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MINIMALISM ABOUT RESIDENCE AND SOURCE

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TABLE OF CONTENTS

INTRODUCTION

Reexamining citizenship as a basis for taxing individuals' worldwide income is timely for reasons that go beyond the issue's importance for individual U.S. taxpayers. The subject is also pertinent to global debates regarding the fundamental principles of international income taxation. Many prominent legal scholars and economists have argued in recent years that the norms and doctrines that traditionally informed international income taxation are now defunct.[1] These arguments have intensified in the last few years as a result of the momentum for multi-jurisdictional tax reform created by the Organization for Economic Development and

* Associate Professor, Peter A. Allard School of Law, University of British Columbia. I am grateful for research assistance by Eric Hou and Chris Ross, as well as comments on an earlier version of the paper by Mindy Herzfeld and Mitchell Kane.

1. *See, e.g.*, Alan Auerbach et al., *Taxing Corporate Income*, *in* DIMENSIONS OF TAX DESIGN: THE MIRRLEES REVIEW 837, 837 (Stuart Adam et al. eds., 2010); Rachel Griffith et al., *International Capital Taxation*, *in* DIMENSIONS OF TAX DESIGN: THE MIRRLEES REVIEW 914, 915-16, 982-83 (Stuart Adam et al. eds., 2010); DANIEL N. SHAVIRO, FIXING U.S. INTERNATIONAL TAXATION (2014); Reuven S. Avi-Yonah et al., *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 FLA. TAX REV. 497 (2009); Michael Graetz, *Taxing International Income—Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy*, 54 TAX L. REV. 261 (2001); Edward D. Kleinbard, *The Lessons of Stateless Income*, 65 TAX L. REV. 99 (2011).

Cooperation's (OECD) Base Erosion and Profit Shifting (BEPS) project. Yet such arguments are typically made in the context of discussions of how to tax (multinational) corporations. Because of the long-standing controversies—which many would say may never be resolved—surrounding the normative foundations of corporate income taxation itself,[2] it is a formidable task to articulate the appropriate directions for changing the policies for, and discourses regarding, international taxation in the context of corporate taxation. If, for instance, we do not know, or at least cannot agree on, what it means to optimize a corporate income tax, it should not be surprising that we do not know how to optimize the international dimension of such a tax.[3] But the converse may also hold: if one conflates international taxation and international corporate taxation, weaknesses in the traditional norms and doctrines of international taxation may consequently remain underexposed. While this conflation is what scholars of international taxation tend to learn to live with, examining fundamental principles of international taxation in the context of individual, and not corporate, taxation offers important opportunities for scholarly insights.

Taxing individuals' worldwide income on the basis of citizenship clearly involves issues of fundamental principle. Just within the last few years, scholars have become comfortable with asserting that "corporate residence" may be a close-to-meaningless concept.[4] This is both because the different core functions of a modern corporation or corporate group—production, management, financing, and distribution—can, and often do, simultaneously take place in different locations,[5] and because under the tax laws of many jurisdictions, the residence of a corporation is easily manipulated.[6] It does not follow from this, of course, that the concept of residence in international taxation is meaningless, given that the concept is equally important when applied to individuals. If it turns out that residence is a fundamentally inadequate concept to guide international taxation, period, then it must be the case that the concept of individual residence is also deeply problematic. Yet a number of the essays in this symposium appear to suggest precisely that conclusion. They show that residence, domicile, and other related legal criteria for taxing an individual's worldwide income are problematic in two ways. First, the manners in which different countries have used such criteria differ both substantially

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2. *See, e.g.*, Auerbach et al., *supra* note 1; Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1197 (2004).

3. The international deployment of capital may make the design of corporate taxation especially challenging, but "overcoming" such challenges requires agreement on what a good corporate income tax should do.

4. *See, e.g.*, Reuven S. Avi-Yonah, *The Case for a Destination-Based Corporate Tax*, 41 INT'L TAX J. 11, 11-12 (2015) [hereinafter Avi-Yonah, *The Case for a Destination-Based Corporate Tax*].

5. *See* Mihir A. Desai, *The Decentering of the Global Firm*, 32 WORLD ECON. 1271, 1271-74 (2009).

6. *See* Daniel Shaviro, *The Rising Tax-Electivity of U.S. Corporate Residence*, 64 TAX L. REV. 377, 381-85 (2011).

and arbitrarily;[7] and second, no way in which such criteria are currently used—or have been proposed to be used—commands anything close to a conceptually precise or morally convincing justification.[8] These two problems, arguably, form the backdrop to both the critique and the defense of the taxation of individuals' worldwide income on the basis of citizenship. If this summary is accurate, then it illustrates how the traditional principles of international taxation are problematic beyond the sphere of corporate taxation, even if the policy urgency and revenue consequences of these problems for the United States may not be as great as in the corporate sphere.

In this Article, I relate the discomfort with fundamental principles in taxing individuals' worldwide income to a problem that has attracted greater attention in recent years: the assignment of geographical sources to income. I suggest that there is substantial similarity between critiques of residence rules (of which critiques of citizenship-based taxation are examples) and critiques of source rules. However, I argue that problematic residence and source rules are only symptoms, not causes, of unsatisfactory conceptual paradigms in international taxation. Many scholars portray source and residence rules as inadequate means for achieving purportedly given normative objectives in the age of intense globalization and claim that we need better tools than these "meaningless" or "incoherent" concepts.[9] Instead, I argue that the meaningfulness and coherence of the residence and source concepts are easily defended, and they are unsatisfactory mostly because the purported normative objectives of international taxation either do not stand scrutiny or attract little consensus. The intellectual perplexity of international income taxation pertains to ends, not means.

To illustrate this perspective, I advance a position that I will call *minimalism about residence and source*. According to this position, residence and source are *a priori* interconnected concepts. As a result of their interconnected definitions, residence and source can have some meaning even if they are devoid of factual and normative content. The minimalist understanding of residence and source has two key theoretical implications. First, it suggests that dissatisfactions with the source concept and the problems associated with defining individual residence (as a basis for worldwide taxation) are of a piece: since source and residence are interconnected concepts, it would be surprising if one concept is incoherent while the other is perfectly clear. Second, minimalism actually deflects skeptical arguments against either source or residence. If minimalism is correct, our expectation (or tolerance) for the arbitrariness or ineffective-

7. *See* Hugh J. Ault & Brian J. Arnold, Comparative Income Taxation 431-36 (3d ed. 2010) (explaining the many differences between taxation criteria for residence in different countries).

8. *See generally* Daniel Shaviro, *Taxing Potential Community Members' Foreign Source Income* (N.Y.U. Law and Econ. Research Paper Series, Working Paper No. 15-09, July 1, 2015) [hereinafter Shaviro, *Taxing PCMs*], http://ssrn.com/abstract=2625732; Ruth Mason, *Citizenship Taxation*, 89 S. Cal. L. Rev. 169, 187-97 (2016).

9. See *infra* note 41 and accompanying text.

ness of particular or general classes of source or residence rules should completely be determined by two factors: namely, tax administration considerations and the existence and soundness of the normative objectives of international coordination in taxation. Basically, because the concepts of source and residence are minimal, they need additional principles to guide their application. It is the shortage and/or incoherence of such principles that have led to the dissatisfaction with the two concepts. Without articulating better normative principles, no amount of critique of the inadequacies of the concepts of source and residence will identify or address the true ills of the international tax system.

