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BRAIN DRAIN TAXATION AS DEVELOPMENT POLICY

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ABSTRACT

This article examines the potential use of taxation to generate development funds in connection with the immigration of skilled immigrants from developing to developed countries, known as the "brain drain," if designed according to the principles of the new development agenda. It explains that a tax on the brain drain that has been discussed for several decades, yet considered impossible to administer, may be administratively and legally implementable within the framework of the current international tax regime. It argues that designing such a tax according to the principles of the new development agenda, tying together the collection and use of the revenue functions, is essential for the tax to be justifiable and effective. The article proceeds to set the parameters for its design.

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INTRODUCTION

Times of crisis tend to shift the focus from progressive policies to survival. It is only natural that the development discourse has attracted less attention lately. This is bad news for developing countries that depend on cooperation with the developed world and international institutions for support in their quest for growth and development, and they may suffer from the international economic crisis even more than developed countries.[1] The likely consequence is a further widening of the already-increasing gap between developed and developing countries.[2] At the same time, using taxation as a policy tool is very unpopular in these times. For example, the current United States administration has been reluctant to increase taxation extensively, despite an unprecedented need for revenue.[3]

Against this unpromising background, this article explores the possibility and merit of using tax measures to promote development. It adds to the growing scholarship, evaluating the use of taxation as a tool in the arsenal of development policy measures, an analysis of the taxation of the emigration of skilled workers from developing to developed countries, a phenomenon commonly known as the "brain drain."[4] Specifically, this article examines the use of tax measures to generate development funds, collected in connection with the brain drain and designed according to the principles of the new development agenda. This new development agenda emerged out of the critique of the consistent—yet failing—agenda of the international institutions that dominate development policies today, which focus on centralized planning

1. *See, e.g.*, Bruno Gurtner, *The Financial and Economic Crisis and Developing Countries*, *in* ANNUAL REVIEW: MAJOR DEVELOPMENT POLICY TRENDS 189, 190 (Int'l Dev. Policy Ser. No. 2, 2010) (discussing how the financial crisis that began in the United States in 2008 has particularly impacted developing nations).

2. *See* ELHANAN HELPMAN, THE MYSTERY OF ECONOMIC GROWTH 2 (2004) (stating the gap between rich and poor countries continues to grow). *See generally* NATHAN ROSENBERG & L.E. BIRDZELL, JR., HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD (1986) (arguing that Third World countries should not expect favorable results by imitating Western economic systems due to differences in the history of the West and the Third World).

3. *See* CONG. BUDGET OFFICE, THE LONG-TERM BUDGET OUTLOOK 1 (2010), *available at* http://www.cbo.gov/ftpdocs/115xx/doc11579/06-30-LTBO.pdf (outlining the dismal revenue outlook if Bush-era tax cuts remain effective but noting that increasing taxes during this economic downturn is unappealing). The current administration's hesitation to increase taxes, at least partly, is due to President Obama's campaign pledge not to raise taxes. *Responsible Tax Cuts for Ordinary Americans*, BARACKOBAMA.COM, http://www.barackobama.com/taxes/ (last visited Jan. 27, 2011).

4. The term originated from British Royal Society reports describing skilled-worker immigration from the United Kingdom to the United States and Canada. *See* Brian Balmer et al., *The Royal Society and the 'Brain Drain': Natural Scientists Meet Social Science*, 63 NOTES & REC. ROYAL SOC'Y 339, 346 (2009) (attributing the phrase to *The Evening Standard*).

and increasing the volume of aid.[5] Alternatively, the new agenda calls for a decentralized, localized, entrepreneurial, trial-and-error approach that works better in the development context.[6] Accordingly, the measures discussed in this article are designed to both raise the development funds and spend them appropriately and effectively. A fundamental premise is that, while possible, independent analyses of resource collection and allocation of the proceeds would be improper, because such analyses would likely fall into the wasteful pattern of past policies.

This article reformulates and embeds into the new development agenda a tax on the brain drain, which Professor Jagdish Bhagwati envisioned almost forty years ago.[7] Similar to the proposal in this article, the goal of the Bhagwati tax was to assist developing countries in their quest for growth, and its policy was motivated primarily by fairness.[8] The success of such a tax can be measured solely by its effectiveness in promoting growth and development. Specifically, the tax neither aims to efficiently compensate developing countries for their brain drain, nor does it promise economic neutrality. In this way, the proposal is essentially independent of the economic debate over whether the brain drain is harmful or beneficial to the "sending" developing countries. The benefit of making the brain drain the subject of the tax is that it makes the tax potentially more palatable to the developed countries (whose cooperation is necessary for the proposal's success) since it is generally perceived as just. For this reason, it is important to understand the brain drain phenomenon and its real effects, economic and otherwise, on both the sending (developing) and host (developed) countries. Part I undertakes this task by reviewing what we know about the brain drain's effect on the relevant countries. By now, a quite large body of studies has attempted to overcome a chronic shortage of data and low-quality data. These studies concluded that there are both positive and negative consequences of the brain drain phenomenon and that such consequences vary depending on the circumstances, the countries involved, and over time.[9] The least developed countries,

5. *See generally* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (arguing globalization policies of international economic institutions like the IMF and World Bank have served industrialized countries' interests and have hurt the world's poor).

6. *See, e.g.*, WILLIAM EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD (2006) (discussing how recent "success story" nations have been those who accepted relatively little foreign aid, and recent "disaster" nations have received a lot of foreign aid and IMF attention).

7. *See infra* Part II.A.

8. *See infra* Part II.A.

9. *See, e.g.*, DEVESH KAPUR & JOHN MCHALE, GIVE US YOUR BEST AND YOUR BRIGHTEST: THE GLOBAL HUNT FOR TALENT AND ITS IMPACT ON THE WORLD 1–2 (2005); Simon Commander et al., *The Brain Drain: Curse or Boon? A Survey of the Literature*, *in* CHALLENGES TO GLOBALIZATION: ANALYZING THE ECONOMICS 235, 237 (Robert E. Baldwin &

however, seem to consistently fall on the losing side, an outcome that calls for action if one cares about the increasing gap between the developed and developing world.[10] A basic assumption of this article is that developed countries do generally care about the gap, as they spend significant capital on foreign aid and other development initiatives.[11] The brain drain tax discussed in this article, although clearly not a cure-all measure, may be one step in the right direction.

Part II discusses the design challenges the proposed tax measures face, focusing on the collectability of the tax. It traces the evolution of the Bhagwati tax proposal and the design challenges it faced, some of which were a consequence of the lack of isolation of the proposal from the economic background of the brain drain phenomenon. Consequently, although the proposal has been extensively discussed over the years, mainly in economics circles,[12] it has not materialized into an operative tool, let alone an actual tax.[13] Political and legal constraints probably have been to blame for this, yet there is a long list of challenges to the Bhagwati proposal, with little support beyond academic literature. This article suggests that, contrary to common perception, these challenges may be overcome, even within the legal framework of the existing international tax regime. The paper argues this, however, while also integrating the tax with the new development agenda.[14] This suggestion results from the observation that if one cares about development, it is insufficient to merely design a mechanism to *allocate* funds for development efforts; it is also imperative to design a mechanism for the *use* of the collected funds.

Part III develops this observation. It places the Bhagwati proposal in the context of the new development agenda, focusing on the use of funds collected by the tax. This agenda rejects the currently dominant agenda, strongly enforced by the international institutions, based on centralized and uniform

L. Alan Winters eds., 2004); Pierpaolo Giannoccolo, *The Brain Drain: A Survey of the Literature* 9 (Università degli Studi di Milano-Bicocca, Dep't of Statistics, Working Paper No. 2006-03-02, 2009), *available at* http://ssrn.com/abstract=1374329.

10. *See* HELPMAN, *supra* note 2, at 86; KAPUR & MCHALE, *supra* note 9, at 17–20.

11. Developed countries spend a lot of money on international development, which indicates at least that they view it as in their interest. *See, e.g.*, DEV. CO-OPERATION DIRECTORATE, ORG. FOR ECON. CO-OPERATION & DEV., DEVELOPMENT AT A GLANCE: STATISTICS BY REGION 2 (2010), *available at* http://www.oecd.org/dataoecd/59/5/42139479.pdf.

12. *See infra* Part I.A–B.

13. The Philippines briefly imposed a citizenship-based tax targeted at its emigrants but was not able to enforce it. Of course, this tax did not follow the Bhagwati proposal that suggested a surtax be imposed by the host (developed) countries to benefit the sending countries, such as the Philippines. Richard D. Pomp, *The Experience of the Philippines in Taxing its Nonresident Citizens*, 17 N.Y.U. J. INT'L L. & POL. 245 (1985), *reprinted in* INCOME TAXATION AND INTERNATIONAL MOBILITY 43, 47, 49 (Jagdish N. Bhagwati & John Douglas Wilson eds., 1989).

14. *See infra* Part III.

("grand") planning and the "Washington Consensus"[15] version of market theory. This current development agenda emphasizes the need for aid and consistently argues that the more aid, the better, practically imposing one-size-fits-all policy instruments on its subjects (the developing countries).[16] This dominant policy has not been seriously challenged despite its recurring, miserable failure over the years. Failure generated merely "new" grand plans that failed again and again. What is called here the "new development agenda" is a growing body of contemporary scholarship that not only challenges the content of the plans, but the entire approach.[17] It calls for support of what works and what may be studied and assessed based on verifiable data. Studies demonstrate that local, smaller-scale, entrepreneurial, focused projects work better than grand plans, and therefore, the new development agenda supports a trial-and-error approach: projects designed with clear goals whose success may be assessed and hopefully measured, focusing on local needs and initiatives, and most importantly, building on success gradually, if potentially slowly due to lesser political appeal.[18]

The potential role of taxation in the new development agenda has yet to be developed, but its basic premises may be helpful for the purposes of this article. Taxation naturally fits the complexity and nuanced characteristic of the brain drain phenomenon and its effect on developing and developed countries, explored in Part II. The new development agenda relates most directly to the question of what to do with the money raised by the brain drain tax and who will make the relevant decisions. Yet this new agenda also is relevant to some decisions regarding the design of the tax itself, primarily the question of who collects the tax and in what manner.

