaties facilitate social citizenship. On this front, a feminist analysis might be concerned with how to create a more direct link between the revenue allocation aims of tax treaties and the government benefits provided to marginalized people within a jurisdiction. A feminist approach might argue that one of the revenue allocation principles driving tax treaty negotiations could be equity pursuits in revenue reallocation. A low-income country that better advances women's equality, for example, would receive a larger share of the tax revenues derived from transnational investment and work than other low-income countries that do not promote the equality of women and other disadvantaged populations with those tax revenues. Using tax treaties in this way might help ensure that women actually receive some of the distributional benefits of additional international tax revenue. It risks, however, importing and reinforcing Western and Northern norms in low-income states resulting in

colonial practices that have been identified as deeply problematic by many feminist scholars.

Third, feminists might challenge the market aims of tax treaties altogether by fundamentally challenging the traditional tax policy aim of neutrality in the drafting of tax treaty rules. As mentioned earlier, traditional tax policy implies the application of three evaluative criteria: equity, neutrality, and administrability. While equity was ostensibly the dominant criteria of traditional tax policy analysis until the early 1980s, neutrality, or economic efficiency, has become one of the leading foci of policy makers' and scholars' analyses. A review of several government reports reveals Canada's embrace of this change. In 1985, Canada released a report by the Royal Commission on the Economic Union and Development Prospects for Canada that recognizes this shift:

When the Royal Commission on Taxation reported in 1966, one of the foremost goals of policy analysis was the establishment of a tax system that was equitable in its treatment of different groups. While equity remains an important goal, tax specialists now stress the need for a system that is calculated to encourage economic efficiency.<sup>72</sup>

Generally, the dominant aim in the evaluation of all tax rules is to draft tax rules that do not change taxpayer behaviour. To put it simply, a good tax rule is a rule that results in the taxpayer doing whatever he or she would have done in the absence of tax. Privileging this evaluative criterion likely seems ludicrous to many feminists. Instead, we might ask how tax rules can be used to create incentives for particular kinds of behaviour that ensure women's equality. In the tax treaty context, we might ask whether something more than allocation can be accomplished. Could tax treaties, for example, be drafted to create a "tax penalty" for particular types of behaviour? Perhaps if a multinational company engages in business activities that simply strip natural resources from low-tax jurisdictions, or that fail to adopt pay equity, they should be subject to double tax. Perhaps tax treaties should not apply to make corporate decisions to invest abroad economically (or morally) neutral ones.

### *Recognizing the Importance of Governments for Women's Equality*

The significance placed on liberalized trade, which is often at the expense of the ability of governments to collect any tax revenue from international transactions, is evidenced in a number of government publications. The Advisory Panel on Canada's System of International Taxation's mandate

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72. Canada Report, *Royal Commission on the Economic Union and Development Prospects for Canada*, volume 2 (Ottawa: Minister of Supply and Services Canada, 1985) at 206.

statement underscores that “Canada must achieve the lowest effective tax rate on new business investment in the G7.”<sup>73</sup> Our willingness to compete for business by reducing our tax rate on business investment is striking, although not new,<sup>74</sup> and presumably this emphasis will only increase if there is an extended economic downturn and a resulting need for new employment.

Canada is illustrative of many countries in its race to the lowest tax rates, but this race is unnecessary and comes at a cost to all nations. The government does not need to focus solely on attracting foreign investment to Canada to create jobs. Rather, it could create additional jobs in periods of economic downturn or high unemployment. A national childcare plan or the extension of education for children currently of preschool age, for example, would create some meaningful work. In addition, the aim of achieving the lowest effective tax rate on new business is an elusive one. Presumably, as one country reduces its tax rate to attract investment, others follow. Canada’s policy thereby feeds an international reduction in corporate tax rates.<sup>75</sup> The evidence to date suggests that despite a global reduction in statutory corporate tax rates, corporate tax revenues have remained remarkably resilient.<sup>76</sup> Such a situation may be explained by the unprecedented business profits over the last twenty years or by the ability of high-income countries to broaden their tax bases (reducing loopholes to increase total income that would be subject to tax).<sup>77</sup> Even if in times of economic prosperity this process of statutory rate reductions and base broadening has worked to shore up corporate tax revenues for high-income countries, one expects that recessions and continued rate reductions will make it increasingly difficult to raise revenue from the corporate tax (and therefore make it increasingly difficult to offer valuable social programs). In addition, there is at least some evidence that the reduction in corporate tax rates by high-income countries has made the collection of a corporate tax by low-income countries difficult since they have had to reduce their corporate tax rates to compete but have not been able to effectively