The Article proceeds as follows. Part I reviews the ways in which individual taxation on the basis of residence, domicile, and citizenship can all be seen as normatively arbitrary to a substantial extent and suggests that the arbitrariness of rules assigning tax residence to individuals is comparable to the arbitrariness of rules assigning source to income. Part II sets out the minimalist and interconnected definitions of residence and source, shows how they contrast with standard assumptions scholars have made about the residence and source concepts, and discusses how the definitions are doctrinally appropriate and theoretically enlightening. The most important implication of minimalism is that whether source and residence are normatively satisfactory concepts depends principally on whether normatively sound principles of international coordination are widely accepted. Part III argues that it is precisely disagreements about fundamental normative principles—controversies about ends, not means—that afflict the design of international taxation. To illustrate the utility of reflecting on such principles, as opposed to criticizing source and residence rules, I offer an argument showing that the principle of preventing double taxation is normatively unreliable because it entirely ignores the issue of tax incidence. The argument is quite intuitive; what is surprising is how infrequently critics of the current international tax system engage in similar reflections. A brief Conclusion follows.

I. The Basis for Selecting Individuals for Worldwide Taxation: Arbitrary Rules and Uncertain Normative Foundations

Residence, domicile, and citizenship are all members of a family of legal criteria that countries have used to determine which individuals are taxable on their worldwide income. Understood this way, residence, like domicile, is a concept with specific factual content. In fact, the terms "residence" and "domicile" as factual concepts have different meanings in different jurisdictions.[10] However, being a "resident" is also often used to capture the very idea of a person subject to taxation on his or her worldwide income. Thus, Article 4(1) of the U.S. Model Income Tax Convention defines the term "resident of a Contracting State" as meaning "any person who, under the laws of that Contracting State, is liable to tax therein by

10. Ault & Arnold, *supra* note 7, at 431-34.

reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature."[11] Here "resident" is an umbrella term and denotes a variety of ways for determining who is subject to worldwide taxation. If we understand "residence" in this abstract sense, citizenship-based taxation is a species of resident taxation (as the U.S. Model Treaty language makes clear). Of course, some writers may hold more specific notions of residence such that the term cannot encompass mere citizenship.[12] They may thus apply other labels to the umbrella concept, such as "domestic taxpayers," "potential community members,"[13] and so on. The terminology does not matter, however, as long as we keep track of what is at stake.

In the U.S. context (as perhaps in many others), citizenship is more easily-applied concept than both individual "residence" and "domicile," when the latter are understood as specific factual concepts.[14] It therefore offers a more bright-line criterion for individual taxation than the latter two concepts. The issue is whether that is a sufficient justification for using the citizenship criterion.[15] In considering this issue, arguably no weight should be given to the fact that the United States is "an outlier" in using citizenship as a basis for worldwide income taxation of individuals. Australia is the only country that taxes corporate groups thoroughly on a single-entity basis by disregarding all intra-group transactions.[16] Japan is the only country that taxes imputed income from home ownership by depreciating

11. Model Income Tax Convention § 4-1 (U.S. Treasury 2006).

12. *See, e.g.*, Shaviro, *Taxing PCMs*, *supra* note 8, at 3 (claiming a tension between taxation based on ongoing affiliation and the notion of residence). This kind of terminological issue is by no means unique to residence, of course. *See also* Canada Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) §§ 3-4 [hereinafter "ITA"] (income must have a "source" to be taxable, but the concept of source is distinct from the concept of the location of a source). In the United States and generally in tax treaty contexts, the source of income—in the sense of geographical assignments of income—is denoted by varied phrases like income "arising from," "from," "from within," or "attributable to." However, for some countries (like the United Kingdom and Canada), "source" has a meaning distinct from geographic assignment: some types of income have sources while others (like windfalls) purportedly do not. Used in this sense, income from a lottery winning could not possibly have a source in any country.

13. Shaviro, *Taxing PCMs*, *supra* note 8, at 3.

14. The definition of residency for individuals under the federal income tax, for example, differs for aliens and U.S. citizens for some purposes. The U.S. residency of U.S. citizens can be a matter of a complex and uncertain factual determination, notwithstanding Treasury regulations under §§ 301.7701(b)-1 through 301.7701(b)-9. Richard E. Andersen, Analysis of United States Income Tax Treaties 2.01(3)(b)(iii)-(iv) (2010); *see also* Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 Iowa L. Rev. 1289, 1291 (2011) [hereinafter Zelinsky, *Citizenship and Worldwide Taxation*].

15. *See generally* Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 Fla. Tax Rev. 117 (2014); Edward Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 Mich. J. Int'l L. PAGE, PAGE (#2 FROM unprinted version) (2015) [hereinafter Zelinsky, *Defining Residence*].

16. *See* Ault & Arnold, *supra* note 7, at 398-99.

the basis of homes owned without granting any depreciation deduction.[17] China is the only country that taxes indirect transfers of shares of resident companies on a look-through basis.[18] These are just a few of many examples of arguably good legal rules that more countries should consider adopting, rather than refraining from because few other countries has made the adoption.[19] The real question is, clearly, whether one rule is better or worse than the others.

Other scholars have examined this question closely,[20] and I believe their findings are consistent with the following conclusion: there are quite different bases for determining which individuals are subject to worldwide taxation; none of the major rules are clearly superior to others; and all are normatively arbitrary to substantial extents. The United States does no worse than other countries overall, but it does not do much better either.

This appraisal can be substantiated in various ways. Consider first the contrast between two main ways of determining individual taxability on worldwide income: mere physical presence versus a more permanent affiliation or allegiance. These two types of criteria are strikingly different. In a globalized world, spending a given number of days in a country in a year—or even in a period of several years—is a requirement more and more easily met by some individuals who otherwise have little connection with the country, and more and more easily flunked by others who otherwise have deep connections with that country. Therefore, taxation on the basis of physical presence could easily be seen as more problematic than citizenship taxation and seems far from "straightforward."[21] It is therefore not surprising that a number of countries refrain from taxing individuals on their worldwide income on the basis of a single-year or even multi-year physical presence alone.[22] To put it differently: it is now much easier than before for measures of physical presence to diverge from measures of long-term affiliation and allegiance, while these two types of criteria for

17. *See id.* at 217.

18. *See* Wei Cui, *Taxing Indirect Transfers: Improving an Instrument for Stemming Tax and Legal Base Erosion*, 33 VA. TAX REV. 653, 684-88 (2014). As these examples show, many a country can claim, referring to *some* provision in its income tax laws, that "we are the only country that does things this way." Esotericism in the law is rather egalitarian. It delights comparativists, but often may be merely a consequence of the facts that the number of countries in the world is small (not to mention that the number of countries whose laws are typically considered) relative to the range of possible permutations of reasonable legal rules, and that legislators tend, for the most part, to copy from models, templates, and precedents.

19. This point is well made by Reuven Avi-Yonah in *Constructive Unilateralism: US Leadership and International Taxation*, Univ. of Michigan Public Law Research Paper No. 463 (June 25, 2015), http://ssrn.com/abstract=2622868; Kirsch, *supra* note 15, at 206-10; Zelinsky, *Defining Residence*, *supra* note 15, at PAGE.

20. *See generally supra* notes 8 & 15.

21. Shaviro, *Taxing PCMs*, *supra* note 8, at 1-12. For a discussion of what one might see as an instance of this issue, see Mark Hoose, *Trading One Danger for Another: Creating U.S. Tax Residency While Fleeing Violence at Home*, 12 FLA. TAX L. REV. 827 (2012).

22. AULT & ARNOLD, *supra* note 7, at 431-36 (examples of Australia, the Netherlands, Sweden, and Japan).

individual worldwide taxation presumably require very different normative justifications.