Part IV concludes with some additional observations about alternatives or complementary tax measures to a brain drain tax, such as exit taxes, revenue sharing for development, and tax incentives designed to support return citizens, remittances, academic "visits," and other scientific cooperation. This article

15. The term "Washington Consensus" was coined by John Williamson in a 1989 summary of ten key development advice items commonly shared by three Washington, D.C. institutions—the International Monetary Fund, the World Bank, and the United States Treasury Department. The original context was advice to Latin American countries following the 1980s crisis. *See* John Williamson, *What Washington Means by Policy Reform*, *in* LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED 7, 7 (John Williamson ed., 1990). This advice later became the symbol of what is often called market fundamentalism. *See* Steven A. Ramirez, *Market Fundamentalism's New Fiasco: Globalization as Exhibit B in the Case for a New Law and Economics*, 24 MICH. J. INT'L L. 831, 835 (2003) (reviewing STIGLITZ, *supra* note 5).

16. *See generally* STIGLITZ, *supra* note 5 (discussing failures of the market fundamentalism approach).

17. *See infra* Part III.

18. *See, e.g.*, EASTERLY, *supra* note 6.

also suggests supporting the communication infrastructure in developing countries to negate brain drain.

I. SO, WHAT DO WE KNOW ABOUT THE "BRAIN DRAIN"?

The brain drain phenomenon has attracted the attention of researchers, particularly economists, as far back as the middle of the last century, when circumstances allowed for increased mobility of labor and particularly, skilled labor from developing to developed countries.[19] During the 1990s, the opening of economies and borders, together with the dramatic decrease in transportation and communication costs due to globalization, led to an increase in the brain drain, mostly into developed countries that implemented special programs to attract skilled migration.[20] The increase also revived an interest in both the empirical and theoretical economic studies of this phenomenon.[21] This section discusses the brain drain phenomenon, what we know about it, its evolution over time, and its effect on the countries and people involved.

19. For an interesting and concise review of the history of the study of the brain drain, see generally Giannoccolo, *supra* note 9. The brain drain in its modern form began in the 1970s, and this is when we begin to see early modern studies of the phenomenon. *Id.* at 6–7. Skilled immigration was, of course, important to some countries even prior to World War II and, naturally, during and after the war. *Id.* at 4–5. The focus of the study of brain drain in the 1950s was the emigration from the United Kingdom to the United States. *Id.* at 5, 10. This immigration was thought to be socially and politically motivated. *Id.* at 5. Its effect was presumed to be harmful to the welfare of the United Kingdom constituency, its society, and demographics. *Id.* at 5–6.

20. Simon Commander et al., *The Brain Drain: A Review of Theory and Facts*, 47 BRUSSELS ECON. REV. 29, 41 (2004). *See also* KAPUR & MCHALE, *supra* note 9, at 37–38, 70–72 (finding developed countries are increasingly competing for skilled labor and can offer greater benefits to immigrating workers who are consequently willing to emigrate); Commander et al., *supra* note 9, at 236 (finding that labor "poaching" by developed countries has increased over the last decade due to greater need for technically skilled workers and that the emigration of skilled labor from developing countries may have positive effects).

21. *See* Giannoccolo, *supra* note 9, at 8–9 (listing numerous studies published after 1990). A complication of this renewed interest is that the evolving literature deals with consequences that change over time, so to some extent, not only due to new observations that were not uncovered by earlier studies, but also possibly due to changes in the phenomenon itself. In addition, we now have more data about brain drain than in prior decades. The most recent data show very high rates of skilled emigration from some of the poorest countries and smaller rates from countries with emerging economies (such as China, India, and Brazil), although these countries provide the largest aggregate numbers of skilled emigrants to developed countries. *See* Commander et al., *supra* note 9, at 238, 239 tbl.7.1.

A. *The Effect of Skilled Immigration on Developing Countries*

1. From Brain Drain to Brain Gain?

The early modern study of the phenomenon of skilled workers' emigration from developing to developed countries focused on what was called the "sending" (i.e., the developing) countries.[22] The initial hypotheses were that this migration harms the sending countries and negatively affects their quest for growth and development: hence, brain "drain."[23] More recent economic literature tells a more complex and nuanced story, demonstrating that skilled worker emigration may have both positive and negative effects on the sending countries.[24] Consequently, a student of the brain drain must evaluate the magnitude of the phenomenon's effects on sending countries, in order to make informed policy judgments. Unfortunately, uncertainty exists regarding these relative magnitudes, and the data is generally both insufficient and qualitatively poor.[25] Therefore, it is difficult to establish widely supportable policies on them. For the purposes of this paper, however, this is not an insurmountable obstacle, since as already mentioned, its proposal, similar to the Bhagwati tax, does not require proof of the harm suffered by developing countries or extent of such harm, if any. Nonetheless, an understanding of the phenomenon is useful, primarily for the purpose of ensuring the legitimacy and the effectiveness of this proposal.

A basic economic model used in the early studies of brain drain was formalized by Jagdish Bhagwati and Koichi Hamada.[26] A basic assumption of

22. *See* Giannoccolo, *supra* note 9, at 6–7. This focus on the developing-developed gap (sometimes called the North-South clash) began in the 1960s and 1970s; during this period most policy responses to the presumed brain-drain harm were devised, including the Bhagwati tax. *Id.* *See also* Commander et al., *supra* note 9, at 235 (explaining the expanded usage of the term "brain drain" in the 1960s).

23. Commander et al., *supra* note 9, at 235; Giannoccolo, *supra* note 9, at 5–7 (summarizing the early studies).

24. *See* KAPUR & MCHALE, *supra* note 9, at 4 (positing that the brain drain actually helped Indian, Irish, and Chinese economies by facilitating international business); Commander et al., *supra* note 9, at 236 (noting that skilled emigration can benefit sending countries by increasing human capital, providing resources through remittance, and increasing the flow of information); Giannoccolo, *supra* note 9, at 8–9 (summarizing theoretical papers which hypothecated that by creating a market for skilled workers, the brain drain could increase the average education of persons remaining in the developing country).

25. *See* KAPUR & MCHALE, *supra* note 9, at 11 ("The data on international migration are so poor that it is difficult to estimate simple migrant stocks and flows, let alone their human capital content."); Commander et al., *supra* note 9, at 237.

26. *See generally* Jagdish N. Bhagwati & Koichi Hamada, *Domestic Distortions, Imperfect Information and the Brain Drain*, 2 J. DEV. ECON. 265 (1975) (extending Bhagwati and Hamada's previous model to incorporate overqualification, internal labor diffusion, imperfect information on labor quality, and the resulting welfare effects of the brain drain); Jagdish N. Bhagwati & Koichi Hamada, *The Brain Drain, International Integration of Markets for*

this model (supported by evidence) was that skilled immigrants significantly increased their wages (in purchase power terms) upon immigration.[27] The brain drain consequently reduced skilled unemployment and increased wages in the sending developing countries, which in turn, presumably increased unemployment for both skilled and unskilled employees in such countries.[28] The loss of skilled workers in developing countries was particularly devastating, since they had so few of them to begin with, and the skilled workers' absence limited investment and growth that depend on such workers.[29] This also affected the employment of unskilled workers that was complementary to the employment and existence of skilled workers.[30] The Bhagwati-Hamada model formally demonstrated the negative effect of the brain drain on the sending developing countries, an effect that was instinctively assumed, but that had not been demonstrated prior to their study.[31] Critics of early brain drain literature note the model's simplicity, dearth of empirical support, failure to look at any variables other than "skilled" versus "unskilled," and the need for differentiating between sectors and countries.[32]

A different argument against the brain drain was that developing countries lost their sunk investment in the education of the skilled workers who emigrated.[33] This loss was exacerbated by the assumption that those who emigrated were the most highly skilled workers.[34] More recent observers argued in response that governments are indeed still the primary financers of education in developing countries, but at least in the less-regulated sectors, private education has increased significantly since the 1980s in some countries.[35] This trend toward private institutions reduces the power of the argument that the developing country loses money via lost educational

Professionals and Unemployment: A Theoretical Analysis, 1 J. DEV. ECON. 19 (1974) (outlining an alternative value-theoretic model for studying the brain drain).

27. Commander et al., *supra* note 20, at 32.

28. *Id.* at 31–32.

29. *See* KAPUR & MCHALE, *supra* note 9, at 27 (describing the emigration of health care workers from developing nations and the resulting exacerbation of already-existing shortages and deterioration of the quality of the care); AnnaLee Saxenian, *From Brain Drain to Brain Circulation: Transnational Communities and Regional Upgrading in India and China*, STUD. COMP. INT'L DEV., Summer 2005, at 35, 36 (noting brain drain can be a constraint on future economic progress in developing countries).

30. Commander et al., *supra* note 20, at 31–32.

31. *Id.* at 30.

32. *See, e.g.*, *id.* at 33.

33. *Id.* at 32–33.

34. Andrew Mountford, *Can a Brain Drain Be Good for Growth in the Source Economy?*, 53 J. DEV. ECON. 287, 288 (1997).

35. *See* Commander et al., *supra* note 20, at 33 (discussing the expansion of private education in China since the 1980s, but noting this expansion has not impacted more tightly regulated sectors, where education continues to be primarily funded in the government).

investment in emigrants, at least in some cases.[36] The argument that the "best and brightest" emigrate seems obvious at first glance, since developed countries that compete for skilled immigrants can—and do—select them from the pool of available talent. It is not always clear, however, that indeed the very best and brightest leave.[37] This is because the selecting countries may not have complete information to allow them to make the best choices in all cases.[38] Moreover, there are many reasons why skilled workers decide to emigrate, so some of them may be more motivated than others, and that may affect, rightfully or not, the selection process. What we do know is that in some fields and particularly when a certain skills set is concerned—notably medical doctors and nurses—the loss is often devastating.[39]

Scholars criticized these two general arguments—that skilled labor became scarce in developing countries and that developing countries lost educational investment in the best and brightest—as proof that brain drain was bad for developing countries. The most important of these critiques was that the earlier literature as a whole did not account for potential positive effects of brain drain.[40] The weaknesses of the earlier studies may have existed partly because some positive effects of emigration on developing nations did not become pronounced until later in time. For example, returning skilled immigrants bring developed world skills and knowledge back to their sending developing countries, yet it is impossible to understand the effect of their return until it occurs, it is studied, and it is measured.[41] Nonetheless, what is clear is that the original assumptions regarding brain drain lacked nuance, and new scholarship evolved to correct this weakness.

