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WHO SHOULD TAX MULTINATIONALS?

By Allison Christians*

Abstract: *Who should tax multinationals? National political figures sometimes signal their assumptions by making superior or even exclusive claims about who may tax "their" multinational companies, and it is common to hear such companies or their incomes referred to as "belonging" to one nation or another. The rhetoric reflects conventional wisdom about sovereign nations and their assumed entitlements, and is often invoked to curb or even sanction the seemingly excessive tax jurisdictions of some nations. But this conventional wisdom often ignores the fundamental dependence of multinationals on ongoing, extensive, and multifaceted regulatory cooperation involving most of the nations of the world. The goal of this essay is to demonstrate that given this dependence, there are no clear legal or normative boundaries to virtually any asserted tax jurisdiction. The claim provides a solution for neither double taxation nor the problems associated with excessive tax competition, but the essay concludes that recognizing the dependence of governments and "their" multinationals on multilateral cooperation should lead to an increase in focus on how nations go about negotiating the terms of their cooperation on tax.*

KEY WORDS: tax sovereignty, nexus, tax residence

I. Introduction

In a 2021 speech announcing a major spending proposal focused on rebuilding U.S. infrastructure, President Joe Biden declared his plan for a "global minimum tax" for U.S. corporations, which he explained would eliminate companies' "hiding their income … in tax havens" as well as "offshoring jobs and shifting assets overseas."[1] The speech signaled a renewal of U.S. commitment to multilateral efforts to build consensus on the taxation of highly digitalized multinationals, with a global minimum tax regime as one of two central pillars.[2] This consensus building, taking place

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[1] Joseph R. Biden, Jr., "Remarks by President Biden on the American Jobs Plan," accessed April 7, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/07/remarks-by-president-biden-on-the-american-jobs-plan-2/.

[2] In June of the previous year, the United States expressed its fundamental disagreements with that consensus-building, declared the process to be "at an impasse," and called upon the OECD to pause discussions with respect to one of the pillars, but maintained its support for the pillar focused on global minimum taxes. Letter of Steven Mnuchin to Ministers of Finance of France, Spain, Italy and the United Kingdom, June 12, 2020 (taking issue with the OECD's intention to "change the most fundamental principles of international taxation" but characterizing the consensus on global minimum taxes as "much closer to an agreement"). See also

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under the direction of the Organisation for Economic Cooperation and Development (OECD), emerged due to widespread concern that multinationals in general, and highly digitalized ones especially, have been steadily and unfairly extricating themselves from tax obligations all over the world.[3]

The OECD characterizes this trend as the inevitable product of "base erosion and profit shifting" or BEPS.[4] President Biden alluded to this same idea when he noted that "at least 55 of our largest corporations [used] various loopholes to pay zero federal tax—income tax—in 2020. It's just not fair." The language of loopholes and BEPS suggests that the major problem to be solved in corporate tax is to close off opportunities for tax avoidance. But the language of fairness signaled that the plan for a global minimum tax touches on something more fundamental about who owes what to whom in the context of a world of nations whose economies are fully intertwined.

The prospect of global minimum taxes as the remedy for widespread dissatisfaction regarding the current norms for assigning taxing rights among nations implicitly raises a fundamental question of tax policy: Which nations ought to be seen as justified in claiming to have jurisdiction over the income that is earned through corporate structures that span territorial borders? This question has intrigued policymakers, practitioners, and academics for the entire history of corporate income taxation. To answer it requires grappling with a host of assumptions and norms surrounding the identification of obligations among nations and multinational enterprises.

By definition, a multinational enterprise is a profit-seeking venture that involves activities in more than one sovereign jurisdiction. Some multinational enterprises operate in two or three jurisdictions, others operate in dozens. In the popular imagination, a multinational enterprise is a sprawling, publicly listed company with thousands of shareholders and a global supply chain spanning multiple entities and jurisdictions. But a self-employed individual who provides goods or services to a single customer in another jurisdiction is a multinational enterprise as well. What is common to the existence of all multinational enterprises is that they would not exist—much less be able to carry out activities and transactions across borders—but for the cooperation of all of the nations in or with which they do business, as well as all those nations they happen to pass through or over in carrying out their business ventures.

Nevertheless, it is entirely common to hear companies characterized as belonging to one nation or another. President Biden signaled as much when

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Alan Rappeport, Ana Swanson, Jim Tankersley and Liz Alderman, "U.S. Withdraw from Global Digital Tax Talks," *New York Times*, June 17, 2020, https://www.nytimes.com/2020/06/17/us/politics/us-digital-tax-talks.html.

[3] OECD, *Action Plan on Base Erosion and Profit Shifting* (Paris: OECD Publishing, 2013) (hereafter OECD, *Action Plan on BEPS*); OECD, *Base Erosion and Profit Shifting (BEPS) Action Plan Report on Addressing the Tax Challenges of the Digital Economy* (Paris: OECD Publishing, 2015) (hereafter OECD, *Action Plan on Tax Challenges of the Digital Economy*).

[4] OECD, *Action Plan on BEPS.*

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he used the possessive pronoun "our" to describe the multinational companies he considered to be avoiding taxation, without defining what characteristics would be required to include a company in the category. His predecessor, Donald Trump, did the same when he attacked France's adoption of a digital services tax in 2019, saying that "France just put a digital tax on our great American technology companies." Trump went further, apparently claiming the exclusive right to tax any company included within the definition, stating that "If anybody taxes them, it should be their home [c]ountry, the USA."[5]

Trump did not explain what makes the United States the home country of a particular multinational company, nor according to what rationale only the United States ought to be allowed to tax such a multinational company, which by definition includes companies incorporated in or doing business in (or with) other jurisdictions. The informal claim of possession in political speech might be based on assumptions about the location of incorporation, corporate headquarters, public company listings, or other criteria, but it reflects a studied ignorance or indifference to the role of consensus norms surrounding corporate residence and source in income tax systems, which would in most cases defy any claim to exclusivity.[6] Even so, the intuition persists whenever one nation seeks to constrain the actions of another when it comes to taxation, including in the realm of tax competition.