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73. Advisory Panel on Canada’s System of International Taxation, *Our Mandate: Enhancing Canada’s International Tax Advantage* (December 2008), <<http://www.apcsit-gercfi.ca/03/mdtmdt-eng.html>> .

74. See, for example, “TEI Comments on Proposed Canadian Legislation Restricting Interest Deductions,” *Tax Executive* (May-June 2007), BNET <[http://findarticles.com/p/articles/mi\\_m6552/is\\_3\\_59/ai\\_n25378296/pg\\_5](http://findarticles.com/p/articles/mi_m6552/is_3_59/ai_n25378296/pg_5)> (“the government’s policy has generally been to favour competitiveness concerns over those of revenue generation”).

75. The tax literature suggests that states chose to reduce their own tax rates as a reaction to the actions of other states, see, for example, Michael P. Devereux, Rachel Griffith, and Alexander Klemm, “Corporate Income Tax Reforms and International Tax Competition” (2002) 17 *Economic Policy* 449.

76. See, for example, Kimberly A. Clausing, “Corporate Tax Revenues in OECD Countries” (2007) 14 *International Tax and Public Finance* 115.

77. See, for example, Thomas Rixen, “Taxation and Cooperation: International Action against Harmful Tax Competition,” in Stefan A. Schirm, ed., *Globalization: State of the Art and Perspectives* (London: Routledge, 2007) 61.

expand their corporate tax bases.<sup>78</sup> Canada's tax decisions do not occur in a domestic vacuum.

In an increasingly borderless world, in which states appear to have declining power relative to multinational corporations, feminists should support government redistribution for women on an international level. From a tax perspective, this would mean that we might argue: (1) that no country should be able to offer corporations and other businesses resident in another jurisdiction safe refuge from taxes;<sup>79</sup> and (2) that no high-income country should design their international tax system so that it encourages low-income countries to compete (using their tax systems) for badly needed investment.

Using low taxes or no taxes as a business subsidy or incentive is, without question, bad for women. Tax evasion and tax competition leads to a destructive race to the bottom for tax rates and bases and makes it increasingly difficult for other states to maintain the public services that are necessary for their populations and that are frankly more important for women than for men, given the often decimating effects of patriarchy and capitalism on women. The introduction of this article documented the significance of the erosion of the role of government redistributive programs for women both domestically and internationally. Tax revenues provide the means for governments to implement spending programs that can, without question, improve women's equality. Government always has other regulatory devices available to it to improve women's social, economic, and political conditions, but women cannot, and should not, rely solely on regulatory instruments that do not involve a government transfer of benefits.

A feminist approach to the design and uses of tax treaties would pay close attention to the way that the interests of capital, which are directly affected by the international tax system, drive nations to compete against each other to attract capital.<sup>80</sup> Feminists should be mindful of the risk that develops in constructing sovereignty arguments to preserve their national policy choices. Nations can engage, for example, in a kind of lowest-price-is-the-law

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78. See, for example, Michael Keen and Alejandro Simone, "Is Tax Competition Harming Developing Countries More Than Developed?" (2004) 34 *Tax Notes International* 1317.

79. See an evaluation of the efforts made by the OECD to reduce global tax competition and a proposal to co-ordinate withholding tax payments and strengthen controlled foreign affiliate rules in Reuven S. Avi-Yonah, "The OECD Harmful Tax Competition Report: A Retrospective after a Decade" (2009) 34 *Brooklyn Journal of International Law* 783.