In the 1980s, scholars (notably Paul Romer) developed the new growth theory, emphasizing the importance of knowledge and technology to economic growth.[42] Most importantly, this theory explained that governments may affect their markets' technological position by policy means and thereby improve their chances for economic growth.[43] This observation is particularly relevant

36. *See id.* at 33 (describing the influx of private education into India and China). Note, however, that this is likely not the case in the weakest affected countries.

37. *See* KAPUR & MCHALE, *supra* note 9, at 16–17.

38. Commander et al., *supra* note 20, at 34–35.

39. *See, e.g.*, *id.* at 25–29 (discussing the effects of the medical brain drain in particular).

40. These weaknesses were addressed by later scholarly works. See Giannoccolo, *supra* note 9, at 8–9.

41. *See id.* at 31–33 (listing enrollments of foreign students in the United States and debating the number that would eventually return to their country of origin).

42. *See* Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71, S72 (1990).

43. *Id*. at S99. For a less-technical review of the new growth theory, see generally DAVID WARSH, KNOWLEDGE AND THE WEALTH OF NATIONS: A STORY OF ECONOMIC DISCOVERY (2006).

to this article. By being skilled and, more often than not, technologically skilled, immigrants were particularly important to the economic growth of their host developed countries.[44] Naturally, they did not contribute to their home countries' economic growth since they were absent. Yet, one must be careful before concluding that they harmed the growth potential of their home countries because it is possible that other factors would have impeded growth regardless of the brain drain.[45] One should also be careful not to overemphasize the contributions of skilled immigrants to the host countries in this regard without careful study of the phenomenon, since the data does not always reflect, in isolation, the technological advantage brought to the hosting developed countries by skilled immigrants from developing countries. Nevertheless, the gap between developing and developed countries continued to widen.[46] Because the gap may be partly explained by the brain drain, it was therefore, from a development perspective, a potential negative consequence of this phenomenon. This continuing gap attracted further study and correction of some of the deficiencies of the earlier literature.

The most recent study is dynamic and also acknowledges the incentives that the brain drain created and not only the harm or potential harm it causes to the sending developing countries.[47] The brain drain's most important positive effect (which brings into question the "drain" description) is the incentive it creates for workers in developing nations to obtain an education and acquire skills desired in developing countries.[48] The argument is that absent the opportunity to migrate, too few workers in developing countries would acquire skills because the return on education investment is low in their home countries.[49] The opportunities are few and productivity is low, resulting in relatively low wages.[50] In contrast, productivity in developed countries is high, and there is an increasing demand for skilled workers that result in higher

44. Giannoccolo, *supra* note 9, at 4.

45. The discussion of this point is beyond the scope of this article.

46. *See, e.g.*, ANGUS MADDISON, THE WORLD ECONOMY: A MILLENNIAL PERSPECTIVE 17 (2001). For additional statistics, see also *The World Economy*, ORG. FOR ECON. DEV. & CO-OPERATION, http://www.theworldeconomy.org/ (last visited Feb. 19, 2011). *See also* PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 2–13 (2007).

47. Michel Beine et al., *Brain Drain and Economic Growth: Theory and Evidence*, 64 J. DEV. ECON. 275 (2001).

48. *Id.* at 287. Note that the authors do not argue, however, that brain gain outweighs brain drain.

49. *Id.* at 276.

50. *See* Commander et al., *supra* note 20, at 32 (noting that skilled workers earn less in developing countries); Giannoccolo, *supra* note 9, at 7 (noting the main motivation for emigration was the market's inability to employ highly-skilled workers).

wages in real (purchase parity) terms.[51] The opportunity to migrate incentivizes more people to acquire skills than the developed world can absorb.[52] Consequently, developing countries may end up with more—rather than fewer—skilled workers, which may result in improved—rather than depressed—economic growth due to the brain drain phenomenon.[53] Of course this can happen only if some of those who acquire skills do not emigrate (this is reasonable because it is difficult for developed countries' firms to effectively assess this *ex ante*).[54] This argument was at the heart of what was called the "brain gain" literature that implied skilled immigration may even result in a net benefit to the sending developing countries.[55]

The brain gain literature sparked strong reactions from scholars, energizing the debate over the brain drain. Some scholars are still skeptical of the importance of the brain gain argument and attempt to demonstrate that even if the brain drain has some positive effects on some sending countries, these effects are very small, and therefore do not negate the overall harm that the brain drain causes such countries.[56] Some explain that it is the weakest countries that are most affected by brain drain, and they suffer most from its negative effects while enjoying little or no brain gain.[57] Proponents of the brain gain, however, added some empirical and theoretical support to their argument.[58] Much of the debate surrounds methodological and quality data

51. *See* Giannoccolo, *supra* note 9, at 8 (noting the motivation for emigration was the higher productivity and associated higher wages in developed countries).

52. *See* Beine et al., *supra* note 47, at 276.

53. *Id.* at 287. For further study, see Andrew Mountford, *supra* note 34 (exploring limited exit visas and how limiting migration may be good for developing nations); Oded Stark et al., *A Brain Gain with a Brain Drain*, 55 ECON. LETTERS 227 (1997) (comparing human capital in developing countries with open versus closed out migration); Oded Stark et al., *Human Capital Depletion, Human Capital Formation, and Migration: A Blessing or a "Curse"?*, 60 ECON. LETTERS 363 (1998) (questioning whether migration actually depletes human capital).

54. Commander et al., *supra* note 20, at 34–39. One potential benefit in addition to the increase in skilled workers in developing countries might be other beneficial spillover effects on the local economy. The effect on the host countries and the reasons for them to want skilled immigration will be discussed *infra*, Part II.E.

55. Commander et al., *supra* note 20, at 35.

56. *See, e.g.*, Commander et al., *supra* note 9, at 266.

57. On this point there is quite a consensus. *See* Michel Beine et al., *Brain Drain and Human Capital Formation in Developing Countries: Winners and Losers*, 118 ECON. J. 631, 648 (2008); Luca Marchiori et al., *Brain Drain in Globalization: A General Equilibrium Analysis from the Sending Countries' Perspective* 7 (IZA Discussion Paper No. 4207, 2009). Note that both of these papers, however, generally support the idea of some brain gain effect.

58. See Michel Beine et al., *supra* note 57, at 648 (finding brain gain mainly in countries with low rates of skilled migration, corresponding with what they call the "main globalizers," i.e., India, China, and Brazil. Conversely, the less developed countries with high rates of skilled migration, mainly the small countries of Africa and Latin America, are identified as clear losers, with an overall small negative effect from brain drain); Michel Beine et al., *Measuring*

sufficiency disputes, yet it does seem clear that simple generalizations and negative or positive tags are inappropriate. The only exception may be, as mentioned above, that the least developed countries suffer the highest rates of brain drain. There is more or less a consensus that those countries are victims of the phenomenon with little, if any, gains from brain drain.

2. Remittances, Diasporas, and Returns

Additional phenomena related to the brain drain should be mentioned separately because of their uniqueness and their uncertain effects on the sending countries. These are: the issues of remittances by immigrants back to the sending countries; the creation of diasporas of sending countries' affiliated citizens ("loyals") in certain developed countries; and finally, the return of ex-emigrants to their home countries. All these have been explored by research on the benefits of brain drain. However, these phenomena should be examined beyond merely whether they show existence of brain gain or not, since they may be targets of distinct policy measures, as explored below.

B. Remittances

This article assumes that remittances from immigrants to those "left behind" may generally improve the wealth and welfare of the latter, specifically, and the sending countries, generally.[59] If this were not the case, then the potential benefits of the brain drain, at least through this channel of remittances, are diminished or non-existent. For example, there is an argument that remittances are sometimes used for immediate consumption rather than investment, and at least in those cases, there is a benefit in the short term, but maybe only in the short term.[60] Beyond enrichment, remittances in foreign currencies help economic growth because they relieve some foreign exchange constraints often faced by developing countries.[61]

International Skilled Migration: A New Database Controlling for Age of Entry, 21 WORLD BANK ECON. REV. 249 (2007) (using age of exit from developing nations as a proxy for where education was obtained, and finding correlations to their original study showing some brain gain); Michel Beine et al., *On the Robustness of Brain Gain Estimates* (IZA Discussion Paper No. 4293, 2009), *available at* http://www.michelbeine.be/pdf/annales%20final.pdf (supporting their conclusions in *Measuring International Skilled Migration*, controlling for new factors, including whether skilled migrants acquired their skills in the home or the host country). *See also* Oded Stark, *The New Economics of the Brain Drain*, 6 WORLD ECON. 137, 139 (2005) (reviewing relevant contemporary research in support of the brain gain argument).

59. *But see* Riccardo Faini, *Remittances and the Brain Drain: Do More Skilled Migrants Remit More?*, 21 WORLD BANK ECON. REV. 177 (2007) (examining whether, as traditionally thought, remittances improved the economic well-being of the recipients).

60. KAPUR & MCHALE, *supra* note 9, at 162.

61. *See id.* at 146 (discussing how in some developing countries remittances amount to a substantial portion of GDP, especially after macroeconomic or natural disasters).

A second assumption made by the relevant economic literature is that the brain drain and the increase of skilled emigration (compared to non-skilled emigration) would inevitably increase remittances and, consequently, their positive economic effects in the sending developing countries.[62] This, of course, is an empirical question, yet it is one not so simple to answer. In addition to the general lack of good data in the field, it is difficult to measure the isolated effect of remittances by skilled workers separate from those of unskilled workers,[63] so it is problematic to incorporate available data into this picture.