Both in matters of taxation and beyond, exclusivity of regulatory authority is by definition inapposite to the multinational enterprise. At the most basic level, nations accommodate multinational activity by: recognizing standard corporate forms and property rights; making it possible to conclude legally enforceable contracts, exchange currency, and access courts or other bodies to settle disputes; and providing low-cost protection from theft and fraud. The production of profit by multinational enterprises depends on nations providing these things. Where essential protections or functions are in doubt, the risk of engaging in other jurisdictions becomes prohibitively high for most business owners. Where assured, they create tremendous value.

Because of the integral importance of these factors, all of which are facilitated, if not directly supplied, by nations, this essay argues that the answer to the question of who should tax multinational enterprises is that virtually all nations are simultaneously entitled to do so. If this is correct, then a second question flows from the first: If multiple jurisdictional claims are valid, (how) should nations coordinate their claims? This is a distinct question that cannot be answered in a satisfactory way unless the answer to the first one is well established. Unless we can be sure that multiple nations are in most cases equally entitled to make the claims that they make with respect to multinationals and their incomes, it is difficult to make arguments about how much

[5] Donald Trump, Twitter, July 26, 2019. The tweet is now unavailable on Twitter due to the suspension of the former President's account under former management but is preserved at https://www.thetrumparchive.com.

[6] As discussed more fully below.

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any one nation ought to cede to any other should they decide to cooperate by splitting their simultaneous claims in some way. Focusing on the first question, the aim of this essay is therefore to defend the claim that most nations have nearly universal jurisdiction to tax multinationals, thereby laying the groundwork for future study on the second question.

II. What Explains the Right to Tax?

Exploring the right to tax typically involves identifying the dominance of a nation over the rights of a person, since the act of taxation is the act of preserving some resources for the use of the polity. Typically, the question is framed in terms of the rights (or entitlements) or, conversely, the jurisdiction of a nation to tax, but it is not always clear whether these terms are meant to convey the same thing. Power, which is the state's ability to impose its will, is occasionally conflated with right, which is the normatively justified exercise of that power. In the tax literature, discussions about the right to tax are relatively rare, typically focusing on reconciling legal conceptions of individual rights with legal conceptions of rights presumed to be held by nations. Sometimes the normative question of the state's claimed right is further conflated with the normative question of the taxpayer's obligation to contribute to the collective order. It is not necessarily clear whether these are inseparable phenomena, or not.

Sorting out when we are talking about positive rights as expressed in law and when we are talking about normative rationales for the exercise of those rights is not necessarily a strength of tax law scholars. Yet there are (perhaps surprisingly) relatively few philosophical theorists who have put their minds to the task, so we tax law scholars must do the best we can with the tools we have available. The discussion that follows first analyzes the customary legal arguments explaining the right to tax and explores why these arguments often leave the question "who should tax multinationals" essentially unanswered. It then turns to the range of normative rationales explored in the legal and philosophical literature to defend the claim of virtually universal entitlement to tax.

III. Legal Arguments

Some legal scholars identify the power to tax as a defining feature of sovereignty, such that any state may in theory impose a tax on any person or thing it chooses, apparently through the act of declaring its power to do so. For example, in 1938, Harold Wurzel declared that "taxing power stems from sovereignty and sovereignty is omnipotence."[7] He denied the existence of "anything in the written or unwritten law of nations" to limit the

[7] Harold Wurzel, "Foreign Investment and Extraterritorial Taxation," *Columbia Law Review* 38, no. 5 (1938): 814.

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jurisdiction to tax, based on the lack of any such articulation by international tax law scholars and policymakers to that date.[8] Almost two decades later, noted expert Stanley Surrey explained that "the assertion of jurisdiction is essentially a matter of national policy and national attitudes" not restricted by law.[9] Martin Norr concurred when he determined in 1962 that "[n]o rules of international law exist to limit the extent of any country's tax jurisdiction" and that "a country is free to adopt whatever rules of tax jurisdiction it chooses."[10] Several decades later, Brian Arnold considered the relevant jurisprudence and wrote that "[a] country's legal authority to levy tax is effectively limited only by practical considerations of enforcement and collection," and that "[r]ules of public international law or domestic constitutional law restrict a country's jurisdiction to tax only in narrow, relatively insignificant ways."[11] Examining the same terrain, Sol Piccioto concluded that "From the point of view of formal sovereignty, there is no restriction on a nation's right to tax, and it may be exercised without regard to its effects on other states."[12]

On the view as these respected scholars expressed it, it is hard to imagine how any state could be prevented from asserting its right to tax any taxpayer, including any multinational taxpayer, on virtually any grounds it chose. A given state's ability to impose its will would seem to be irrelevant to the question.

The position might seem a bit extreme, yet it can be seen implicitly at work behind some of the current tax policy discourse unfolding around the particular administrative challenges associated with taxing highly digitalized firms.[13] That discourse inadequately confronts the question of the boundaries of the tax jurisdiction, while at the same time it posits a world in which multinationals, having been apprised of a nation's intention to tax them, can be expected to voluntarily comply, even where compliance and enforcement mechanisms may be missing.

A related yet incompatible view holds that nations, as creatures of international law, are entitled to autonomy but that the exercise of their regulatory power is subject to the equally valid jurisdictional claims of other nations.[14] Under this view, a nation's right to tax would be defined and

[8] Ibid., 814.

[9] Stanley S. Surrey, "Current Issues in the Taxation of Foreign Corporate Investment," *Columbia Law Review* 56, no. 6 (1956): 815, 817.