Consider next the difference between citizenship taxation and taxation on the basis of domicile (as varied as are the interpretations the latter term is subject to). Professor Zelinsky is of course correct to point out that both measures track long-term affiliation.[23] Whether the former is, as Professor Zelinsky claims, a good "proxy" for the latter, however, is a question that should be answered by asking how often it is that citizenship and domicile will diverge: the more frequent the divergence, the less good the proxy. The answer to that question, I believe, is that they can diverge quite often, and may do so even more often in the future. It is perhaps more accurate to say that both citizenship and domicile can be important forms of long-term affiliation, even though they are substantially different from each other. But this implies that choosing one over the other as the basis for taxing an individuals' worldwide income—as most countries do—seems to be quite arbitrary, and arbitrary in normatively significant ways.[24]

Finally, consider one aspect of the rules of some countries (such as Canada) for determining residency: some relatively weak ties to the country (e.g. physical presence, ownership of assets) are sufficient for creating residency status, but such status is negated for all purposes (i.e. not just for purposes of applying the relevant tax treaty) if the country happens to have an income tax treaty with another country and the individual to which the treaty may be applied is treated under the treaty tie-breaker rules as a resident of the other country.[25] This type of rule demonstrates two implicit assumptions: (1) the status of individual residency can sometimes be viewed as inherently a matter of allocating tax rights among different countries, and (2) when there is no need to coordinate with other countries, a country may be willing to impose the worldwide taxation on relatively weak grounds. The second assumption suggests that if citizen-

23. *See* Zelinsky, *Citizenship and Worldwide Taxation*, *supra* note 14, at 1323-24.

24. Under some countries' rules, past affiliation or future intended affiliation may also be regarded as relevant to determining whether an individual is a "domestic taxpayer" (or "resident" in the abstract sense of the term). *See* Ault & Arnold, *supra* note 7, at 432-33. It is clear that these may also diverge from ongoing affiliation and from each other.

25. Pursuant to ITA § 2(1), "an income tax shall be paid . . . on the taxable income . . . of every person resident in Canada." R.S.C. 1985, c. 1 (5th Supp.) § 2(1). The term "resident" is not defined in the ITA other than by § 250(3) to include persons "ordinarily resident in Canada." The term "ordinarily resident" has been interpreted to include persons who have been physically absent from Canada for extended periods of time but who continue to own assets in Canada. *See, e.g.*, *Gaudreau v. R.*, [2005] 1 C.T.C. 2701, 2005 D.T.C. 66; *McFadyen v. R.*, [2000] 4 C.T.C. 2573, 2000 D.T.C. 2473; *Johnson v. R.*, [2007] 4 C.T.C. 2359, 2007 D.T.C. 1022. Alternatively, § 250(1)(a) of the ITA deems persons not factually considered ordinarily resident in Canada to be resident in Canada throughout the taxation year if the person has been physically present in Canada in the year for a period of, or periods the total of which is, 183 days or more. However, § 250(5) of the ITA deems persons otherwise considered resident in Canada (either factually or deemed) not to be resident in Canada if the person is, under a tax treaty with another country, considered resident in that other country and not Canada (*i.e.*, by reason of the treaty's tie-breaker rules).

ship-based taxation can seem arbitrary under certain circumstances, so can many other known rules for determining the scope of individual worldwide taxation.

None of these observations are very novel. They merely aim to shift our attention from questions such as: "Whose method for determining resident status is more of an outlier?" or "Whose definition of residence casts a wider net?" to the question: "Whose method of delineating the scope of individuals for worldwide taxation has a more compelling basic moral justification?" Among the scholars who take opposing views with respect to citizenship taxation,[26] none, I believe, purports to offer an answer to this question. If the workhorse ideas of the benefits principle and the principle of ability to pay do not (adequately) justify citizenship-based taxation, do they satisfactorily ground any other rule? Are we anywhere close to having a coherent moral theory of national community membership? Traditional public finance theory does not attempt to address the issue of who should be subject to income taxation.[27] In terms of assigning residence to individuals, therefore, we seem to take normatively arbitrary rules for granted.

The rest of this Article aims to connect these observations with a very different set of rules that are fundamental to international taxation as we know it. Rules assigning geographical sources to income have also been subject to fundamental critiques, so much so that many scholars have claimed that ascribing source to income is not only artificial but also an essentially incoherent exercise.[28] One scholar recently observed that skepticism about the coherence of the concept of source may now be the "dominant view in current academic analysis of international tax policy in the United States."[29] The question I would like to propose is whether the assignment of source to income is any more incoherent than the assignment of residence (in the abstract sense, understood as the status of a "domestic taxpayer" or PCM) to individuals. I would argue that, if many source rules do not have adequate normative justifications, individual residence rules seem not too different in this regard. Similarly, if different countries seem to adopt rather different source rules for (the same type of) income, without obvious justification, this is a point of commonality between source and residence rules. Moreover, if it is sometimes impossible, in any principled fashion, to determine that an item of income should be sourced to one country as opposed to another,[30] the same can be said of many instances of the assignment of residence. Given all this, can we really claim that we have better grips on the notion of individual residence (deliberately putting corporate residence aside for now)—that our intu-

26. In addition to the work cited above, see generally Reuven Avi-Yonah, *The Case Against Taxing Citizens*, 58 Tax Notes Int'l 389 (2010).

27. Shaviro, *Taxing PCMs*, *supra* note 8, at 21.

28. See literature cited in note 41, *infra*.

29. Mitchell Kane, *A Defense of Source Rules in International Taxation*, 31 Yale J. on Reg. 311, 319 (2015).

30. *See* Auerbach et al., *supra* note 1, at 870-71.

itions are more defensible in this regard—than we do on the notion of source for income?

In the current state of the literature, surprisingly, many seem to answer this last question in the affirmative.[31] The seemingly "dominant" skepticism about source is not taken to carry over to individual residence. The extensive discussion of U.S. citizenship-based taxation that has led to this symposium, however, potentially unsettles this view. This Article does not intend to go into the details of source rules, any more than it intends to repeat the classification and evaluation of residence rules. But, to see the plausibility of the similarities between residence and source rules, I would suggest the following when we compare the two sets of rules.

First, both because at least many of the purported difficulties with defining corporate residence, and because more fundamentally of the artificiality of the corporate form itself, it makes sense to disregard the presence of corporate entities entirely for purposes of the comparison. That is, any source rule that presumes the existence and identity of corporations should be left aside, just as residence rules for corporations are.

Second, income tax laws tend to classify income much more finely than they classify taxable persons, because, even in purely domestic settings, the character of income is used to track a wide assortment of considerations about how to measure both the quantity and timing of income and how to apply differential tax treatment to them. By contrast, in the domestic setting, we do not need to classify persons as much, since we do not need market transactions to *measure* a person, and the issue of timing is also less important for persons. Much of the complexity of source rules arises from using different source rules for income items of different characters. Therefore, the proper comparison is perhaps between residence rules and source rules for just one type of income.[32] If one compared, for example, the different ways in which wages (or royalties, or capital gain, or any other particular type of income) may be sourced, would the discussion of the coherence, adequacy of normative justification, arbitrariness, and manipulability of the relevant rules differ very much in character from the discussion of residence rules in connection with citizenship-based taxation?

My own sense is that the answer to this last question is "No." Source rules and residence rules are problematic for similar types of reasons. For those who share this sense, the next Part offers a potentially useful theoretical explanation: I argue that examining the basic meaning of source and residence shows that our unease with one set of concepts may be of a piece with our unease with the other.

31. See literature cited in note 41, *infra*.

32. Alternatively, we can try to imagine source rules for income that is undifferentiated as to character. If that is imaginable, would source rules look very different from the residence rules that we are familiar with?