Some recent studies challenge this second assumption, arguing that the increase in skilled migration may actually result in fewer, not more, remittances.[64] Skilled workers do earn more than unskilled workers, and therefore, they have the capacity to remit more, yet studies show that they do not always do so.[65] One explanation is that skilled migrants often come from wealthier families, and therefore, they have less need to remit; another is that skilled workers usually spend longer periods abroad, which reduces their ties with their home countries and, hence, their propensity to remit.[66] Additionally, studies show that remittances decline as the period of time migrants spend abroad increases.[67] Another explanation is that skilled migrants are more likely to try to bring their families to join them in the host countries rather than support them in their home countries.[68]

In conclusion, it is not possible to make the simple claim that the negative effects of the brain drain are offset by its positive effects through remittances. Better data and more targeted research are needed to better assess the effect of remittances on sending countries, and even then, these studies will probably be accurate only for the period, the set of countries, and the circumstances studied.

62. *See, e.g.*, Dilip Ratha, *Workers' Remittances: An Important and Stable Source of External Development Finance*, *in* WORLD BANK, GLOBAL DEVELOPMENT FINANCE: STRIVING FOR STABILITY IN DEVELOPMENT FINANCE: ANALYSIS AND STATISTICAL APPENDIX 157, 158 (2003).

63. Commander et al., *supra* note 9, at 40.

64. *See, e.g.*, Faini, *supra* note 59, at 178.

65. *See, e.g.*, Richard H. Adams, Jr., *The Demographic, Economic and Financial Determinants of International Remittances in Developing Countries* 16 (World Bank Dev. Econ. Dep't Dev. Prospects Grp., Working Paper No. 4583, 2008), *available at* http://www.ssrc.org/workspace/images/crm/new_publication_3/{fof1bfa0-2d55-de11-afac-001cc477ec70}.pdf.

66. *Id.*

67. Faini, *supra* note 59, at 179.

68. *See id.* at 182–84.

C. Diasporas

Communities of developing countries' locals in developed countries (diasporas) may serve another beneficial purpose: They create a welcoming environment that is easier for future successful immigration from the relevant countries. Additionally, diasporas may also support export from the "home" countries.[69] They also tend to invest in such countries, either in the form of foreign direct investment (FDI) or by transferring knowledge and technology,[70] aiding growth and development in their home countries.[71] Significant diasporas are also often associated with significant remittances.[72] Arguably, diasporas should be viewed as a distinct phenomenon from the brain drain because they allow unique benefits to both the home countries and the emigrants themselves.[73]

The concept of diaspora is not well-defined and may have very different effects in different circumstances—particularly, different host countries and their policies. Also, the potentially positive effects of diasporas are not limited to skilled-worker migration; these effects may be even greater for non-skilled migrants.[74] If indeed large diasporas behave differently, altering the impact of brain drain in certain developing countries, these unique effects must be identified in policy debates regarding brain drain,[75] including in this article.

D. Returns and "Brain Circulation"

The potential benefits to home countries from returning skilled ex-emigrants are quite straightforward. They return with new capital, cutting-edge training and knowledge, worldliness, and connections, all of which could immensely benefit their home developing countries.[76] First, they bring investment that is more likely to stay in the developing country than other

69. Commander et al., *supra* note 9, at 259.

70. Yingqi Wei & V.N. Balasubramanyam, *Diaspora and Development*, 29 WORLD ECON. 1599, 1600 (2006).

71. *See id.*

72. *See id.* As discussed above, it is not entirely clear what is exactly the effect of these remittances. *See supra* Part I.A.2.

73. *See* Wei & Balasubramanyam, *supra* note 70, at 1600 (noting that the diaspora model accounts for benefits beyond resource allocation). *See also* Frédéric Docquier & Elisabetta Lodigiani, *Skilled Migration and Business Networks*, 21 OPEN ECON. REV. 565, 586 (2010) (concluding that diaspora positively counters some brain drain).

74. *See, e.g.*, Michel Beine et al., *Diasporas* 14 (CESifo, Working Paper No. 2607, 2009), *available at* www.econstor.eu/bitstream/10419/26652/1/597855889.pdf.

75. Specific policy responses to diasporas are mostly beyond the scope of this article. For a detailed discussion of these policy responses, see *id.*

76. Commander et al., *supra* note 9, at 258.

investments.[77] Second, they import technology and other intangibles that they acquired in the developed countries.[78] Third, they are likely to develop new enterprises in their home countries,[79] thereby creating new opportunities for employment and growth that are wholly endogenous. Finally, they may benefit their home countries in many other ways that are less direct, such as contributing to a homegrown middle class, democracy, and healthy institutions or emphasizing desirable skills and education.[80] Measuring these latter effects is much more complicated, yet may be more important than the direct economic effects.[81]

Some argue that this picture is too rosy since those who come back are likely to be the less successful ones, leaving behind in the developed countries the most successful and promising talent.[82] There is, however, disagreement among researchers as to the validity of this argument.[83] If true, this argument implies that returns may result in minimal benefit—even damage—to the developing countries. This implies that returns to sending countries do not help lessen the gap between the developed and developing countries; thus, policies that encourage emigrants to return should be more carefully scrutinized. Note, however, that it is possible that returning emigrants contribute—perhaps significantly—to their home countries, even if they were not the most successful abroad. In addition, another study implies that emigrants educated abroad—arguably the most skilled—are also the most committed to returning to their home countries and that they keep close connections with such countries believing that they will return, even if later than originally expected.[84]

Finally, recent scholarship discusses a new way to view the skilled immigration phenomenon in general and returning migrants in particular,

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77. *See id.* at 258–59 (discussing the relation between savings and entrepreneurial investment in the home country).

78. *See* KAPUR & MCHALE, *supra* note 9, at 169 (describing the benefits to Ireland's high-tech sector due to returning Irish in the 1990s).

79. Commander et al., *supra* note 9, at 258.

80. *See* KAPUR & MCHALE, *supra* note 9, at 175 (discussing the important role returning emigrants have for social change).

81. *Id.* at 5, 96.

82. KAPUR & MCHALE, *supra* note 9, at 171–72.

83. Commander et al., *supra* note 9, at 259 (stating studies suggest successful immigrants stay and poorly-performing immigrants return home, but that this is not necessarily always true). *See also* KAPUR & MCHALE, *supra* note 9, at 171 (discussing how the skill level of the returning emigrants depends on the initial skill level of migrants in the home country and the skill level of immigrants in the destination country).

84. WILLIAM A. GLASER, UNITED NATIONS INST. FOR TRAINING & RESEARCH, REPORT NO. 22, THE BRAIN DRAIN: EMIGRATION AND RETURN xxxviii (1978).

termed "brain circulation."[85] These studies explore the phenomenon of skilled workers who migrate to a developed country, return to their home countries after some years, invest there, and then disseminate the knowledge acquired in the developed country.[86] This is particularly interesting in cases where this route becomes engrained and is perpetuated by migrants from the same sending countries to the same host countries.

E. Host (Developed) Country Perspective

Little study has been conducted on the effect of the brain drain on the host countries in the context of development, probably because the focus of this literature was (and still is) on the developing countries and their quest for growth and development. Yet, developed countries clearly are intertwined in the brain drain phenomenon. For example, there has been increasing competition recently between these countries over skilled immigrants and the relaxation of immigration policies to target such immigration.[87] The most instinctive perception is probably that the brain drain contributes to the increasing gap between these developed and developing nations. This perception may politically benefit promoters of a tax on the brain drain; however, the validity of this claim should first be investigated.

In this context, it may be useful to consider the motivation of the developed countries to attract skilled workers from other countries, including developing countries. There is little debate that developed countries actively encourage brain drain.[88] It is also quite generally accepted as a reasonable and not offensive policy.[89] In some instances, aggressive actions may be viewed as skill poaching, yet this is not common.[90]

Most directly, developed countries' economies are hungry for skilled workers, as they increasingly depend on technology and services for growth.[91] They are not able to depend on homegrown skilled workers to fulfill their

85. JEAN M. JOHNSON & MARK C. REGETS, NAT'L SCI. FOUND., SCI. RES. STUDIES ISSUE BRIEF NO. 98-316, INTERNATIONAL MOBILITY OF SCIENTISTS AND ENGINEERS TO THE UNITED STATES-BRAIN DRAIN OR BRAIN CIRCULATION? 1 (1998), *available at*: http://www.nsf.gov/statistics/issuebrf/sib98316.htm. *See also* Saxenian, *supra* note 29, at 35 (analyzing the phenomena in India and China).

86. *See* Saxenian, *supra* note 29, at 37–38.

87. *See* KAPUR & MCHALE, *supra* note 9, at 37.

88. Commander et al., *supra* note 9, at 236.

89. This could, perhaps, be because of the real need for talent in developed countries, the human aspects, or the greater ease with which successful developed countries' residents accept a class of developing countries' immigrants similar to their own. *See* KAPUR & MCHALE, *supra* note 9, at 70–72 (discussing the positive aspects of globalization and immigration).

90. Commander et al., *supra* note 9, at 236.

91. Stephen Moore & Vernon M. Briggs Jr., *Forum: Immigration Policy and Skill Shortages*, 8 EMP. REL. WKLY. (BNA) 1703 (1990).

needs for a variety of reasons, so they actively recruit foreigners.[92] This lack of homegrown skilled workers is caused by demographic problems, particularly their declining and aging population.[93] The aging populations also increase the need for growth, since social security networks in these countries depend on a fresh supply of young workers who earn enough to support those who do not work anymore.[94] Finally, regardless of the important need for skilled workers, the ability of developed countries to increase the pool of qualified workers allows them to have a better overall workforce, since they can select from the best of the best.[95] This argument assumes that some foreign workers are superior to some domestic ones, which seems trivially true. A less trivial assumption is that the developed countries are capable of choosing the best of the best among available workers. There are good reasons to doubt the strength of this assumption because the motivations for immigration vary: Some potential immigrants may be more motivated (desperate) and, hence, more determined than others, which may affect their chances of successfully immigrating. Note that the brain drain argument depends on the falsehood of this assumption, as explored above.

For purposes of this article, it suffices to say that developed countries actively promote brain drain, sometimes aggressively, due to competition among themselves. Because of this promotion by developed countries, the brain drain can potentially exacerbate the effects of this phenomenon on the sending developing countries.[96] This, very basically, is the source of the moral obligation that developed countries have to developing countries, in the context of the brain drain. More importantly, this moral obligation translates into possible political acceptance of measures in support of aid and development in connection with the brain drain, simply because it is perceived as fair.