[10] Martin Norr, "Jurisdiction to Tax and International Income," *Tax Law Review* 17 (1962): 431.

[11] Brian J. Arnold, *Tax Discrimination Against Aliens, Non-Residents, and Foreign Activities: Canada, Australia, New Zealand, the United Kingdom, and the United States* (Toronto: Canadian Tax Foundation, 1991).

[12] Sol Picciotto, *International Business Taxation* (Cambridge: Cambridge University Press, 1992).

[13] OECD, "Planned Stakeholder Input in OECD Tax Matters," https://www.oecd.org/tax/planned-stakeholder-input-in-oecd-tax-matters.htm.

[14] See, e.g., *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) (associating sovereign immunity with the territorial right of each sovereign against encroachment by the others); *United States v. Harden* (1963) 44 W.W.R. 630, 634 ("an assertion of sovereign authority

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limited by jurisdictional rules in international law.[15] This view has arguably been influential to the OECD, which is the self-described leader in global tax policymaking.[16]

In particular, the OECD has taken the position that nations are "free to design their own tax systems" but only on the condition that they "abide by internationally accepted standards in doing so." [17] What are these internationally accepted standards? The OECD is not explicit, but the growing set of international norms and standards developed through its various programs of work are likely its intended referents. The OECD's view is significant because its member states have in the past proposed, on the strength of such norms, to limit or even sanction nations that did not cooperate on terms it laid out for them. Current negotiations over the scope and rate of global minimum taxes are built on the same foundation. These norms are accordingly significant, and are examined in more detail below.

It is difficult to reconcile the claim that there are no limits to the tax jurisdiction other than those set by a nation itself, with the claim that nations are obligated to respect the jurisdictional claims of other nations. It is also difficult to explain what is meant by "respect" in this regard: Is this a matter of noninterference or active obligation? Throughout most of history, the idea that nations are obligated to assist each other in tax collection has been soundly rejected in favor of the opposite proposition, encapsulated in the so-called revenue rule that "no country ever takes notice of the revenue laws of another."[18]

On this view, which recent international developments seem to be revisiting in some respects, nations may make jurisdictional claims that other nations may be bound to respect, but no state is required to take positive action to facilitate, defend, or implement the tax claims of another. This might be interpreted to mean that any state's particular claim to tax multinationals might be valid as a legal matter, but no state is obligated to assist another in determining the amount of the tax (such as through information exchange) or collecting the tax on behalf of another (such as through domestic enforcement measures). Both assertions make the taxpayer an object of

by one State within the territory of another … is (treaty or convention apart) contrary to all concepts of independent sovereigns").

[15] Alex Mills, "Rethinking Jurisdiction in International Law," *British Yearbook of International Law* 84, no. 1 (2014): 187, 194; Cees Peters, *On the Legitimacy of International Tax Law* (Amsterdam: IBFD, 2014).

[16] See "About," OECD, accessed June 1, 2021, https://www.oecd.org/about/.

[17] OECD, *Report on Harmful Tax Practices* (Paris: OECD Publishing, 1998). For commentary, see Edwin van der Bruggen, "State Responsibility under Customary International Law in Matters of Taxation and Tax Competition," *Intertax* 29, no. 4, (2000): 115, 116 (exploring the OECD's efforts to frame the rights of jurisdictions to use tax rules that inflict harm on others).

[18] *Holman v. Johnson* (1775) 1 Cowp 341, 343 (opinion of Lord Mansfield). For a comprehensive review of the U.S. view, see Barbara A. Silver, "Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments," *Georgia Journal of International and Comparative Law* 22 (1992): 609.

regulation, possibly to be fought over where two sovereigns collide, but uninvolved in the act of claiming and regulating. Tax law scholarship seems to implicitly accept this view when it uncritically invokes the sovereign "right" to tax.

The legal analysis is complicated by the fact that most governments explicitly claim their right to tax under formative documents such as constitutions, and they do so without acknowledging any legal constraints. For example, Canada's Constitution expressly authorizes the federal government to impose taxes of any kind.[19] Similarly, the U.S. Constitution expressly provided its Congress a broad power to "lay and collect" taxes, seemingly without limit as to personal or geographic scope.[20] Constitutional documents around the world purportedly do the same for their governments.[21] Writers of national constitutions do not appear to have been compelled to explain the power to tax as related in any way to the competing efforts of other nations to do the same.

Despite the conceptually limitless regulatory range of the state, however, in practice no state actually taxes without limitation. Perhaps following the same intuition that one person's liberty stops where another's starts, nations have adopted some common conventions respecting the jurisdictional reach

[19] Canada Constitution Act, 1867–1982 s. 91 (stating that "the exclusive Legislative Authority of the Parliament of Canada extends to," *inter alia*, the "raising of Money by any Mode or System of Taxation").

[20] U.S. Const., Art. I, Sec. 2. Mainly owing to some contestation over the internal scope of the power vis à vis the several states, Congress passed the Sixteenth Amendment in 1909 to ensure that a federal income tax could be levied without restriction, but that conflict was about internal sharing of power rather than a matter of sovereign right. U.S. Const. Amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration"). The amendment was generally viewed as necessary because the U.S. Constitution stated that "Representatives and direct Taxes shall be apportioned among the several States," according to a formula that infamously discounted Native Americans and slaves. U.S. Const. Art. I. Sec. 8. There is some scholarly debate about whether the Amendment was actually necessary to achieve the purported goal. Calvin H. Johnson, "Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution," *William and Mary Bill of Rights Journal* 7, no. 1 (1998): 70; Bruce Ackerman, "Taxes and the Constitution," *Columbia Law Review* 99, no. 1 (1999):1911–89; Calvin H. Johnson, "Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Taxes," *Tax Notes* 97 (2002): 1723, 1734; Erik M. Jensen, "The Constitution Matters in Tax," *Tax Notes* 100, (2003), 821. Together, Article I and the Sixteenth Amendment unequivocally assert the right of the U.S. government to impose taxation, seemingly without limit. Perhaps for this reason Calvin Johnson argues that the Constitution was a pro-tax document, "written to give the federal government revenue to pay enough of the war debts to restore the public credit so that the federal government could borrow again in the next emergency.") Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution* (Cambridge: Cambridge University Press, 2005) at 2.