II. A Minimalist Understanding of the Concepts of Residence and Source

Consider the following statements regarding the concepts of source and residence for income tax purposes:

(i) A *resident* of country X is a person who may be subject to tax on her income by X regardless of whether the income is derived from a *source* within X; and

(ii) An item of income is derived from a *source* within X if it may be subject to the income tax in X regardless of whether the person deriving such income is a *resident* of X.[33]

I would suggest that statements (i) and (ii) do not express something that just happens to be true. Instead, they can be seen as theoretical *definitions* of the concepts of residence and source: they state the necessary and sufficient conditions for legal rules to be recognized as assigning sources and residences to income and persons; they specify what we mean essentially by the terms of residence and source. Of course, these definitions are not intended to capture what the terms "residence" and "source" mean under the actual laws of particular countries—which generally contain a lot more content than (i) and (ii). To understand what "residence" means under the Internal Revenue Code (IRC), for example, one has to look, among other places, at IRC § 7701 and related regulations. To understand what "source" means, one has to look, among other places, at IRC § 861. But statements (i) and (ii) capture what is generally true of actual legal definitions of residence and source and what *must* be true of any proposed definition.

Many implications, I believe, follow from statements (i) and (ii): the validity and informativeness of these implications constitute the definitions' virtues. In the following sections I elaborate four such implications. First, while the source and residence concepts are not empty, their meanings are also minimal in many important ways. In particular, they do not require the assignment of source and residence to track any intrinsic spatial properties of income or persons. Nor do they impose any normative requirement on such assignment. Second, the concepts of source and residence are inter-dependent and neither is primary relative to the other. Third, the minimalist content of the concepts renders them immune from much of the skeptical attack that many economists and legal scholars have lodged against them. They are clearly coherent concepts, even if, being minimal, they offer little normative guidance in themselves. Fourth, the minimal content in the source and residence concepts can be seen as a

33. A variation is the following joint definition: for any item of income, its source(s) is (are) the country (countries) that is (are) entitled to tax it regardless of the residence(s) of the person owning the income; for any person, his/her/its residence(s) is (are) the country (countries) that is (are) entitled to tax his/her/its income regardless of the source(s) of the income. Both sets of definitions permit an item of income to have multiple sources and a person to have multiple residences.

consequence of the scarcity of useful normative principles in the realm of international taxation, and not the cause of such scarcity. In fact, if there had been a greater supply of widely-accepted normative principles of international taxation, minimalism about the concepts of residence and source would be less compelling: one would then be able to offer *functionalist*, not minimalist, definitions of the concepts as alternatives. Overall, minimalism about source and residence helps us achieve better focus on what is truly controversial in the design of international taxation.

A. *Minimalism*

Minimalism about the concepts of source and residence claims that we apply these concepts subject to only three possible constraints:

(a) the structure articulated in statements (i) and (ii) above;

(b) unilateral enforceability consideration; and

(c) agreed-on normative principles for coordinating international taxation among countries, *if any*.

There is no other constraint on the use of the concepts. Because of the obvious circularity in statements (i) and (ii), (a) constitutes almost no constraint. And because enforceability considerations are highly circumstance-specific, one should not expect (b) to mitigate normative arbitrariness in residence and source rules. It is only constraint (c) that can impart coherent normative content to such rules. But if agreed-on normative principles for coordinating international taxation are themselves missing, the concepts of source and residence and the rules that define them will necessarily appear inadequate in many circumstances. A strong version of minimalism about residence and source can be understood as making the further claim that, in fact, only constraints (a) and (b) are binding. Unsatisfactory source and residence rules *result* from the failure of constraint (c) to bind; they do not *cause* such failure. A weaker version of minimalism, by contrast, would simply claim that the strengths of constraints (b) and (c) determine the strength of the residence and source concepts, while being agnostic about how strong these constraints are.

To see the utility of minimalism, consider first the minimal constraints imposed by definitions (i) and (ii) on the ascription of residence and source. *Any* country can be the source of an item of income, as long as the country is entitled under a legal rule to tax the income regardless of the residence of the owner of the income. The same is true for the assignment of residence to a person given a definition of source for income. The only constraint imposed by definitions (i) and (ii) is that they must be satisfied simultaneously: Residence rules for persons and source rules for income must be simultaneously given.

The minimal constraints these definitions impose can be appreciated in different ways. Perhaps most importantly, observe that the definitions do not refer to any spatial property of income or persons. *Any* country can be assigned as the residence of a person as long as definition (i) is satisfied, and likewise for source and definition (ii). This stands in contrast with the view that the assignment of residence (or source) to persons (or income) is a matter of detecting some spatial fact about the person (or income). This latter view is perhaps most frequently expressed by the purported intuition that someone can be a resident of a country only if he is sufficiently "connected" with that country, and that an item of income can be sourced to a country only if it is sufficiently "connected" with that country.[34] The term "connection" implies that the diverse legal definitions of residence and source under the laws of different jurisdictions simply express divergent views about a common subject matter, namely what some basic spatial facts of persons (and their activities) and of income (and the activities that generate income) consist in. The existence of such essential facts or properties—a "connection"—is what justifies the assignment of residence or source. However, *what* such essential properties consist of—such that it would explain the variety of actual assignments of residence and source under the laws of different jurisdictions—is usually left vague and metaphysical. What definitions (i) and (ii) suggest, by contrast, is that there is no such factual element in the basic conceptual structure of source and residence. Both are *purely legal* concepts free of any essential factual content. Talks of "connection" are mere fiction and pretense.

The idea that residence and source fundamentally refer to spatial facts about person and income is widely embraced, including by both critics of the concepts of residence and source and their defendants. For example, many scholars argued in recent years that it is (either often or sometimes) impossible to determine the source of income, and *therefore* that the concept of source is a meaningless one.[35] This argument implicitly assumes that assigning source to income involves a factual determination, which sometimes seems impossible. Likewise, those who defend the coherence of the concept of source have claimed that *some* intrinsic spatial feature of income should be relevant in the assignment of a source to it. Mitchell Kane asks us to imagine, for example, a situation where someone buys a lottery ticket in London, flies to New York City, and during a layover in Iceland, scratches the ticket to find that he has won.[36] He suggests that no one would be able to accept Iceland as the source of the person's income, simply based on our intuitive contemplation of the spatial property of income. Kane argues that, therefore, the concept of source itself contains (factual) content that constrains its application.[37] The definition of source in Statement (ii) above precisely rejects this kind of claim.

The same rejection of any essentialist claim about residence follows from Statement (i). By defining residence in terms of either physical presence or domicile, for example, one has simply chosen from two different,

34. *See, e.g.*, Fred B. Brown, *An Equity-Based, Multilateral Approach for Sourcing Income Among Nations*, 11 FLA. TAX REV. 565, 574-85 (2011).

35. *See infra* note 41.

36. Kane, *supra* note 29, at 331.

37. *Id.*

reasonable (but still arbitrary) ways of fixing the meaning of residence. Physical presence and domicile do not capture some more abstract spatial property that is the person's connection to a country.

Note that the above does not imply that applying the concepts of residence or source under any given body of tax law involves no fact finding. Once the law of a given jurisdiction has specified that residence is to be determined by reference to physical domicile or the length of stay, for example, courts, taxpayers, and tax administrators will have to ascertain the meaning of these latter spatial concepts. Instead, the claim of minimalism about residence and source is that there is little that constrains the choice of spatial properties to legally define the notions of residence and source in the first place. Minimalism also implies that when we say that something is a better residence (or source) rule than another, it in no ways means that we have somehow better captured a spatial fact about the person (or the relevant type of income).[38]

Another important feature of definitions (i) and (ii) is that they contain little normative content. They do not imply by themselves that the source and residence countries should coordinate to make sure that an item of income is taxed only once. Indeed, they do not even assign only one source to any item of income or one country of residence to any given person. To avoid double taxation or (more strongly) to implement the normative "single tax principle,"[39] source countries need to coordinate among themselves, as do residence countries among themselves, just as source countries need to coordinate with residence countries. How they should engage in such coordination is not implied by the definitions.[40] It should also be transparent that legal rules satisfying definitions (i) and (ii) are by no means guaranteed to achieve efficiency, fairness, or any other relevant normative criteria for international taxation.