F. Relationship between Brain Drain, Trade, and Foreign Direct Investment

This paper focuses on the brain drain as a stand-alone phenomenon; yet, of course, it has a strong influence on some crucial production factors. Some work has been done since the 1980s on the relationship between skilled migration and international commerce.[97] The "received wisdom" in this context was that international migration and trade should be substitutes since,

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92. *Id.*

93. POPULATION DIV., UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, REPLACEMENT MIGRATION: IS IT A SOLUTION TO DECLINING AND AGING POPULATION? 4 (2001).

94. *Id.* at 97.

95. *See generally* KAPUR & MCHALE, *supra* note 9, at 37–38 (discussing the competition between Australia, Canada, Germany, the United Kingdom, and the United States for the most talented human capital and the immigration policies adopted to accommodate this competition).

96. *See id.* at 4–6 (discussing the effects of the brain drain on developing countries due to the competition between developed countries).

97. Giannoccolo, *supra* note 9, at 15 (summarizing research from that period).

as borders open and barriers to trade are eliminated, the wage gap that was considered the main cause of the brain drain will close, resulting in less migration.[98] The same logic should apply to FDI.[99] The reality has been more complex, however, and one survey concluded that the relationship among migration, trade, and FDI is too complex to draw definitive policy conclusions.[100] The theory that skilled immigrants tend to invest more in their home countries than host countries was explored above in the context of diasporas and brain circulation, yet studies demonstrate that the complementary nature of brain drain and FDI stands, regardless of an established large diaspora.[101] Understanding the importance of further study of this connection, this article shall ignore it due to the preliminary stage of its research.

II. TAXING THE BRAIN DRAIN

The uncertainty explored in the prior section, describing the overall effects of the brain drain on the relevant parties and the magnitude of such effects make it difficult to design a policy measure that will accurately respond and counterbalance its effects—particularly the harm to developing countries. Nonetheless, there is a general belief that the phenomenon harms developing countries—at least the least-developed of these countries—more than it benefits them. That observation, combined with the undisputable widening gap between developing and developed countries, can only support an already established moral argument in support of developed countries assisting developing countries in their quest for growth. Tying such assistance to the brain drain phenomenon may provide more definite and legitimate support to such assistance.

In the early 1970s, this observation led Jagdish Bhagwati to propose a tax on the brain drain.[102] The proposal has been the focal point of the academic debate over potential taxation of the brain drain ever since, although it was never seriously implemented.[103] Therefore, this section begins with a critical analysis of the Bhagwati tax and its evolution, proceeds to lessons regarding the design of such a tax, and concludes with suggested solutions to the design difficulties of a tax on the brain drain.

98. Artjoms Ivlevs & Jaime de Melo, *FDI, the Brain Drain and Trade: Channels and Evidence* 2 (Centro Studi Luca D'Agliano, Dev. Stud. Working Paper No. 261, 2008), *available at* http://www/dagliano.unimi.it/media/wp2008_261.pdf.

99. *Id.*

100. *Id.* at 2–3.

101. *Id.* at 18–20.

102. Jagdish Bhagwati, *The United States in the Nixon Era: The End of Innocence*, DÆDALUS, Fall 1972, at 25, 44.

103. Giannoccolo, *supra* note 9, at 15.

A. The Bhagwati Tax Proposal

The original articulation of the Bhagwati tax was not the main focus of the article in which it appeared. That article was primarily a very strong political (or a political economy) critique of the foreign policy of the Nixon administration in general and its trade policy in particular.[104] Bhagwati's argument was primarily a moral argument based on fairness and the idea of a tax imposed on migrants from developing countries into developed countries.[105] The proposed tax would be collected by the developed countries and transferred to the developing countries.[106] This was just "one idea" that the United States could adopt to fulfill its moral obligation towards developing countries.[107] The sheer economic size and power of the United States and its multinational enterprises, according to Bhagwati, created such moral obligations.[108]

Bhagwati elaborated on the problem of drain brain, as he called it, and proposed a pro-forma solution, in the context of the general criticisms of insufficient support of economic development and aid, at that time. He proposed this solution because to him, the brain drain was closely related to another source of the moral obligation of the United States to developing countries—the scale of the American advantages in technology and capital, augmented by the "enormous salary differentials," between the United States and developing countries.[109] He rejected the alternative solutions of supporting research facilities in developing countries and imposing restrictions on immigration, citing both effectiveness and humanitarian grounds.[110]

The proposal itself was very generic: imposition of a tax, possibly 15%, on the taxable income of immigrants, collected by the Internal Revenue Service (IRS) and transferred to the countries of origin of such migrants.[111] The tax was intended to somewhat "compensate the poor country, while discouraging, however marginally, those migrants who shift locale simply for improved incomes."[112] The proposal developed into a specific policy prescription in later scholarship, where it also occupied center stage.[113]

The following year, Bhagwati cooperated with William Dellalfar to provide a more detailed proposal and to test the proposal using actual and

104. Bhagwati, *supra* note 102, at 25–26.
105. *Id.* at 44.
106. *See id.*
107. *Id.*
108. *Id*. at 39–40.
109. Bhagwati, *supra* note 102, at 41.
110. *Id*. at 42.
111. *Id.* at 44.
112. *Id*.
113. *See generally* Jagdish Bhagwati & William Dellalfar, *The Brain Drain and Income Taxation*, 1 WORLD DEV. 94 (1973).

relevant data.[114] Their self-proclaimed "realistic" estimate of a 10% tax on adjusted taxable incomes of professional immigrants from Less Developed Countries (LDCs) resulted in predicted tax revenue of over $62 million in 1969, which was more than 10% of the net aid flow from the United States in 1971.[115] This was a rough estimate, but it demonstrated the potential significance of the proposed tax, especially if adopted by other developed countries or if "matched" by the remitting developed countries, as called for by Bhagwati and Dellalfar.[116]

More importantly, Bhagwati and Dellalfar provided the analytical basis for the proposal, subject to the basic assumption that "one has LDC welfare in mind."[117] They elaborated on the reasons for rejecting alternative policies that were only briefly mentioned in the original paper[118] and set the goal clearly: compensate developing countries for their losses and deter, if and to the extent possible, the phenomenon.[119] This later paper also dealt with potential criticisms.[120] The most obvious critique was that the proposed tax is inequitable because it increases the burden on immigrants.[121] Bhagwati and Dellalfar rejected this argument, pointing out that the tax would be quite small in comparison to the benefit: the potential increase in salary that motivated the migration.[122] A second critique was that the developing countries did not deserve the proceeds from this tax—a return on their investment in the migrants—since they did not really invest in them in the first place.[123] Bhagwati and Dellalfar's response to this argument was that the permission to migrate itself represented a loss to the developing country and a corresponding benefit to the migrant.[124] The authors added that there was a basis for the tax even if there was no welfare loss to the developing country involved: The country deserved to share part of the surplus created by the act of migration

114. *See generally id.*

115. *Id*. at 96.

116. *Id*. at 97 (estimating a potential total of $300 million).

117. *Id*. at 95.

118. In particular, they emphasize that the humanistic necessity of permitting emigration is not driven by economic factors, such as salary differentials, but rather by non-economic factors, including political and personal difficulties. Since fairness is the ultimate guiding principle, they could not support barriers to personal freedom of relocation in those circumstances. Bhagwati & Dellalfar, *supra* note 113, at 95.

119. *Id*.

120. *Id*.

121. *Id.*

122. *Id.*

123. Bhagwati & Dellalfar, *supra* note 113, at 95.

124. *Id.*

that it permitted to occur.[125] They also anticipated constitutional constraints, but chose to postpone the discussion of those constraints.[126]

Finally, Bhagwati and Dellalfar dealt with some important design questions regarding their proposed tax. They suggested the tax be collected for ten years after migration, even though they preferred lifetime payments.[127] They believed developed countries would not support a lifetime payment, and complications such as change of citizenship might further encumber the issue.[128] Also, they supported collecting the tax after immigration rather than upon a person's exit, since the latter would be inefficient and inequitable.[129] This decision dictated that the tax should be collected by revenue authorities in developing countries, such as the IRS in the United States.[130] They went even further, supporting collection under the auspices of the United Nations rather than under bilateral arrangements.[131] It seems they believed this solution could be more effective, yet they also acknowledged the potential political objections and suggested mechanisms to alleviate such objections.[132] This is interesting since it creates an option for international income yet to be explored seriously in international tax policy literature.

In 1976, the Bhagwati tax proposal was presented again at an important international conference convened in Bellagio, Italy, resulting in two volumes containing the articles presented at the conference.[133] These volumes included: a revised version of the Bhagwati and Dellalfar 1973 paper; additional revenue estimates from different countries to support that paper; legal analysis which pointed to legal and political hurdles the original proposal may have faced if implemented by host countries; and further progress in the economic debate over the harm brain drain causes sending countries.[134] One of these books'

125. *Id.*

126. The issue was raised later at the Bellagio conference. *See* Martin Partington, *Taxing the Brain Drain: A Report on the Bellagio Conference*, *in* TAXING THE BRAIN DRAIN I: A PROPOSAL 199, 201–02 (Jagdish N. Bhagwati & Martin Partington eds., 1976).

127. Bhagwati & Dellalfar, *supra* note 113, at 96.

128. *Id.*

129. *Id.* at 95.

130. *Id.*

131. *Id.* at 95–96.

132. Bhagwati & Dellalfar, *supra* note 113, at 95–96.

133. *See generally* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126; THE BRAIN DRAIN AND TaXATION II: THEORY AND EMPIRICAl ANALYSIS (Jagdish N. Bhagwati ed., 1976).