[21] For example, the Constitution of Australia states at Art. 51 that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … taxation"; The Constitution of Brazil states at Art. 48 that " The National Congress shall have the power, with the sanction of the President of the Republic … to provide for all the matters within the competence of the Union and especially on [the] system of taxation, collection of taxes and income distribution"; and the Constitution of Russia states at Art. 71(h) that "the jurisdiction of the Russian Federation shall include … federal taxes and levies."

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of their tax systems when applied to multinationals.[22] The starting point for these common conventions is that nations tend to accept the notion that the jurisdiction to tax hinges on the existence of a connection between the national territory and the company or income to be taxed. This acceptance can be observed within the legal doctrine of nexus.

IV. The Potentially Constraining Idea of Nexus

Nexus is a well-accepted yet habitually contested tax concept. At its core, it simply refers to whatever justification a nation might put forth to explain its intent to claim a person or a thing as within its jurisdiction, regardless of whether it seeks to impose a tax. Since there is no legal order to police tax nexus boundaries and resolve disputes, as established above, it falls to nations to continuously negotiate (or at least attempt to negotiate) the terms of their acceptance of the concept of nexus whenever the views of another state would seem to interfere with a national policy preference.

Following the first attempts to negotiate such terms at the dawn of the twentieth century, nexus is conventionally defined as a matter of "source"—that is, the geographic origin or wellspring of a given income—and "residence"—that is, the geographic location of primary residence of the income earner.[23] The common conception of nexus on the basis of source is that nations are entitled to income that is said to arise within their territories (that is, the territory in which capital is invested or activities are carried out), while the common conception of nexus on the basis of residence is that nations are entitled to any income, wherever it is earned, when it is earned by anyone they define as a resident.[24]

[22] See, e.g., Peter Dietsch, "Rethinking Sovereignty in International Fiscal Policy," *Review of International Studies* 37, no. 5 (2011): 2107-20.

[23] Gijsbert W. J. Bruins, Luigi Einaudi, Edwin R. A. Seligman, and Sir Josiah Stamp, *Report on Double Taxation* (Geneva: League of Nations, 1923).

[24] The entitlement principle referred to is explored in depth in Allison Christians and Laurens van Apeldoorn, *Tax Cooperation in an Unjust World* (New York: Oxford University Press, 2021) (explaining that the entitlement principle speaks to the nation's claim of right as to income generated within its territory or by people it identifies as its residents). The principle was expressed as a matter of the nation's right to tax (while remaining silent on the right not to tax) in the well-accepted treatise, *The American Law Institute Federal Income Tax Project, International Aspects of United States Income Taxation, Proposals on United States Taxation of Foreign Persons and of the Foreign Income of United States Persons* (1987), which in turn referenced the *Restatement (Third) of the Foreign Relations Law of the United States*, at §§ 411-12 (1987). The American Law Institute encapsulated the doctrine in declaring that under generally accepted principles, a country may tax: (1) the worldwide income of a national or a resident natural or juridical person, (2) the income of a person present or doing business in the country that is derived from or associated with that presence or business, or (3) income derived from property located in the country. The statement parallels those implied in the OECD, United Nations and U.S. Model Tax Treaties, but that is not to say that these principles are not contested. See also Allison Christians, "Drawing the Boundaries of Tax Justice," in *The Quest for Tax Reform Continues: The Royal Commission on Taxation Fifty Years Later*, ed. Kim Brooks (Toronto: Carswell, 2013).

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In the corporate context, the residence question is complicated by the fact that assigning residence to legal fictions could be accomplished in all manner of ways, such as by location of majority shareholders, place of incorporation, location of directors or management functions, location of operations, or virtually any other plausible criteria. In practice, place of management and control and place of incorporation have been the primary indicators of residence, but there are many distinct rules across nations, including in the form of anti-abuse rules that deem a company to be resident in a jurisdiction in some cases.

In the sense used in political speech as discussed above, residence is what makes a company belong to a nation, while source is what makes a company's income belong to a nation. Yet the residence or source of a given company or dollar of income are by no means in all cases exclusively assigned to one nation or another. Definitional overlaps are extremely common, sometimes solved by treaties but often not, and unresolvable as a matter of abstract legal principle. Disagreements most often end by agreement among relevant designated officials pursuant to treaty-based processes that do not include explanations and are not reviewable by courts. Despite these nuances, the concepts of source and residence have been so widely accepted that some scholars consider them principles of customary international law.[25]

Insofar as nexus is an idea rather than a legal standard, it is apparent that virtually any plausible claim in either residence or source can justify a claimed right to tax multinationals. Yet it is not entirely clear to whom or for what reason any such justification must be offered. Over the course of a century of lawmaking, administration, and jurisprudence, unless nations used treaties to reciprocally curtail the scope of their respective domestic definitions of these terms, relatively modest ties have been used to justify a finding of nexus when challenged by the taxpayer. The 1906 corporate tax residence case of *DeBeers Consolidated Mines Ltd. v. Howe* is exemplary in this regard.[26] In that case, the UK House of Lords determined that a company that was registered in and earned all of its income from sources within South Africa was nevertheless "resident" in the United Kingdom for tax purposes because a majority of the company's board of directors lived in England, and because they held meetings covering "important" business in England, even though board meetings concerning the mining operations themselves were held in South Africa.[27]

[25] Nancy H. Kaufman, "Fairness and the Taxation of International Income," *Law and Policy in International Business* 29, no. 2 (1998): 148 (arguing that the accepted jurisdictional bases to impose income tax have acquired the status of customary international law); Reuven Avi-Yonah, *International Tax as International Law* (Cambridge: Cambridge University Press, 2007).