One might ask: Given the minimalism of these definitions, why are they useful at all? Why do they seem to say *something*? I believe that the answer is that they implicate the substantive idea of worldwide taxation. Imagine a jurisdiction that practices "pure territorial taxation"—all individuals and legal entities are taxed on any income only if such income arises in that jurisdiction. In this situation, it may be said that the notion of residency has no use in such jurisdiction, since residents and nonresidents

38. Contrast this with Kane, who asserts in connection with the concept of source that the essential role of legal theorists of international taxation is to identify the factual essence of income that serves as the basis of assigning source to income. Kane, *supra* note 29, at 320.

39. *See generally* Reuven S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 TAX L. REV. 507 (1997).

40. In contrast, some authors tie the concepts of source and residence to the purpose of coordination, which presumably implies some normative goals. *See, e.g.*, Mitchell Kane's claim that "source" plays a "base-contracting" function by limiting the residence country's taxing power by requiring it to relinquish primary taxing rights to source countries (for certain types of income). Kane, *supra* note 29, at 323 ("[A]t least as currently construed, the basic function of the source principle (and the source rules that are supposed to reflect that principle) is to coordinate, alongside the residence principle, taxing claims of various jurisdictions").

are taxed alike. But it could equally be said that the notion of source has no use, either; instead of saying what income is from sources within that jurisdiction, one can simply say what income is taxable in that jurisdiction. In other words, the practice of worldwide taxation is what gives *some* content to the circularity of the definitions of residence and source under Statements (i) and (ii).

B. *Interdependence and Doctrinal Utility*

An important theoretical implication of definitions (i) and (ii) is that they show source and residence to be *a priori* or intrinsically interconnected concepts. One cannot understand one without the other. Whenever someone is trying to offer a definition of residence, one must at least implicitly have in mind a definition (or range of possible definitions) of source. The converse is also true: we don't know whether some country is the source of an item of income unless we know what might characterize the residence of a person owning the income.

This implication is controversial (and informative if correct) because quite often, legal scholars have written as though the ascription of source to income and the ascription of residence to persons are entirely independent matters.[41] Thus, discussions of the proper definition of source—or whether such a coherent definition is possible—have proceeded without discussing the definition and coherence of the concept of residence, while the converse also holds.[42] Even scholars who have asserted that *both* concepts are incoherent have written as though they are incoherent for independent reasons.[43] If definitions (i) and (ii) are correct, then these discussions are incomplete: it is not possible for one member of the pair of concepts to be coherent (or incoherent) without the same being said about the other member.

Moreover, the definitions imply that neither concept is primary relative to the other. In a recent exploration of the conceptual structure of the notion of source, Mitchell Kane suggests that the concept of residence,

41. Recent scholars who have tried either to define residence or to question the coherence of the concept independently of the concept of source include Desai, *supra* note 5, at 1283; Omri Marian, *Jurisdiction to Tax Corporations,* 54 B.C. L. REV. 1613*,* Parts II-III (2013). Scholars who have tried either to define source or to question the coherence of the concept independently of the concept of residence include Hugh Ault & David Bradford, *Taxing International Income: An Analysis of the U.S. System and Its Economic Premises*, *in* TAXATION IN THE GLOBAL ECONOMY 11, 31 (Assaf Razin & Joel Slemrod eds., 1990); Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1311 (1996) [hereinafter Avi-Yonah, *The Structure of International Taxation*]; Robert Green, *The Future of Source-Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18, 29 (1993); Kane, *supra* note 29, at 331-39; Daniel Shaviro, *Does More Sophisticated Mean Better?* 54 TAX L. REV. 353, 353 (2001); David F. Bradford, *The X Tax in the World Economy* 18, 21 (NBER Working Papers, 10676/Aug. 2004), http://www.nber.org/papers/w10676.

42. *See supra* note 41 and accompanying text.

43. *E.g.*, Avi-Yonah, *The Case for a Destination-Based Corporate Tax*, *supra* note 4, at 2(a)-(b).

while not issuing from any "natural law," relies on straightforward facts about the world concerning the physical presence of individuals.[44] Our grip on the concept of source, by contrast, is weaker.[45] In an opposite move, Adam Rosenzweig proposes to define corporate residence by reference to source rules taken as given.[46] What the two authors have in common is that both are willing to give primacy to one member of the pair of concepts, residence and source. The definitions of residence and source advanced here, by contrast, claim that we cannot not have firmer intuitions about either concept, since the two concepts are inter-dependent.

Acknowledging the inter-connectedness of the residence and source concepts is important from a doctrinal perspective. For the dependence of the concept of residence on the concept of source, evidence is directly available from Article 4(1) the OECD and U.N. Model Tax Conventions:

> [T]he term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. . . . This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.[47]

The centrality of the concept of source in this definition is unmistakable.[48] As to the dependence of the concept of source on the concept of residence, the following reflections may be useful. Often it is difficult to distinguish between an item of income that is labeled as having a source outside country X, and an item of income that is labeled as having a source within country X, but exempt from country X tax in the hands of non-residents. For example, U.S. taxation of the passive income of non-residents is based on an elaborate set of source rules enacted in statute (chiefly IRC Section 861). Under Canada's Income Tax Act, by contrast, the concept of source is regarded as essential to the very nature of taxable income—income without a source is not taxable[49]—and the geographical source of income is merely one aspect of the factual essence of the source of income.[50] The source of income is, therefore, a purely factual determination. Nonetheless, the U.S.-Canada treaty requires the competent authorities of the two countries to agree "to the same determination of the source . . . of particu-

44. Kane, *supra* note 29, at 328-29.

45. *Id.*

46. *See* Adam H. Rosenzweig, *Source as a Solution to Residence*, 17 Fla. Tax Rev. 471, 505-26 (2015).

47. U.N. Model Tax Convention art. 4(1). Art. 4(1) of the United States Model Convention adopts similar language while adding citizenship and place of incorporation as possible criteria determining the scope of residence taxation.

48. The OECD/UN Commentaries on art. 4(1) add very little.

49. ITA, R.S.C. 1985, c. 1 (5th Supp.) § 3.

50. That the source of income contains a geographical aspect is explicitly recognized in statute, but the nature of "source" is rarely elaborated. *See* ITA, R.S.C. 1985, c. 1 (5th Supp.) § 4.

lar items of income."[51] This "agreement to agree" would seem impossible in many cases, given that the two sides operate with completely difference source concepts. The only explanation, I believe, is that everyone finds it perfectly intuitive to switch from a concept of source that is either fact-based, or restricted to a particular legal regime, to the minimalist concept of source in the international taxation context—source is whichever country that may subject the income of a non-resident to tax. A closely related example is treaty resourcing rules. Treaties often contain rules agreeing that any income is to be sourced to country X if, independent of such agreement, X and the other contracting state agrees that X may tax the income when received by a non-resident.[52]

C. *Coherence and Immunity to Skeptical Attack*

An additional advantage of minimalism regarding residence and source is that it casts a new light on certain skeptical arguments that either have been or can be made against the two concepts. As discussed in the Introduction and Part I above, many commentators on international taxation have expressed deep misgivings about the concepts of source and of corporate residence. The strongest way in which such misgivings are expressed is that the concept of source is "meaningless" or "incoherent." As applied to source,[53] such charge of incoherence is usually based on two types of skeptical arguments: first, it is questioned whether it is *always* possible to make a non-arbitrary determination of the source of an item of income;[54] second, it is questioned whether one can *ever* make a factual determination about source that is not arbitrary, at least to significant degrees. Clearly, the second type of argument is more critical. Hugh Ault and David Bradford, for example, gave voice to the second type of challenge when they asserted that the concept of source of income is fundamentally ill-defined. Their ostensible argument is that the concept of source has no place in the Haig-Simons definition of income: "[The Schanz-Haig-Simons] income concept is not susceptible to characterization as to source at all. Income in this definition attaches to someone or something that consumes and that owns assets. Income does not come from some place. . . ."[55]

This argument, rather surprisingly, has been taken by a number of legal scholars to state a definitive "economist's view" of the impossibility of assigning source to income.[56] But the argument can be countered in fairly straightforward ways. I believe that most cogent reply to the argument is

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51. United States-Canada Income Tax Convention, art. XXVI, 3(c), Sept. 26, 1980, 1469 U.N.T.S. 189.