On the question of why populations are generally not engaged in resisting tax base erosion, there is a fitting quote in Braithwaite and Drahos: "'Save the tax base' simply does not elicit the same reaction as 'save the whale.'" See John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 130.

80. Tax is not unique as a regulatory model exposed to the pressures of increased transnationalism—similar pressures are exerted on environmental, labour, and other regulatory regimes. The empirical and normative debate about tax competition is rich. See, simply to illustrate, Avi-Yonah, *supra* note 44; Devereux, Griffith, and Klemm, *supra* note 75; and Charles E. McClure, "Tax Competition: Is What's Good for the Private Goose Also Good for the Public Gander?" (1986) 39 *National Tax Journal* 341.

competitive approach to access their labour markets and natural resources, among other valuable attributes.<sup>81</sup> As a consequence, feminists might resist moves towards exemption systems (as described earlier). The recent Canadian proposal, for example, which expands the scope of Canada's exemption system, adds to the already too competitive tax environment for low-income states. Some tax commentators might suggest that maintaining our worldwide taxation of business income to avoid adding to the incentives for low-income countries to provide tax breaks is paternalistic. However, the more pressing problem is how to backstop a worldwide tax system that leaves low-income countries with little real ability to maintain their tax systems. Tax sovereignty is meaningless when states are unable to actually use their tax systems as a means of raising revenue and of advancing social and economic policy goals. Tax treaties can provide a mechanism for combating this inter-nation competition by allowing nations to work collaboratively to ensure that at least one of them claims the tax revenues associated with economic activity that has a nexus to both. To this end, tax treaties could play a critical role in fostering inter-nation collaboration, rather than competitiveness, in the tax arena.

Feminists should also resist the neo-liberal conception of all individuals as being self-reliant.<sup>82</sup> Such a perspective would also extend to an understanding that our collective sense of who we are, while in some ways delimited by state boundaries, is informed by our global citizenship. In other words, we might deconstruct the language of sovereignty to assert a kind of global or cosmopolitan membership that means that we care not only about the well-being of our immediate neighbour but also about the well-being of others around the world and, in particular, about the well-being of other women in the world.

### ***Towards a Feminist Cosmopolitan Use of Tax Treaties as an Instrument of Distribution***

Some feminists' concerns about the under-regulation of corporations, the footloose nature of global capital, and the importance of government action for the pursuit of women's equality suggest that we could offer different ways of designing and implementing tax treaties, particularly between high- and

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81. Some tax scholars have been working on an articulation of the concept of sovereignty that would require positive obligations or duties on nations to consider the implications of their tax policies on other states as part of their exercise of the power to tax. See, for example, Allison Christians, "Sovereignty, Taxation and Social Contract" (2009) 18 *Minnesota Journal of International Law* 99.

82. See Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004) and Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self* [forthcoming; on file with author].

low-income states. If feminist scholars were to devote some energy to an evaluation of tax treaties, they could potentially propose quite radically different uses than the uses that are dominant today. If women were to sit at the negotiating table in greater numbers, tax treaty negotiations might be conducted and resolved differently. Most fundamentally, though, it seems that feminists thinking about using tax treaties as one possible instrument of redistribution among nations might subsequently consider embracing a modified cosmopolitan form of justice.<sup>83</sup> Such a conception would require that we begin to view the situation of women's inequality around the world as an issue of global justice that is of importance to women in every country. We would both recognize that our relational positioning relative to other women in the world suggests that we have moral obligations to women in other countries (and that we are implicated in their inequality) while at the same time underscoring the importance of the state as a locus for achieving the advancement of women's political, social, and economic equality.