[26] *Consolidated Mines, Ltd. V. Howe* [1906] AC 455.

[27] *DeBeers,* 459 (in the opinion of Lord Loreburn L.C., "[i]n applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We

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Similarly, absent treaty-based bargaining, nations have broad leeway to determine when an item of income has a domestic source. Such a claim can mean that the income is legally attributed to an income-producing asset or activity in a given country, or it can mean that the income is attributable to economic factors that have taken place in that state, regardless of the legal attribution. The two definitions are not always compatible. By way of simplified example, a multinational might define a given income stream as a royalty payment arising from a license that is legally owned by a corporate entity formed in a specified jurisdiction, while another state could object that the income in question is in economic substance a payment for services carried out somewhere else. Some nations are unassertive in defining source because they might be concerned that domestic taxes will drive away investment. This concern manifests itself in domestic tax incentives, as well as negotiated curtailment of taxation via treaty, but neither form of constraint is mandated as a matter of law.[28]

There is almost nothing to say about whether or how these justifications would matter in the case of overlapping or conflicting claims by nations. Applied to multinationals in today's globalized economy, the flexible and imprecise nature of nexus, combined with the utter lack of procedure to test national disagreements about jurisdictional claims made under their respective mantles, means that the ability of nations to impose even expansive jurisdictional claims over multinationals and their incomes appears practically limitless. Income arising from cross-border investment can be attributed to any number of contributing factors in any number of nations.

It is perhaps still true that practical considerations regarding which nation has the ability to detect that a payment has occurred, as well as the power to compel payment from one of the parties to the transaction, provide a common explanation for the geographic source conventions we see in widespread use today.[29] But these administrative constraints are not legal ones, and in any event they may be falling away thanks to technological innovation and increased economic interdependence. If they do fall away, there appears to be no legal backstop to act as a brake on the jurisdictional claims of any nation.

The conclusion to be drawn is stark: there appears to be no legal way for one nation to prevent any other from asserting jurisdictional rights with

ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad").

[28] The pressure to increase foreign investment through tax competition falls differently on differently situated states. See Allison Christians, "Global Trends and Constraints on Tax Policy in the Least Developed Countries," *University of British Columbia Law Review* 40, no. 1 (2010): 239.

[29] For a discussion, see Lawrence Lokken, "What Is This Thing Called Source?" *International Tax Journal* 37, no. 3 (2011): 25.

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respect to multinationals and their incomes. As such, when it comes to coordination among states, no one source or residence state can be said to come to the negotiating table with any superior legal claim compared to the others, regardless of their respective intentions to tax such incomes, or not. The question that remains is whether the lack of legal constraint is followed by a lack of normative one, a question examined in the next section.

V. Normative Arguments

Because the legal realm appears to place few hard limitations on most jurisdictional claims over multinationals and their incomes, it is no surprise to find philosophical theory occasionally called upon to provide some clarity. Many scholars turn to Hobbes, whether as a matter of convenience or convention, referring to the claim that "[t]hese are the rights which make the essence of sovereignty … the power of raising money."[30] Others equate necessity with entitlement, citing the state's need for revenues in order to exist as a moral justification for taxation.[31] Neither claim seems to add much by way of limitation on the power to tax as outlined in legal terms above, and all are silent on the particular subject of multinationals, whose very existence reflects the concurrent jurisdiction and cooperation (or minimally, comity) of nations.

For example, in maintaining that taxation is essential to sovereignty, Hobbes was defending an argument that the sovereign, ideally a monarch, possesses the divinely bestowed and inviolable right to command its subjects, including an absolute power to raise money from them.[32] Hobbes' appeal to sovereignty defends the idea that even a self-appointed and

[30] Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil* (New York: Simon and Schuster, 1651). A century earlier, Jean Bodin more explicitly claimed that "[t]he right of levying taxes and imposing dues, or of exempting persons from the payment of such, is also part of the power of making law and granting privileges." Jean Bodin, *Six Books on the Commonwealth*, trans. M. J. Tooley (Oxford: Blackwell, 1955 [1576]). See, for example, Deborah Bräutigam, "Building Leviathan: Revenue, State Capacity, and Governance," *IDS Bulletin* 33, no. 3 (2002):10 (quoting Hobbes); Peggy B. Musgrave, "Sovereignty, Entitlement, and Cooperation in International Taxation," *Brooklyn Journal of International Law* 26, no. 4 (2001): 1335, 1336 ("international law" recognizes "national entitlements to tax").

[31] See, for example, Jonathan R. Macey, "Government as Investor: Tax Policy and the State," in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds., *Taxation, Economic Prosperity, and Distributive Justice* (Cambridge: Cambridge University Press, 2006), 255, 266 ("One moral justification for giving government the power to tax is that such power is justified simply because the state needs revenue and the state is legitimate… . Alternatively, one can claim that the state lacks the power to impose tax under some natural rights theory. But as long as the state has the power to colt taxes in practice, this argument is purely theoretical and academic").

[32] Hobbes, *Leviathan*; see also Bodin, *Six Books* (arguing, contra Aristotle's view of the superiority of mixed forms of government, that to sustain order, government must rest the absolute power to make, interpret, and enforce laws in one person or institution, because competing rulemakers would inevitably disagree and resort to force, and ultimately civil war, to resolve their differences). For a review of Hobbes' and Bodin's shared views of the need for absolute supremacy in a single sovereign, see Preston King, *The Ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes* (London: Routledge, 1974), 58–60.