52. *See, e.g.*, U.S. Model Tax Convention, art. 23(3).

53. In Part I, I argued that if such misgivings were justified, the concept of individual residence should perhaps be seen as equally vulnerable.

54. *See* Auerbach et al., *supra* note 1, at 839, 870-71.

55. Ault & Bradford, *supra* note 42, at 31; *see also* Bradford, *supra* note 41, at 18-19.

56. *See, e.g.*, Avi-Yonah, *The Structure of International Taxation, supra* note 41, at 1310 n. 32; Kleinbard, *supra* note 1, at 143 n. 161.

that "source" concept is used to allocate taxing rights in the international context. The Haig-Simons definition of income is already meaningful in a purely domestic context. Indeed, arguably any fundamental notion of income needs to make sense in a nationless context—in a world that has no national divisions but does have a government levying taxes. It is thus not at all surprising that the "source" concept makes no appearance in the definition of income. Moreover, insofar as "residence" also derives its meaning essentially from its use to allocate taxing rights in the international context, a fundamental definition of income that is applicable in a nation-less context would not refer to the concept of residence, either. Although Ault and Bradford imply that one can read the notion of "residence" into the Haig-Simons definition of income,[57] that implication is unconvincing: on the face of it, the Haig-Simons definition of income is completely silent on the notion of residence as well. Simply examining the notion of income, in other words, may tell us nothing about the meaningfulness or utility of concepts that are used to allocate taxing jurisdiction in the international context.

Contrast the Ault-Bradford arguments with the arguments of Michael Keen and David Wildasin in an important theoretical article on international taxation.[58] Keen and Wildasin point out that although many economists have thought that the superiority of residence-based income taxation (over source-based taxation) and of destination-based commodity taxation (over origin-based taxation) follows from the Diamond-Mirrlees theorem regarding production efficiency,[59] the Diamond-Mirrlees theorem actually does not apply in the international context because, in such context, there are different governments each subject to binding national budget constraints. The Diamond-Mirrlees framework, by contrast, assumes that there is only one government and one budget constraint. Because Keen and Wildasin accept—as seems the only reasonable thing to do—that the existence of binding national budget constraints is an essential feature of international public finance, they go on to develop a different theoretical framework to characterize Pareto-efficiency in the international context. If, by contrast, they had made an argument like Ault and Bradford's, they would have said: "There are no such things as binding national budget constraints, because there are no such constraints in the Diamond-Mirrlees framework."[60]

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57. *See, e.g.*, Ault & Bradford, *supra* note 41, at 31.

> Income in this definition attaches to someone or something that consumes and that owns assets. . . . To the extent that income describes an activity, it is . . . that of consumption and wealth accumulation, and its location is presumably the place of residence of the person doing the consuming and accumulating.

58. Michael Keen & David Wildasin, *Pareto-Efficient International Taxation*, 94 Am. Econ. Rev. 259, 259-60, 265 (2004).

59. The Diamond-Mirrlees theorem states that, given a certain set of assumptions, any Pareto-optimal tax will have to ensure production efficiency.

60. Daniel Frisch made a similar comment on Ault and Bradford:

One can thus counter skeptical arguments against source (and residence) without resorting to minimalism about residence and source. However, the counter-argument just described implies that sources of income are real facts about the world, just like binding national budget constraints. Minimalism takes a somewhat different tack and deflects such skeptical arguments in another way. According to minimalism, if, as a definitional matter, source and residence are concepts that are free of intrinsic factual content (as minimalism implies), then it is indeed conceivable that sometime we would want to speak of source or residence even when there is no fact of the matter. It therefore follows that the assignment of source indeed cannot *always* proceed as a matter of factual determination.[61] Further, minimalism suggests, any factual content that is bestowed on the concepts of source and residence is also extraneous in the sense that it does not follow from the definitions of these concepts. This acknowledges the element of arbitrariness in all source (and residence) assignments. In short, skepticism about source (or residence) is correct insofar as it is skeptical about the concept of source (or of residence) as involving factual determinations. But, if the latter represents a mischaracterization of the conceptual structure of source and residence, skepticism is misguided. To put it differently, it is difficult to be skeptical about statements that say truly little.

D. *Functionalism and the Constraint of Normative Principles*

The definitions of the concepts of residence and source at the beginning of this Part are glaringly circular and therefore almost empty by themselves. How does one get from these definitions to the actual legal rules for source and residence that countries use? This question can also be framed as: what are the other constraints on the application of the two concepts, such that they are applicable at all to the real world? As stated earlier, there are two possible sources of further constraints. The first is unilateral enforceability. The other is coordination among different nations to achieve whatever it is that nations agree to achieve.

By far the most important determinant of the assignment of source and residence is likely to be tax administration. Governments tax what they can get their hands on. Although modern governments rely to remarkable degrees on self-assessment and self-reporting for tax compliance, a government's capacity to detect evasion and enforce tax liabilities still depend importantly on how well-positioned it is to monitor particular

> [J]ust because neither [Haig nor Simons] considered the source of income does not imply that it cannot be studied. A well-specified model should . . . analyze the incentives effects of current source rules and . . . their effects on efficiency and welfare. . . . [It] may yield a consistent and valuable foundation for source rules[.]

Daniel J. Frisch, *Comment on Ault and Bradford*, *in* Taxation in the Global Economy 50 (Assaf Razin & Joel Slemrod eds., 1990).

61. As the treaty re-sourcing rule, discussed *supra* in note 52, and other similar legal rules suggest, the law does not pretend that source is always a matter of a factual determination either.

income-generating transactions. Thus, the spatial dimension of income may be more important than the spatial dimension of persons. Whoever is best-positioned to monitor an income-generating transaction is likely to have a prima facie claim to primary taxing jurisdiction over that item of income.[62] In this sense, source taxation is primary. Ault and Bradford are thus perfectly right in surmising that "force majeure has been as important as any ethical conception of sovereignty in producing a general acceptance of the priority of the 'source' jurisdiction to tax particular transactions."[63] Most of what we think of as the factual bases for source determinations—the location of business activity for active income, the location of income-generating assets for passive income—have transparent connections to the capacities of tax administration. Many aspects in the evolution of international taxation in different countries serve to illustrate this point. The more sophisticated a country's tax administration, for example, the more likely that its source rules may deviate from merely tracking the stream of payment (consider, for example, "place of use" rules for sourcing royalty income), and to rely on taxpayer self-reporting instead. Such movements towards self-reporting tend also to reduce the manipulability of source rules. As manipulable as some current source rules in the United States are felt to be, on the whole they are a lot less manipulable than most members of the universe of possible source rules.

Arguably, therefore, the aims of enforceability and reducing manipulation, which involve highly contingent issues of institutional design, explain the great variety of source rules, and, possibly, the lesser variety of residence rules. A second type of possible further constraint on the residence and source concepts is their function in coordinating the taxing powers of different jurisdictions. A number of scholars have stated recently that the essential role of the source and resident concepts is to facilitate such coordination, although it is not always clear what is meant by these statements.[64] As discussed in Part II.1 above, definitions (i) and (ii)

62. Note that international tax administration is mostly unilateral. Therefore, even political bargaining over the source of income between or among nations may have had only a secondary role in shaping source rules, when compared to the role of tax administration.