One of the limitations of using tax treaties to ameliorate women's inequity is that there is no guarantee that if tax treaties were designed to leave additional tax revenue in the hands of low-income states it would be used to increase women's social, political, and economic participation or the standards of living for low-income people around the world more generally. However, one of the advantages of increased globalization is that there are glimpses of a global commitment to which feminists could refer for some normative guidelines. The MDGs provide a beginning framework. One hundred and eighty-nine nations have agreed that the eight aims of the MDGs should be pursued. Those commitments could form the foundation for determining a just inter-nation sharing of tax revenue. If Canada was negotiating a tax treaty with a low-income country that provided evidence of a government commitment to: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases;

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83. Political theorists and philosophers such as Charles Beitz and Thomas Pogge might serve as starting points for analysis, although one does not need to go as far as they do to support the claim in this section. Indeed, the argument in this article underscores the importance of the state while at the same time recognizing its circumstance of being bound as a consequence of some arbitrariness that should not delimit our sense of relationship in a context of inequality. See Charles R. Beitz, "Cosmopolitanism and Global Justice" (2005) 9 *Journal of Ethics* 11; Thomas Pogge, "Real World Justice" (2005) 9 *Journal of Ethics* 29; and Thomas Pogge, "World Poverty and Human Rights" (March 2005) 19 *Ethics and International Affairs* 1. See also Kwame A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W.W. Norton and Company, 2006). For feminist engagement with cosmopolitan theory, see Seyla Benhabib, "Democracy, Demography, and Sovereignty" (2008) 2 *Law and Ethics of Human Rights*, <<http://www.bepress.com/cgi/viewcontent.cgi?article=1014&context=lehr>>; Ruth Buchanan and Sudhya Pahuja, "Collaboration, Cosmopolitanism and Complicity" (2002) 71 *Nordic Journal of International Law* 297; Nancy Fraser, "Reframing Justice in a Globalizing World" (2005) 36 *New Left Review* 69.



ensure environmental sustainability; and develop a global partnership for development, Canada (and other high-income states) might sensibly use income tax treaties as an instrument for assisting their global neighbours in the pursuit of these globally endorsed goals.

The precise form of tax treaties could also be a subject of experiment. Relative to other international instruments of distribution, tax treaties might be a preferable solution since they enable the low-income country to choose to spend the tax revenue on their own priorities, without the strings and interference traditionally associated with aid programs and without the under-regulated activity that can be associated with trade activities. Tax treaties could not only be designed to facilitate cross-border investment and work, which are important for the transfer of technology and the provision of employment, but they could also be used in some ways to limit the negative externalities associated with much under-regulated investment. For example, the benefits of tax treaties might be made available only to businesses making a contribution to the low-income state by providing stable, meaningful jobs; technology transfer and training; consistent longer-term investment; and pay equity and equal opportunities for women. Tax treaties might deny the advantages of reduced taxation to businesses whose sole aims are to strip countries of their natural resources and to exploit workers, the environment, and women's caregiving labour. Tax treaties could also be used to ensure that tax revenues are collected—parties to the treaty could agree to work together to ensure the enforcement of their tax systems by implementing the robust exchange of information provisions and by agreeing to assist with tax collection and the prevention of tax abuse and evasion.

Tax treaties present a modest instrument that could, if exposed to feminist scrutiny, provide a mechanism to resist the erosion of the state's role in revenue raising and redistribution. The hurdles that would need to be confronted, however, are multiple: government unwillingness to reconsider the aims of our international tax system, business interests in the status quo, the cognitive limits imposed on the human imagination by national boundaries, and so on. However, perhaps more significant than the possibilities for the promotion of a feminist conception of international justice presented by tax treaties is the opportunity that a discussion of tax treaties provides for (re)considering our theories of international justice and the mechanisms we have at our disposal to advance women's equality.<sup>84</sup>

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84. As stated by Margaret Thornton, the feminist project has the "twin aims of challenging the existing norms and of devising a new agenda for theory." See Margaret Thornton, "Feminist Jurisprudence: Illusion or Reality?" (1986) 3 *Australian Journal of Law and Society* 5 at 23.