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unaccountable ruling class, so long as it maintains order, has an inherent right to extract rent from everyone else, including by force or threat of force. This is not a very compelling justification of the right to tax.[33] Moreover, it says nothing about how to think about competing or overlapping claims, each of which rests on the same notion of sovereignty.

The scholarship generally tends to focus again on the taxpayer to government relationship, rather than that between nations. For example, prompted by the influential work of Robert Nozick, some scholars consider the act of taxation as an infringement of the rights of private persons and therefore liken the act of taxation to theft.[34] Yet Nozick acknowledged the equally valid counter proposition that individuals cannot ensure that any of their rights are protected unless they voluntarily relinquish some resources to the state to act on their behalf.[35] Nozick asked, if the state did not exist, "[w]ould one be needed and would it have to be invented?" He launched from this question into a theory that justified taxation by the (minimal) state to order human society by positing that even if it didn't exist, the state would naturally arise in the form of mutually agreed contracts and norms. This observation, while intriguing, does little to explain whether or how multiple nations ought to interact when each makes the same claims on a given taxpayer. The problem is especially stark when the taxpayer in question is a multinational with income that arises as the product of the interactions and coordinating actions of multiple nations.

Liam B. Murphy and Thomas Nagel's book, *The Myth of Ownership: Taxes and Justice* is an influential and compelling analysis of tax law and philosophy, but it similarly provides little guidance for thinking about the simultaneous claims of nations in respect of multinationals.[36] Murphy and Nagel argue that the nation-state has a normatively defensible right to tax because it contributes to economic outcomes by providing the laws, institutions, and mechanisms necessary to enable market transactions. The argument is that,

[33] See Macey, "Government as Investor," 266 ("[G]overnments compete for the right to control various land masses. States that lack the power to tax inevitably will fail in Darwinian competition for power and authority with rival states. For this reason alone, taxation will survive as a feature of civil life. This is troubling to those interested in controlling the power of government, not only for the obvious reasons that taxation creates distortions in the real economy and provides the state with sufficient resources to create a leviathan that can destroy fundamental rights and quash dissent, but also for other reasons"). Certainly, a Hobbesian view was insufficient to convince the American colonists that the English King was their permanent sovereign to whom both allegiance and tax was owed. See, e.g., John Phillip Reid, *Constitutional History of the American Revolution* (Madison: University of Wisconsin Press, 1986–1993).

[34] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); see also Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985); Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987).

[35] Nozick, *Anarchy, State, and Utopia* (laying out the conditions for society-forming agreements to compel the payment of taxes based on mutual benefit.)

[36] Liam B. Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).

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but for the state, no rights to property (or liberty, or security, and so forth) would be possible, roughly following Hobbes. These accounts implicitly condition the state's right to tax on its doing so by means and methods that protect the rights of those who initially agreed to its authority precisely because they sought to forestall the constant state of war that is life without the state, again in Hobbesian terms.[37] But they do not speak to the level of inter-nation relationships any more than the other claims do, and they are all but silent regarding the issue that multinationals face: what matters is not whether one nation has a legitimate claim, but whether multiple nations might have the same claim at the same time.

From the perspective of a single nation and its relationship to a given taxpayer, the government undertakes to order society to prevent war and violence and must sustain itself financially in a manner that does not simply recreate state of nature conditions with itself as the main threat to order and peace. Commandeering resources is out of the question in that case; instead, taxation arises as a potentially justifiable method for raising money. But which nation may make these choices with respect to a given amount of income earned by a taxpayer that spans jurisdictional lines? Casting the nation as facilitator of entitlements invokes social contract theory as a justification for the authority of the sovereign, thus setting up an alternative answer to the question "who should tax multinationals."[38] Social contract theory glosses over some major difficulties by assuming that a clear relationship always exists between a given nation and a given individual, and then extending the analysis to legal persons, that is, corporations. As soon as multiple nations are involved, the number of unanswered questions in the literature multiplies accordingly.

In his influential work *A Theory of Justice*, Rawls developed what are now fundamental principles of a just society, including the protection of fundamental liberties and acceptance of social and economic inequality only when conditions of equality of opportunity and of maintaining or bettering

[37] See, for example, Murphy and Nagel; see also Macey "Government as Investor" ("Embracing in a disciplined fashion Thomas Hobbes's assumptions about the proclivities of man and the nature of the state requires one to recognize that government is the ultimate "necessary evil").

[38] See, for example, Jean-Jacques Rousseau, "*Of the Social Contract," in The Social Contract and Other Later Political Writings*, Victor Gourevitch, ed. (Cambridge: Cambridge University Press, 1997 [1791]), 39, 50 (arguing that people need social order to preserve their innate freedom through cooperation, and stating the theory of social contract as the idea that "[e]ach of us puts his person and all his full power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole"); John Locke, *Second Treatise on Government* (London: Awnsham Churchill, 1690), at Sec. 140 ("It is true, governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, i.e. the consent of the majority, giving it either by themselves, or their representatives chosen by them: for if any one shall claim a power to lay and levy taxes on the people, by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government: for what property have I in that, which another may by right take, when he pleases, to himself?").

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the lot of the least-advantaged are met.[39] In later work that attempted to apply his reasoning to a world in which there is more than a single society, Rawls envisioned nations, as embodiments of their populations, becoming parties to a second-level social contract.[40] He argued that rational nations should seek an international system that favors political independence and noninterference among themselves as nations, while ensuring a truncated list of essential individual rights for their associated populations.[41]

One way to operationalize Rawls's conception might be to look for justification of the jurisdiction to tax in the form of the "membership principle." In simplified terms, this principle attempts to explain a link between person and polity by reference, at least in some accounts, to voluntary choice on the part of the taxpayer (whether individual or corporate).[42] The membership principle is a component of the concept of political obligation, which attempts to explain why one can be expected to obey laws laid down by a sovereign.[43] The principle is invoked rarely in tax scholarship, but has been proposed as a key normative framework by Peter Dietsch and Thomas Rixen.[44]

[39] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), [hereafter *Theory of Justice*] at 92.