63. Ault & Bradford, *supra* note 41, at 32. They also observe with insight:

> In many cases, amounts paid and received can be rather readily given a location by association with a process of production or similar activity. A practical consequence is that the transaction becomes susceptible to monitoring by a particular local jurisdiction and thereby becomes a potential basis for taxation. The association is so obvious that it is apparently taken for granted that a government has the 'right' to levy a tax based on a measure of the profits earned by a production activity physically carried on within its jurisdiction.

Id. at 31-32.

64. *See* Kane, *supra* note 29, at 322-23, 329 (claiming that source rules are essentially coordination tools); Rosenzweig, *supra* note 46, at 483-84 (claiming that it is common to see residence rules as coordination tools but less common to view source rules this way). Rosenzweig's claim regarding residence seems to follow from the idea that corporate residence has no "independent normative meaning," i.e. it serves no other purpose than coordination. *Id.*

of residence and source, being so minimalist, neither require countries to coordinate nor suggest how they might do so. But they are not incompatible with the following claim: the concepts of source and residence do not refer to any independently significant facts about income and persons; instead they refer to facts about income and persons only insofar as such reference helps coordinating the tax powers of different countries.

One might call this latter claim "functionalism" about source and residence. Like minimalism about source and residence, functionalism presents an alternative to how the notions of source and residence are normally depicted. Usually, for example, the geographical source of income is portrayed as a matter for factual determination, as though the making of such a determination is meaningful even outside the context of international taxation. It is then asked, given a mapping of income to sources that is a matter of *sui generis* factual determination, what the normative justification may be for source-based taxation. For example, one is supposed to know first what source-based taxation is, and subsequently understand that it may be (or has been thought to be) justifiable on the basis of the benefit principle.[65] It may be this prior, factual, non-normative assignment of source to income that is derided by source skeptics. However, according to the functionalist view, the basic definition of source is non-factual, and its applicability to the real world depends entirely on a mixture of administrative, normative, and political considerations in international coordination. Thus functionalism, like minimalism, may also deflect many skeptical arguments against residence and source.

The difference between minimalism and functionalism, I would suggest, relates to whether the concepts of source and residence are sufficiently enriched by the roles they play in international coordination, beyond the content already given to these terms by considerations of unilateral enforceability. Presumably, on the functionalist view, the less of an extent to which countries coordinate, the less meaningful are the source and residence concepts. Conversely, countries coordinate to achieve *something*. Therefore, source and residence are presumably more meaningful concepts, the greater extent to which the goals of coordination are achieved. Thus *whether* countries coordinate, *what* they coordinate to achieve, and how successful they are in achieving this coordination, can all affect the coherence and (non-)arbitrariness of the concepts. If one is agnostic about either the normative coherence of principles that could guide coordination or the adequacy of incentives for countries to coordinate, one would have to be—as dictated by functionalism—agnostic about whether the source and residence concepts are meaningful. Minimalism towards these two concepts can be viewed as stating the lower bound of

at 480. The argument thus in part rests on the conflation of residence with corporate residence.

65. This is essentially the approach taken by Kane, *supra* note 29, at 315-16, 327, 334, suggesting that (i) there are fundamental factual (non-normative) constraints on the assignment of source to income (which are moreover not just a matter of social convention), and (ii) that some version of the benefit principle legitimates such an assignment.

the meaningfulness of the two concepts, in the case of full-blown agnosticism.

III. Questioning the Aims of International Taxation, Not the Means

Both critics and defenders of the current international tax regime trace the "traditional principles" of international taxation to a small group of elite academics and policymakers working for the League of Nations in the 1920s and 1930s.[66] These principles, implemented and refined through the domestic tax laws of different countries and through tax treaties, allocate primary taxing rights to "source countries" and "residence countries" based on classifications of income, and prescribe ways of mitigating "double taxation" in cases of overlapping taxing rights. According to an all-too-familiar narrative, these principles have fallen in disarray, either because globalized economic activities and sophisticated tax planning make it increasingly hard to enforce both source and residence country taxation, or because, when enforced, such tax rules create significant economic distortions.

The minimalist position about residence and source described in the last Part sheds a new light on this narrative. According to minimalism, residence and source are extremely flexible concepts and are not constrained by intrinsic spatial properties of income and persons. Therefore the traditional architecture of residence- and source-based international taxation—however one prefers to articulate it—at best instantiates just one set among many possible sets of source and residence rules. Instead of describing the "traditional principles" of international taxation as "residence-based" and "source-based," therefore, it would be much more useful to state what countries have aimed to achieve by adopting a common set of concepts and rules for coordination in international taxation (subject to their individual enforceability constraints). If, for example, countries essentially agreed (through the League of Nations framework and its progenies) to prevent "double taxation," but have until recently coordinated very little in respect of the aim of limiting "double-non-taxation," then it perhaps should not be surprising that "double-non-taxation" became a widespread phenomenon.[67] What are at fault are the normative objectives previously chosen, not the policy instruments for implementing them.

Similarly, if countries are now agreeing—pursuant to the BEPS framework—to increase coordination to limit "double-non-taxation," without adopting any specific vision about how to improve either the economic efficiency or the distributional consequences of international taxation,

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66. *See generally* Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke L.J. 1021 (1997); Reuven Avi-Yonah, *Who Invented the Single Tax Principle? An Essay on the History of U.S. Treaty Policy*, 59 N.Y.L. Sch. L. Rev. 309 (2014).

67. It is not even clear that intense globalization is a pre-condition for the proliferation of tax planning strategies that try to game an under-coordinated system.

then perhaps it would not be accidental if BEPS continue to fall short relative to efficiency and fairness benchmarks. In that case, however, it does not clarify things to claim that the BEPS framework fails to improve efficiency or fairness because the framework clings to traditional source- and residence-based taxation. The current debate about the fundamental principles of international taxation, however, displays a propensity to generate precisely such claims.

It follows, therefore, that discussions of reforming the international tax system could benefit from more reflection on the fundamental normative objectives of international taxation, as opposed to the identification of unintended consequences of residence and source rules. To illustrate this point, I will set out briefly an argument to the effect that the prevention of double taxation is very often not a meaningful goal. The prevention of double taxation is generally believed to be a primary objective for countries entering into tax treaties to coordinate the exercise of their taxing powers. It is also a primary justification for foreign tax credit regimes. Given this, it seems surprising that legal scholars otherwise critical of the current international tax framework have only recently begun to question its cogency as a policy objective. Professor Shaviro has argued that the aim of preventing "double taxation" does not specify how much foreign investment should be taxed as compared to domestic investments. Writing from the perspective of the residence country of the outbound investor, he suggests that since it is the (domestic) tax rate that applies to the foreign income of residents that will affect investment decisions (and not how many times a taxpayer has to write checks to governments), "preventing double taxation" provides an insufficient guide for domestic policy.[68] This line of critique, however, leaves entirely open the assessment of how good "preventing double taxation" is as an objective for international coordination.[69]

A reassessment of "preventing double taxation" as an objective for international coordination nonetheless does seem long overdue. When the "founding paradigm" of international taxation was designed under the aegis of the League of Nations and during the early years of tax treaty practice, the idea that the economic incidence of capital income taxation may substantially differ from its legal incidence was just being developed. More than half a century after Harberger,[70] however, incidence analysis has become central to the study of the effect of international taxation. Econo-

68. Professor Shaviro goes on to criticize foreign tax credit (FTC) mechanisms for offering a 100% "marginal reimbursement rate" for foreign tax paid, which he argues is too high from a national interest perspective. Like his critique of the aim of preventing double taxation, a critique of the FTC from a national interest perspective cannot easily be reformulated as a critique of the FTC as a mechanism of international coordination. Shaviro, *Taxing PCMs*, *supra* note 8, at 31, 35-36.