134. Peter Balacs & Anne Gordon, *The Brain Drain and Income Taxation: The U.K.*, *in* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126, at 71; Bhagwati & Dellalfar, *supra* note 113, *reprinted in* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126, at 33, 37; Don DeVoretz & Dennis Maki, *The Brain Drain and Income Taxation: Canada*, *in* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126, at 53, 59; Frank C. Newman, *The Brain Drain Tax and International Human Rights Law*, *in* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126, at 187; Martin Partington, *supra* note 126, at 199; Martin Partington, *The Brain Drain Tax*

contributions is an organized discussion of alternative measures to curb the brain drain and promote development and a more organized discussion of alternative tax schemes.[135] Bhagwati did not advance a true new version of his proposal, yet he made clear that he viewed legal restrictions, particularly constitutional objections in the United States,[136] as mandating a tax levied by developing rather than developed countries. Bhagwati argued it would be practically difficult for developing countries to enforce such a tax without the help of developed countries, it must be done through some measure of cooperation—tax treaties (bilateral or multilateral) or through an international organization.[137]

In a later article, Bhagwati distinguished taxing skilled immigrants from revenue-sharing between sending and host countries and clarified his view that these are distinct, even alternative, policy options.[138] When he discussed the rationale for taxing the brain drain, he mentioned compensation for harm on one hand and taxing economic rents on the other hand.[139] Bhagwati likened the enrichment of migrants to a windfall and, as such, non-distortionary (the tax does not change people's choices).[140] Nonetheless, he preferred a new "political" argument based on fairness, calling for taxation of emigrants in similar fashion to other constituents of home countries.[141] He likened the failure to tax emigrants to "representation without taxation."[142] Slogans aside, it is obvious this argument arose from the attraction of Bhagwati and his proponents to the practical solution of citizenship-based taxation.[143] This solution appeared to solve the legal problems the original proposal (a tax imposed by the host countries) faced in those host countries[144] and satisfied the international preference for self-reliance by sending countries (and perhaps, also alleviated Bhagwati's disappointment in the lack of political enthusiasm for his initial proposal).[145] Then he turned to the revenue-sharing alternative

Proposal: A Lawyer's Analysis, *in* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126, at 115.

135. *See, e.g.*, Jagdish N. Bhagwati, *The Brain Drain Tax Proposal and the Issues*, *in* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126, at 3, 13–14.

136. *See* Oliver Oldman & Richard Pomp, *The Brain Drain: A Tax Analysis of the Bhagwati Proposal*, *in* TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126, at 167, 181–82 (questioning the constitutionality of Bhagwati's proposal).

137. *See* Bhagwati, *supra* note 135, at 20–21.

138. Jagdish N. Bhagwati, *International Migration of the Highly Skilled: Economics, Ethics and Taxes*, 1 THIRD WORLD Q., July 1979, at 17, 22–29.

139. *Id.* at 22.

140. *Id.* at 22–23.

141. *Id.* at 24.

142. *Id.* at 23.

143. Bhagwati, *supra* note 138, at 24–25.

144. *See, e.g.*, Oldman & Pomp, *supra* note 136, at 168.

145. Bhagwati, *supra* note 138, at 25–26.

and basically supported it, if developed countries were willing to engage in that process with developing countries.[146]

The complexity of the brain drain, as it unfolded in economic studies, also affected the evolution of the Bhagwati tax proposal. In 1989, Bhagwati and Wilson edited a collection of articles exploring the effect of international mobility on tax policy.[147] This book did not advance significant changes to the proposal, yet the book documented the Philippines's failure to enforce a unilateral citizenship-based tax without the cooperation of the developed host countries.[148] Overall, the impression is that Bhagwati remained supportive of a citizenship-based tax on skilled immigrants, yet one that benefits from cooperation with the developed host countries.[149]

Discussion of Bhagwati's proposal at this stage benefits from an acknowledgment of the nuances of various circumstances and countries that may affect such a tax's design.[150] This is essentially the current status of the Bhagwati tax proposal evolution. It should be noted, however, Bhagwati has recently documented the development of his thoughts and various rationales.[151]

Generally, the Bhagwati tax proposal was based on fairness and fairness-related arguments.[152] Yet, support for the proposal also came in the form of optimal tax literature and efficiency arguments.[153] The basic premise was that developing countries would not be able to impose the progressive income tax the literature encouraged because skilled emigrants were not taxed; the

146. *Id.* at 29.

147. *See* INCOME TAXATION AND INTERNATIONAL MOBILITY, *supra* note 13.

148. Pomp, *supra* note 13, at 62.

149. Jagdish N. Bhagwati & John D. Wilson, *Income Taxation in the Presence of International Personal Mobility: An Overview*, *in* INCOME TAXATION AND INTERNATIONAL MOBILITY, *supra* note 13, at 3, 8.

150. *Id.* at 3.

151. Jagdish Bhagwati, *Overview of Issues*, *in* SKILLED IMMIGRATION TODAY: PROSPECTS, PROBLEMS, AND POLICIES 3, 9–11 (Jagdish Bhagwati & Gordon Hanson eds., 2009).

152. Note that these fairness arguments are not ethical, philosophical arguments, but rather economic. Responding to a critique about moral justification is beyond the scope of this article because the tax discussed herein does not depend on a moral argument. Rather, it is an observed choice of developed countries to support the developing countries' quest for development. Fernando R. Tesón, *Brain Drain*, 45 SAN DIEGO L. REV. 899, 918–20 (2008) (arguing there is no moral justification for preventing immigration, and consequently, no justification for taxing the fruits of immigration when there is no unjust harm caused by the brain drain).

153. *See, e.g.*, Jagdish N. Bhagwati & Koichi Hamada, *Tax Policy in the Presence of Emigration*, 18 J. PUB. ECON. 291, 292–93 (1982) (using a public-finance-theoretic approach to analyze the income taxation of emigrants); J.A. Mirrlees, *Migration and Optimal Income Taxes*, 18 J. PUB. ECON. 319 (1982) (analyzing the presumption that keeping taxes low prevents emigration); John D. Wilson, *Optimal Linear Income Taxation in the Presence of Emigration*, 18 J. PUB. ECON. 363 (1982) (arguing using an income tax, an income tax on emigrants, and an educational subsidy can improve the welfare of developing nations and the world).

progressive income tax would incentivize emigration.[154] That would be an incentive in the wrong direction. Therefore, the conclusion was that a brain drain tax was necessary to maintain the integrity of the domestic progressive income tax in developing countries that suffer from brain drain.[155]

Before we discuss the contemporary analysis of the Bhagwati proposal, it may be useful to summarize previous critiques. The most consistent critique of the proposal was based on its unfairness toward migrants vis-à-vis fellow residents of host countries (where the host imposes the tax).[156] Also, if the home country imposed a citizenship-based tax, it likely would be considered an inappropriate extension of its powers or, alternatively, impossible to enforce.[157] Such a tax might also be politically unattractive to host countries required to accept the tax or assist in its enforcement.[158] Similarly, some raised human rights concerns. Critics were concerned curbing emigration may hurt those who wished to emigrate for reasons other than the capture of the economic rents—reasons which justify distinguishing their migration from those simply seeking higher salaries.[159] Finally, brain gain proponents did not see the need for a tax where the underlying phenomenon presumably benefits developing countries.[160] This article next explores the contemporary support and evaluation of the Bhagwati tax proposal and examines how the proposal responds to the aforementioned critiques.

B. Revival of the Bhagwati Tax Idea

Recent scholarship has found a renewed interest in the Bhagwati tax. An interesting example of this new scholarship is John D. Wilson's voluntary brain drain tax proposal.[161] Wilson proposed creating an incentive for migrants to pay the brain drain tax voluntarily, not because the tax is voluntary, but rather because, absent the incentive, they would be expected to simply evade it.[162] The proposed incentive is to lower the domestic tax payments of return migrants who actually paid the brain drain tax (as opposed to those who evaded it).[163] Wilson acknowledged the scheme will create a disincentive to return for tax evaders, such as those who miscalculated their chances of return

154. Bhagwati & Hamada, *supra* note 153, at 295, 309, 310.
155. Mirrlees, *supra* note 153, at 319.
156. Oldman & Pomp, *supra* note 136, at 181.
157. *Id.* at 168.
158. *Id.*
159. *Id.*
160. *See* Michel Beine et al., *supra* note 74, at 25–26.
161. John D. Wilson, *A Voluntary Brain-Drain Tax*, 92 J. PUB. ECON. 2385 (2008).
162. *Id.* at 2386.
163. *Id.* Specifically, Wilson recommends a tax credit at least equal to the tax and which is unavailable to non-payers. *Id.*

and, therefore, evaded the initial payment.[164] The scheme would also pressure governments to provide tax or other incentives to returning immigrants who return, even if they had not paid the voluntary tax.[165] In response, Wilson emphasized how governments must build a reputation for upholding the law and enforcing tax incentives, which will eventually result in correct incentives for immigrants.[166] Wilson also argued that such a scheme does not distort migration decisions.[167] The primary reason for this proposal is the frustration with developing countries' inability to tax the brain drain without the assistance of developed countries—assistance which is not generally available.[168] Wilson recognized that, of course, the cooperation of developed countries could improve the scheme that is otherwise only a partial solution.[169] This proposal is concerning because it could be used to camouflage governments undesirably coercing immigrants to "volunteer" to pay the tax. This, some claim, is the reality in Eritrea.[170]

John McHale also argued recently that the Bhagwati tax should be re-evaluated due to several changed circumstances.[171] These changes include the availability of better data about the magnitude of the brain drain, particularly the large rates of skilled immigration from Africa and the Caribbean region; the renewed understanding of the dire need for capital among the governments of developing countries; the understanding of the effects of globalization on skilled immigrants that allow closer connections with their home countries; and in some cases, better understanding of the harm caused in developing countries by the brain drain.[172] Reviewing the failure of Bhagwati's proposal to materialize as policy, McHale concluded that principled arguments, such as freedom, efficiency, and fairness—although worthy of answering—were not the reasons for such failure; rather, vested interests and administrative hurdles actually caused the failure of the idea.[173] He then argued that the significant changes in the administrative environment, such as globalization, transnationalism, and international cooperation, warrant another attempt at

164. *Id.*

165. *Id.* at 2390.

166. Wilson, *supra* note 161, at 2390.

167. *Id.* at 2388.

168. *See* Pomp, *supra* note 13, at 62–63.

169. Wilson, *supra* note 161, at 2390.

170. *Eritrea "Intimidates Emigrants into Paying Tax"*, AFROL.COM (May 26, 2010), http://www.afrol.com/articles/36196.