[40] John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Cambridge, MA: Harvard University Press, 1999), 62–64 [hereafter *Law of Peoples*]. Rawls explicitly rejects the use of the term "nation" or "state," placing political authority in "peoples," which he attempts to define as groups of persons aligned by "common sympathies," and a "willingness to live together under the same set of democratic principles." However, as Nussbaum and others have shown, the departure is "confused and confusing," as well as possibly indistinguishable from current conceptions of statehood in any event. Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006), at 246.

[41] Rawls, *Law of Peoples*, 106. (Rawls's short list of duties includes a just war theory and a theory that people will want states to honor a bare minimum of human rights and help people living under conditions that preclude the existence of a just (national) social regime (what he calls "burdened societies.") The list is shorter than the list of basic liberties he outlines in *A Theory of Justice* (*A Theory of Justice*, 61.) Analogizing to the original contract, the "veil of ignorance" would prevent representatives from knowing the size, wealth, and so forth of their states, so they "will develop a system that ensures their political independence, civil liberties, and self-respect as a people."

[42] Contra, see, e.g., Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), 206; John Horton, *Political Obligation* (New York: Red Globe Press, 1992), 146, 150.

[43] Political obligation is itself the subject of multiple and conflicting accounts, but generally connotes a communal responsibility that is either assigned by local social practices "to membership in some biological or social group," such as a family or neighborhood (in the anti-voluntarist view) or that arise from the individual's voluntary choice to subject herself "to the political authority of others or to participate in the ongoing cooperative schemes of political life" (the voluntarist view, as in social contract theory). A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 65–73. See also Magda Egoumenides, *Philosophical Anarchism and Political Obligation* (London: Bloomsbury, 2014); Michael Hardimon, "Role Obligations," *Journal of Philosophy* 91, no. 7 (1994): 333, 342–44, 353; Carole Pateman, *The Problem of Political Obligation: A Critical Analysis of Liberal Theory* (New York: John Wiley and Sons, 1985), 27; Margaret Mactwitter, "The Language of Political Theory," in Antony Flew, ed., *Logic and Language* (New York: Clarendon Press, 1963), 184; Thomas McPherson, *Political Obligation* (London: Routledge, 1967), 64.

[44] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (Oxford: Oxford University Press, 2015).

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Dietsch defines the membership principle as one's intrinsic obligation to obey the tax laws in every nation of which one is a member, with membership arising when one benefits from the public services or state-provided infrastructure.[45] Dietsch offers this principle explicitly as a normative explanation for the jurisdiction to tax, linking it conceptually to the universally accepted residence and source principles.[46] The use of benefit from specified items as a threshold in the membership principle (at least as Dietsch explains it) suggests the addition of two principles that have not been fully explored in tax policy discourse.

These two principles may be stated in simple terms as: (1) a nation may justifiably assert its jurisdiction over a taxpayer or a given amount of income if it can point to certain tax-specific evidence of voluntary consent to the jurisdiction, and (2) a nation may not interpose (or allow itself to be used) to defeat the claims of another state with respect to those likewise observed to have voluntarily consented to that other state's jurisdiction. These are not claims about what nations can accomplish as a practical matter. Rather, they are claims about what nations have a right to expect from each other in the international tax order, and what taxpayers have a right to expect from all nations in which they are members.

Tying the jurisdictional claim to benefit specifically from public services and infrastructure is a central plank in this account of the membership principle. The membership principle would conclude that using publicly funded services and infrastructure is tacit evidence of a taxpayer's unforced expression of belonging, and therefore acceptance of obligation to others.[47] Applying this idea specifically to multinationals, it is easy to see why multiple jurisdictions could make the exact same claim to the exact same income, with no one claim clearly superior to the others.

In order to assess the potential normative strength of the membership principle as applied to the jurisdiction to tax multinationals, a few areas of ambiguity require resolution. The first involves whether the public services and infrastructure that benefited the putative taxpayer must have been funded by taxation and not taking. If this is necessary, there may be difficulties in implementation because much infrastructure, and many national borders, will be traceable to past instances of forced taking and exploitation

[45] Ibid., 80-83.

[46] Ibid.

[47] See, for example, Margaret Gilbert, *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (Oxford: Oxford University Press, 2006), 138–39 (explaining her idea of membership and obligation as the formation of joint commitments are formed, which "involves a kind of expressive behaviour on the part of the would-be parties. In each case, each one's expressive behaviour is an expression of readiness for joint commitment: each understands what a joint commitment is, and expresses all that is needed on his or her part to bring such a commitment into being, namely, readiness to be jointly committed." For Gilbert, the relevant expressive behavior must also be common knowledge among the parties, meaning that "if some fact is common knowledge between A and B (or among members of population P, described by reference to some common attribute), that fact is entirely out in the open between (or among) them, and, at some level, all are aware that this is so"). Ibid., 144-45.

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that were unjust then and are no more just now.[48] It seems necessary to explain how the legacies of war, exclusion, and slavery that touch so many nations would not invalidate virtually any normative claim regarding political obligation.

A second is that the definition of public services and infrastructure is open to interpretation.[49] Presumably the definition would include actual use of tangible things such as roads, schools, hospitals, sanitation, and so on. But in thinking about multinational companies, intangible goods, such as the rule of law and a reliable global reserve currency loom large as vitally necessary elements that make corporate existence and profit-making potential possible. If the rule of law that protects contract and intellectual property rights, backed by institutions of review and redress, are not public services, it is not clear what principle would exclude them. But if these things are not excluded, it is difficult to exclude laws promoting legal or financial service industries specifically to assist taxpayers in avoiding taxation by other nations—precisely the problem for which Dietsch turns to the membership theory as a solution. If these are included in public services and infrastructure, the membership principle, like nexus, provides further support for the claim that multiple nations have justifiable reasons to claim jurisdiction over every kind of multinational activity, with no one claim obviously superior to the others.