69. The prevention of double taxation arguably figures much more prominently as a policy guide for international coordination than as a guide for domestic tax policy.

70. *See generally* Arnold Harberger, *The Incidence of the Corporation Income Tax*, 70 J. Polit. Econ. 215 (1962).

mists now generally accept the theoretical postulate that for countries that are small, open economies,[71] host-country taxes on the normal return and mobile rent accruing to foreign capital are likely to be borne substantially by local immobile factors such as labor.[72] Perhaps more important than the acceptance of this theoretical prediction,[73] a growing number of empirical studies provide evidence that source country taxes on capital are often borne by labor, though perhaps directly through an impact on wage bargaining as opposed to indirectly through effects on the demand for and supply of capital.[74]

If we take seriously either the theoretical postulate of or the empirical evidence for the shifting of tax burden onto local immobile factors, however, the objective of relieving double taxation becomes unreliable.[75] If the tax nominally "paid" by foreign investors to the source country government is, substantially, not borne by such investors, then relieving such investors of the "burden" of double taxation is misguided. If such investors are able to claim foreign tax credit in their home countries for the source-country tax paid (but not borne), they receive a windfall against their home country tax liability. Effectively, they will bear neither source- nor residence-country tax on foreign source income. The instrument of relieving double taxation (i.e. foreign tax credit) would thus result in "double non-taxation" instead. In fact, even a residence-country tax system that only allowed deductions and not credits for foreign tax paid would be over-generous, if the foreign tax paid was never borne by the payor. Whereas a deduction system is normally regarded as providing insufficient relief from the burden of double taxation, once incidence is taken into account, it may in fact result in foreign-source income being subject to a lower tax burden than domestic-source income.

The above analysis can be contrasted with a standard depiction of the foreign tax credit as effecting a revenue transfer from the residence-country government to the source-country government.[76] To the extent that

71. Economists view even countries like the United Kingdom and Canada all as "small open economies," which means that there are very few large open economies in the world. *See, e.g.*, Auerbach et al., *supra* note 1; Robin Boadway & Jean-François Tremblay, *Corporate Tax Reform: Issues and Prospects for Canada* 23 (Mowat Ctr. Research Paper No. 88, May 7, 2014), http://mowatcentre.ca/corporate-tax-reform.

72. Griffith et al., *supra* note 1, at 925.

73. One key problem with this theoretical result is that its derivation generally assumes that the residence countries of international investors do not offer foreign tax credits. *See, e.g.*, Roger H. Gordon, *Taxation of Investment and Savings in a World Economy*, 76 Am. Econ. Rev. 1086, 1096 n.30 (1986). *See generally* Roger Gordon & James Hines, Jr., *International Taxation*, *in* 4 Handbook of Public Economics 1935 (Alan Auerbach & Martin Feldstein eds., 2002).

74. *See, e.g.*, Wiji Arulampalam et al., *The Direct Incidence of Corporate Income Tax on Wages*, 56 Eur. Econ. Rev. 1038 (2012).

75. See Boadway & Tremblay, *supra* note 71, at 27, for a discussion of how traditional arguments for integrating corporate- and shareholder-level taxation may have to be reexamined in light of incidence considerations.

76. *E.g.*, *id*. at 28.

local immobile factors in the source country bear the burden of taxes imposed by the source country, this depiction is inaccurate. Instead, we should think of there being two separate transfers, each of which is between a government and a private party. In the source country, funds are transferred from the local immobile factors of production (e.g. labor, owners of land and other immobile capital) to the local government, via the foreign investors. In the residence country, funds are transferred from the home country government to the investor claiming the foreign tax credit.

It seems, therefore, that if countries have been coordinating for decades to prevent double taxation, their actions have been guided by an objective that, inherently, contains very large margins of error. If such a degree of mis-targeting in the choice of ends is tolerable, then why is it so intolerable that the choices of means, e.g. source and residence rules, are often arbitrary?

The significance of the foregoing argument lies not just in the fact that the prevention of double taxation is generally held as one of the most important objectives of international tax coordination. It lies further in the irony that although this objective seems easily vulnerable to critique based on economic thinking, such critique has rarely been lodged. This, I believe, is reflective of two features of our current state of understanding regarding the norms of international taxation.

First, normatively, academic theorists are ill-positioned to propose any principle or criteria to substitute for governments' declared objectives of preventing double taxation and (more recently) double non-taxation. This is so despite the fact that the prevention of double taxation and double non-taxation as principles make almost no appearance in any abstract public finance theory, and are generally regarded as doctrinal in character. This reticence on the part of theory in the face of doctrine is fundamentally attributable to the fact that the dominant normative theoretical framework for analyzing tax policy—which is generally welfarist—has had no place for national governments. If national boundaries are morally arbitrary, then it is difficult to develop any normative theory that set appropriate benchmarks for the inevitable inter-nation distributional consequences of international taxation.[77] Yet at the same time, theories that do not take into account distributional consequences and focus only on efficiency concerns are unlikely to be accepted as setting out adequate normative criteria for international taxation.[78]

77. Graetz, *supra* note 1, at 277-79; *see also* Shaviro, *Taxing PCMs*, *supra* note 8, at 20-21.

78. *See, e.g.*, Keen & Wildasin, *supra* note 58, at 267; *see also* David A. Weisbach, *The Use of Neutralities in International Tax Policy* 68 NAT'L. TAX J. 635, 638-39 (2015); *c.f.* Wei Cui, *A Critical Review of Proposals for Destination-Based Cash-Flow Corporate Taxation as an International Tax Reform Option* (Oxford Univ. Ctr. for Bus. Taxation, Working Paper No. WP15/21, 2015) (highlighting the fact that economists also seem to make ad hoc assumptions about (i) whether revenue transfers among nations are feasible, and (ii) whether and why nations coordinate in tax administration).

Second, positively, there may still be too little theoretical understanding of why governments behave in the international tax arena as they do. Existing theoretical predictions of governments' incentives seem to fit poorly with what we observe governments to do.[79] In fact, perhaps at a more elementary level, there is simply not enough documentation and analysis of what it is that governments have been doing, either administratively or in policymaking.[80] Understanding government behavior in the international tax arena is arguably much harder than understanding the behavior of multinational corporations in response to government policies. Yet doing so seems an unavoidable prerequisite to arriving at better understandings of international tax law—the sphere in which the source and residence concepts take shape.

Conclusion

This Article has tried to situate the debate about citizen-based taxation of individuals' worldwide income in the context of broader debates about international taxation. The choice among residence-, domicile- and citizenship-based taxation is difficult, if one tries to ground it on fundamental normative principles. In the absence of sharper normative criteria, fundamental improvements in our choice of the basis for taxing individuals' worldwide income are also unlikely. This Article argued that it is useful to connect our unease in respect of this policy choice with the discontent widely expressed regarding the assignment of source to income: the concept of residence is as fragile as the concept of source, even when one abstracts from the artificial distinction deployed in the corporation taxation context.[81] The Article further argued that the concepts of residence and source give a minimal quantum of meaning to each other, and both depend, for their further meaning, on coherent normative principles in the coordination of international taxation. The debate about fundamental principles of international taxation therefore should not focus on the concepts of source and residence, nor on particular residence and source rules, but on articulating the fundamental assumptions about what countries are willing to coordinate to achieve.

79. *See, e.g.*, Gordon & Hines, *supra* note 73, at 1986-89.

80. Avi-Yonah, *supra* note 19, can be seen as precisely raising questions about how best to characterize what the United States has done and what other countries' responses have been.

81. In this Article, I have not mentioned the artificiality of treating corporations as separate persons and the problems raised by the arm's length principle. A general point of the Article is that international taxation would be problematic at the core even abstracting from these problems of international corporate taxation.