171. John McHale, *Taxation and Skilled Indian Migration to the United States: Revisiting the Bhagwati Tax*, *in* SKILLED IMMIGRATION TODAY: PROSPECTS, PROBLEMS, AND POLICIES, *supra* note 151, at 362, 363–65.

172. *Id.* at 363–65.

173. *Id.* at 378.

promoting the tax, regardless of the issue of "vested interests."[174] This is consistent with views of several other scholars,[175] including Professor Bhagwati himself.[176] In particular, McHale argued a citizenship-based tax is now more feasible than in the past because citizenship is "worth more," and its administrative burdens, including the information furnishing requirements from developed countries, are not prohibitive.[177] McHale and co-author Devesh Kapur provided further support for the brain drain tax in a book that analyzed the whole spectrum of potential policy responses to the brain drain, including three models of fiscal solutions: a citizenship-based tax that largely follows the modern version of the Bhagwati tax proposal, a revenue-sharing model that requires cooperation of developed countries, and an exit-tax mechanism.[178]

In conclusion, the present interest in taxing the brain drain is apparent. The most attractive forms of such taxes seem to be the citizenship-based tax and a tax imposed with cooperation between developed and developing countries. Still, the main problem with the former is the inability of developing countries to administer the tax, and the latter cannot be seriously considered without cooperation between countries. This article next considers these and other design challenges from the perspective of the existing international tax law regime, and suggests that these challenges can be solved with little or no reform to the existing regime if political will exists.

C. Design Challenges and Possible Solutions

Determining the goal of the brain drain tax is the most important decision. The evolution of the Bhagwati tax proposal indicates that despite a constant reminder of the explicit fairness rationale, Bhagwati and others constantly debated the point of compensation (based on the harm, if any, caused by the

174. *Id.*

175. *See, e.g.*, Domenico Scalera, Skilled Migration and Education Policies: Is There Still Scope for a Bhagwati Tax? 2 (Dec. 18, 2009) (unpublished manuscript), *available at* http://mpra.ub.uni-muenchen.de/19643/ (focusing on efficiency, and arguing that under certain circumstances, the Bhagwati tax could universally improve welfare); John Douglas Wilson, *Taxing the Brain Drain: A Reassessment of the Bhagwati Proposal* 1 (2004) (unpublished manuscript), *available at* https://www.msu.edu/~ec/faculty/wilson/Taxing%20the%20Brain%20Drain.pdf (reassessing Bhagwati's original proposal in light of new theoretical models of international taxation).

176. *See, e.g.*, Bhagwati, *supra* note 151.

177. McHale, *supra* note 171, at 380. McHale discusses other related policy measures, including tax sharing between the host and home countries, and tying skilled immigration to development aid. *Id.* at 381, 384. For further discussion, see *infra*, Part III.

178. KAPUR & MCHALE, *supra* note 9, at 190–95. Their analysis is based on a prior paper published by them together with Professor Mihir Desai. *See* Mihir A. Desai et al., *Sharing the Spoils: Taxing International Human Capital Flows*, 11 INT'L TAX & PUB. FIN. 663, 678, 684 (2004).

brain drain) and deterrence (stopping some of the brain drain, even if very little).[179] These additional goals increased the difficulties of design: the former due to its complexity and uncertainty of magnitude (as explained in Part II), and the latter due to its potential undesirable human aspects. For the purposes of this article, a tax on the brain drain may be one more weapon in the arsenal of development-supporting policies and would be based upon the actual commitment of host countries to support sending countries in their quest for development. This commitment is observed and assumed without nuance for the purposes of this section. The next section discusses the use of the funds raised by the tax.

Once a goal is set, one should address the most fundamental international tax issue: jurisdiction or, in the context of this article, which country should impose the tax? The original Bhagwati tax proposal envisioned a surtax imposed by the host country.[180] Yet, the surtax idea received much criticism and was deemed legally impossible—or at least difficult to implement—due to the unequal taxation of these legal immigrants when compared to other taxpayers in the host country.[181] Also, an additional tax may negate some of the host countries' interests in permitting, and even encouraging, this migration.[182] Therefore, as already mentioned, this model fell from grace and was abandoned in later versions of the proposal.

The obvious alternative is a tax implemented by the sending country. This was initially problematic because tax jurisdiction follows residence in our current international tax regime, and immigrants are residents of the host, not the home country, once they migrate.[183] A solution to this difficulty was found in an alternative personal jurisdiction regime—citizenship-based taxation.[184] A citizenship-based tax is justified by the immigrants' continued ties with, and allegiance to, their home countries.[185] This jurisdictional rule dominated, as mentioned above, the more recent version of the Bhagwati tax proposal.[186] It was appealing because the United States has consistently taxed its citizens on a worldwide basis and basically without regard to competing tax jurisdiction

179. McHale, *supra* note 171, at 376.

180. Bhagwati, *supra* note 102, at 44.

181. *See, e.g.*, McHale, *supra* note 171, at 378.

182. *See* Bhagwati & Dellalfar, *supra* note 113, at 95 (discussing the United States' "ineffective" measures to try to slow the brain drain and arguing the tax will have the desired effects).

183. *See* ORG. FOR ECON. CO-OPERATION & DEV., ARTICLES OF THE MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL art. 4(2) (2008) [hereinafter ARTICLES OF THE MODEL CONVENTION].

184. Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 448–50 (2007).

185. *Id.* at 456.

186. Bhagwati & Wilson, *supra* note 149, at 3.

claims, even if such claims are made by its treaty partners.[187] Why, then, could such treaty partners not use a similar rule and the United States, the most important host country, allow it to happen (and even assist in collecting it, at least on behalf of its developing tax treaty partners)?[188]

There is nothing inherently problematic with this solution, but it requires the imposition of new taxation by the sending countries, since they currently do not impose citizenship-based worldwide income taxation like the United States does. Note that this measure could not simply be initiated by a tax treaty itself, as part of the agreement between, for example, the United States and the home countries, because tax treaties are not supranational tax-imposing mechanisms.[189] There are universal treaties that taxpayers may use, effectively by election, to alleviate excessive taxation of cross-border transactions.[190] More recently, the role of tax treaties in improving coordination between treaty partners, including enforcement and collection of *existing* taxes, has been emphasized, yet they never have been used to impose *new* taxes.[191] The challenge of this construct is that sending countries may not be able to impose a new model of taxation without many legal and political complications.[192]

This, however, does not mean the tax cannot be imposed by sending countries. This is especially true if they already tax their residents on a worldwide basis, i.e., not exclusively on a territorial basis. This system of taxation is much more common than citizenship-based worldwide taxation.[193] If developing countries consider the relevant emigrants their residents (and taxpayers), even after they have emigrated, it is possible to tax them. This taxation could occur even if a tax treaty is in place, although minor amendments to tax treaties may be required to allow implementation of the Bhagwati-style brain drain tax. Tax treaties envision cases of dual residence.[194] In our case, the migrants remain by law, residents of their home

187. Kirsch, *supra* note 184, at 448–49.

188. The Philippines example demonstrated the obvious: that the developing countries cannot do it themselves. Pomp, *supra* note 13, at 62–63.

189. Allison Christians, *Networks, Norms, and National Tax Policy*, 9 WASH. U. GLOB. STUD. L. REV. 1, 13 (2010).

190. *See id.* (discussing how many individual treaties exist, but there is not a single, universal, mandatory governing treaty).

191. *See id.* (noting that the model treaties have led to cooperation and soft law, but not to a universal governing treaty).

192. *See id.* (noting the lack of a legally authoritative body to enforce such taxation treaties). One complication may be that both skilled and non-skilled immigrants will be subject to the tax, and it will be difficult to explain why the tax is not enforced in the case of non-skilled immigrants, regardless of salary levels. Another complication is that often skilled immigrants or their families are politically influential.

193. *See* Kirsch, *supra* note 184, at 445 (noting the United States is an "outlier" in the international community for imposing citizenship-based worldwide taxation).

194. *See* ARTICLES OF THE MODEL CONVENTION, *supra* note 183, art. 4(2).

countries,[195] yet over time they also establish residence in the host countries.[196] Almost all tax treaties include a provision to "break the tie" in such cases. Under the treaty, an individual is considered a resident of only one of the countries.[197] Typically, taxpayers have the flexibility to arrange their affairs in a way that will ensure the outcome that benefits them the most. For our purposes then, it is likely that most skilled immigrants will be able to avoid normal residence taxation by the home country.

One response to skilled immigrants' ability to avoid residence taxation of the home country could be a new separate tax on residents outside the jurisdiction of the treaty. Yet this option suffers from the same problems of citizenship-based taxation. A less aggressive move would be amending the tie-breaking rules or simply providing in them that immigrants from the developing treaty partners will be considered residents of their home country for the purposes of the treaty, for a specified period of time post-immigration.

Probably the least intrusive amendment of the rules would be to change the order of the tie-breaking tests. Currently, the first test assigns residence to the country where the taxpayer has a permanent home available to her at all times.[198] Obviously, this is completely controlled by the taxpayer. Only when the taxpayer has a permanent home in both contracting countries, or in neither country, does the second test come into play.[199] The second test assigns residence to the country where the taxpayer has her "centre of vital interests."[200] The second test is more subjective and less strictly controlled by tax planning. During the first few years of immigration, it is arguable that the skilled immigrant's "centre of vital interests" remains in the home country. If the economic test does not produce the intended result, more weight could be given to family, social, and religious ties, as those ties tend to remain with the home country, while economic ties are often stronger with the host country.[201] Deviating from the model convention is not particularly difficult, as countries negotiate actual treaties that quite often vary from the model, although not

195. The immigrants remain residents of their home countries, either indefinitely or for a period of several years. *See* Kirsch, *supra* note 184, at 449 n.15.

196. Most countries use some form of substantial presence trigger for residence, often based on aggregate presence in the country of more than 183 days in any year. *See, e.g.*, I.R.C. § 7701(b)(3)(A) (2006).

197. *See* ARTICLES OF THE MODEL CONVENTION, *supra* note 183, art. 4(2).