For these purposes, it is notable that the scope of requisite benefit is undefined: membership is explicitly used only to establish, as a threshold, a necessary prior link to the legitimate claim of jurisdiction.[50] The membership principle is therefore not simply another name for the benefit theory of taxation. Benefits theory posits that people should contribute to government in proportion to the benefits they receive from it.[51] This is an intuitively attractive idea, grounded in the notion that societies form for the purpose of engaging in shared projects, and a government's main role, perhaps especially in a democratic state, should be that of aggregator of preferences. However, scholars universally reject benefits theory in domestic tax policy given its many shortcomings. These include the impossibility of accurately measuring the value of noncash transfers to specific taxpayers (especially when they are intangible or difficult to disaggregate, such as clean air or a corruption-free legislature); and the difficulty of collecting payment or excluding benefits from those without the means to pay (such as those with incomes below subsistence level).

[48] The legacies of war and slavery that touch virtually every state would thus seem to invalidate virtually any normative claim regarding political obligation.

[49] At least Dietsch does not explicitly limit them.

[50] Dietsch, *Catching Capital*, 80; see also Simmons, *Justification and Legitimacy*, 73.

[51] Scholars often attribute some version of benefit theory to John Locke, who claimed that "it is fit everyone who enjoys his share of the protection [of life, liberty, and property] should pay out of his estate his proportion for the maintenance of it." John Locke, *Concerning Civil Government, Second Essay* (London: Awnsham Churchill, 1690), Ch. IX, sec. 140.

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Applied internationally, given that so many of the benefits enjoyed by multinationals are the product of the combined actions of nations such that the contributions of any one cannot be easily isolated, the benefits principle is wholly unsatisfactory as a dividing tool. Even so, the benefits principle supports the idea that the tax jurisdiction is normatively unlimitable. In the context of the membership principle, benefit is instead a broad threshold concept that, when triggered by the actions of the taxpayer, gives the state normatively legitimate jurisdictional claims. Rather than drawing any lines between acceptable and unacceptable action by nations, benefits theory merely reinforces the idea that multinational businesses benefit from the cooperation of nations, such that multiple nations may have equally legitimate claims of jurisdiction. Just like the legal idea of nexus, in this context benefit might be defined broadly to mean virtually any contact with any person or any asset—real or intangible—that even tangentially involves a nation, such as using its currency as investment or medium of exchange, or buying goods that were developed from scientific research it funded. This conclusion will be unsatisfactory to those who would seek to limit the use of tax systems as a tool to attract investment capital by, in effect, shielding it from the jurisdictional reach of others. The challenge for those who would seek to do so is to formulate a clear normative prohibition on the most tenuous jurisdictional claims.

The membership principle is likely too wide-ranging to provide this kind of clarity. If its ambiguities could be resolved, however, it might provide more acceptable limits on the scope of tax jurisdiction claims than nexus given that express consent is a threshold requirement for the former but not the latter. Requiring a benefit from public services or infrastructure as a prerequisite to membership might prevent some forms of manipulation that plague the nexus theory and force nations out of an otherwise rightful claim to tax, or, conversely, entice them to resort to nonnormative grounds (especially diplomacy) to produce a preferred outcome. For example, if certain types of favorable regulatory regimes provided by nations are not considered public services or infrastructure, the multinational entity that uses such a regime to strategically place itself outside of the jurisdiction of a given nation (in membership terms, denying or disguising its obvious consent to be a member of that state) may fail to accomplish that task.

VI. Conclusion

Who should tax multinationals? This essay has shown that, as a matter of legal jurisdiction, the answer appears to be: virtually every nation *may* do so, because there are no strong constraints on the jurisdictional claims that any given nation can make. The essay has further argued that there is no clear normative prohibition on any jurisdictional claim that any nation might wish to make with respect to multinationals and their incomes. The lack of prohibition arises from the essential dependence of governments and

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multinationals upon the continuous cooperation of virtually all nations with cross-border trade and investment. This cooperation is secured through extensive regulatory coordination, including in the area of taxation.

These observations do not lead inexorably to the normative conclusion that all nations *should* tax multinationals, but they demonstrate the absence of any support for the inverse proposition, that any nation *shouldn't* do so. In the fully economically integrated world in which we now live, it is virtually impossible to say where the jurisdiction of one state ends and that of another begins when it comes to the activities of multinationals. If so, then the question of whether, as a legal and normative matter, any given nation should lay some type of claim to the income earned by multinationals is almost certain to yield a positive answer in all kinds of cases and for all kinds of reasons.

This will seem to be an unsatisfying conclusion. On the one hand, it seems to imply that there is simply no way to prevent nations from imposing multiple levels of taxation at will. On the other hand, it effectively denies nations the right to scold, sanction, or restrain any nation that refuses to cooperate with prevailing tax norms, even if jurisdiction is claimed with the express intent to assist taxpayers in avoiding taxes elsewhere. As such, the conclusion that every nation can tax multinationals—and that there is no clear normative prohibition against any one of them doing so—provides no solution for either double taxation or the problems associated with excessive tax competition.

Even so, recognizing the dependence of governments and "their" multinationals on multilateral cooperation should lead to an increase in focus on how nations go about negotiating the terms of international coordination on tax. The apparently unsatisfactory implications laid out above might be less so if the methods of international coordination used to address them are themselves normatively acceptable. Such coordination methods currently lie in negotiated agreements and an extensive network of soft law instruments developed to support them; it is therefore appropriate to continue to interrogate the normative aspects of these measures. This includes the complex international institution-building that has gone on to date, largely without sufficient normative scrutiny.

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