198. *Id.*

199. *Id.*

200. *Id.* These interests are both economic and personal. *Id.*

201. Current convention gives more weight to economic ties rather than social, political and religious ties. *See* ARTICLES OF THE MODEL CONVENTION, *supra* note 183, art. 4(2)(a) (stating that an individual may be deemed a resident in the state where he has closer economic ties).

typically from these residence rules.[202] Moreover, it is common practice in international arrangements that support development to grant some limited and temporary concessions to developing countries.[203]

Once residence is established in the home country, that country has tax jurisdiction, and treaties should settle the division of revenue according to the treaty. When employment is the most relevant item of income, Article 15 of the Organisation for Economic Co-Operation and Development's Model Convention provides that a country may tax employment income of a non-resident only if she was present in such country for more than 183 days.[204] It seems obvious that, having gone to the trouble to migrate, skilled immigrants would typically stay away more than 183 days. In this case, double taxation is possible, though it may not be an issue if income is not significant.[205] If the worldwide taxation imposed by the home country is limited to a few percentage points (as was the case with the Bhagwati proposal), then the contracting states may tolerate this double taxation, modify it, or completely eliminate it. This simple scheme can facilitate the modern version of the Bhagwati tax proposal with little tweaking of the current international tax regime and little effect on the tax balance between the countries involved.

Developed countries could further assist developing countries in this context if they established, unilaterally or by agreement with specific countries, stricter rules for "establishment of residence"—say, beyond the conventional 183-day rule. Naturally, if the host country does not claim tax jurisdiction based on residence, there is no conflict. This, however, seems a very arbitrary and limited solution and could only last, if at all, for one or two years after immigration.

Note that this residence solution is more challenging than amending the tie-breaking rules, yet would be easier than enacting a new citizen-based tax. This solution is risky, however, and potentially counterproductive, since immigrants might sever ties with their home countries earlier than they would absent these rules. Further research on this point would be useful to better understand this risk.

An objection to this solution may be that it weakens the international tax regime and the recent trend toward harmonization. The strength of this established regime benefits both developed and (productive) developing countries, and changing it may result in more harm than benefit to the latter. This argument, however, is weak because the extent of deviation from the

202. *Compare id.*, *with* Tax Convention with the Republic of India, U.S.-India, Sept. 12, 1989, S. TREATY DOC. NO. 101-5 (1989) [hereinafter U.S.-India Tax Treaty].

203. *See* General Agreement on Tariffs and Trade, art. XVIII, XX, July 1986, http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX.

204. ARTICLES OF THE MODEL CONVENTION, *supra* note 183, art. 15(2).

205. *Id.* art. 15(1).

model rules is quite limited and easily contained. Also, most of the skilled migrants move to very few countries: the United States, Australia, Canada, Germany, France, and the United Kingdom.[206] And, the countries that suffer the most (mostly African and Caribbean countries) compose a small percentage of international commerce.[207] Thus, these limited special rules are unlikely to frustrate the global balance.

1. An Illustration

To illustrate how a brain drain tax may work, take *A*, an Indian-born software engineer immigrating in Year 1, to work in the Silicon Valley, on an H1-B visa.[208] He is an Indian citizen and resident and becomes a United States resident for tax purposes in Year 1, assuming that he spent essentially the whole year within the United States.[209] He earns $100 as wages for his work in the United States and suffers an assumed tentative tax of $30. Let us assume that Indian income (wage) taxes would also amount to $30. The United States has entered into a tax treaty with India, partly for the purposes of eliminating double taxation of taxpayers such as *A*.[210]

Two preliminary investigations are required prior to analyzing the tax consequences for *A* under the treaty. First, one should establish substantive scope: whether the taxes involved are covered by the treaty. Article 2, entitled "Taxes Covered," provides that the treaty covers the income taxes of both countries, any surcharge on them, and also any similar taxes imposed after the treaty's enactment.[211] This is a standard provision in tax treaties,[212] and in most cases the relevant tax base for brain drain taxes is wages,[213] and the relevant taxes are the regular income taxes on wages.[214] If a home country were to enact a separate brain drain tax as a surtax or a separate tax, it would still probably fall within the substantive scope of the treaty, as a tax substantially similar to an income tax under Article 2(2). In any event,

206. KAPUR & MCHALE, *supra* note 9, at 30.

207. *See* William J. Carrington & Enrica Detragiache, *How Extensive is the Brain Drain?*, 36 FIN. & DEV., June 1999, at 46, 47–48.

208. The author uses the India-United States example merely to illustrate a realistically typical case, not to analyze the laws of these countries, particularly not that of India as it is in the present. United States tax law is accurate and current to the time this article is written.

209. Assuming he spent the entire year in the United States and he is not a United States citizen or permanent resident ("green card" holder). I.R.C. § 7701(b)(1)(A)(ii) (2006).

210. U.S.-India Tax Treaty, *supra* note 202.

211. *Id.* at 2.

212. *See* STAFF OF THE JOINT COMM. ON TAXATION, 107TH CONG., BACKGROUND MATERIALS ON BUSINESS TAX ISSUES 18 (J. Comm. Print 2002) (noting that tax treaties usually limit the amount of income taxes imposed).

213. *See id.* (discussing how foreign persons in the United States are generally taxes based on gross income).

214. *Id.*

enactment of such a separate tax should be communicated to the treaty partner; it is difficult to envision such an enactment without a prior agreement stipulating that the host country will recognize the new tax. This could be done through a common competent authority agreement under the tax treaty.

The second, and more important, scope issue for our purposes is that of personal scope or residence. The United States-India treaty essentially applies only to residents of the contracting countries.[215] Residence is determined under Article 4(1), which refers to the residence rules of the contracting countries: "For the purposes of this Convention, the 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, citizenship, place of management, place of incorporation, or any other criterion of a similar nature."[216] In our hypothetical, *A* will certainly be a resident of the United States; if India chooses to implement a brain drain tax scheme, it will make sure *A* is also considered a resident of India. It is easy to see that in the typical cases, immigrants will be dual residents. "Breaking the tie," by determining residence in only one of the contracting countries, is one of the more important and effective roles of tax treaties. Article 4(2) provides:

> Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
>
> (b) if the State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;
>
> (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
>
> (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.[217]

This, again, is a very common provision in tax treaties,[218] and as explained above, it is usually decided on the permanent home questions.[219] Assuming

215. U.S.-India Tax Treaty, *supra* note 202, at 1.

216. *Id.* at 3.

217. *Id.*

218. *See* Kirsch, *supra* note 184, at 481 n.157 (noting that bilateral tax treaties generally contain a provision to determine residence status of individuals who are residents of two countries).

that *A*, like most immigrants, does not have a permanent home available to him in India and that he must live somewhere other than a hotel in the United States, he will be recognized under the treaty as being only a United States resident. This is undesirable for India if it wishes to tax the brain drain: The place of permanent residence is mostly under the control of the taxpayer. If, however, the second test (personal and economic ties) comes into play, there is a greater chance that some recent immigrants will still be considered Indian residents for treaty purposes. As suggested above, this is not an elegant or comprehensive solution; a better one will be to agree with the United States on interpretation of the "centre of vital interest" test, such that a sufficient portion of Indian immigrants are considered Indian residents for treaty purposes for an agreed number of years.

In the case of the United States, there is one variation that may be helpful or detrimental to a brain drain tax. Article 1(3), better known as the "saving clause," provides:

> Notwithstanding any provision of the Convention except paragraph 4, a Contracting State may tax its residents (as determined under Article 4 (Residence)), and by reason of citizenship may tax its citizens, as if the Convention had not come into effect. For this purpose, the term "citizen" shall include a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of 10 years following such loss.[220]

This is a uniquely American provision that ensures the integrity of the United States' taxation of the worldwide income of its citizens, regardless of their residence elsewhere—a uniquely American tax treatment.[221] But, note that Article 1(3) applies bilaterally: India could also tax its citizens regardless of this treaty's application.[222] Proponents of the Bhagwati tax proposal were attracted to a solution under which India, for example, could use this provision to tax the brain drain emigrants, regardless of the residence determination in the treaty (most likely the United States, in the case of *A*).[223] The problem with this solution, as mentioned above, is that, first, India must change its tax system to what would likely be a very unpopular system (to both emigrants and potential emigrants). Even if such change occurred, migrants like *A* would face double taxation: citizenship-based taxation by India and residence-based taxation by the United States. Note that the double-taxation relief mechanism,

219. *See, e.g.*, Adams v. Comm'r, 46 T.C. (CCH) 2424, 2430 (1966).

220. U.S.-India Tax Treaty, *supra* note 202, at 1.

221. STAFF OF THE JOINT COMM. ON TAXATION, 107th CONG., BACKGROUND MATERIALS ON BUSINESS TAX ISSUES 54 (J. Comm. Print 2002).

222. U.S.-India Tax Treaty, *supra* note 202, at 1.

223. *See* Pomp, *supra* note 13, at 43 (discussing this type of tax as most feasible and attractive because a country can adopt it unilaterally).

either the domestic, unilateral United States foreign tax credit[224] or Article 25 of the United States-India treaty,[225] would not help in this case. The United States would generously grant a foreign tax credit to its residents, but only against their foreign source income; *A*'s income at issue here is unquestionably domestic, as it is earned from services performed within the United States.[226] Double taxation may not be so worrisome if it is only an Indian brain drain tax of a few percentage points that is applied on a citizenship basis. This indeed was the original intention of the Bhagwati tax proposal. In that case, though, India should make sure that the United States accepts that tax as falling within the substantive scope of the treaty and that such tax does not taint the regular income tax, making it non-creditable in the United States, for example. The conclusion must be that if India were to take this direction, it should implement it in cooperation with the United States.

At this point, the taxing rules come into play. The United States would want to tax the wages earned in the United States because even non-residents are taxed on their United States source income from employment.[227] If *A* were a non-resident of the United States under the treaty, as a result of the tie-breaking rule he would be taxed in the United States under both domestic law and the treaty. This is because the treaty in Article 16 (an older version of current Article 15 of the OECD Model, but with a similar effect in this case) permits the country of source (the United States) to tax wages earned within its territory, if the taxpayer was present in that country for more than 183 days in the relevant tax year and was employed by a non-resident.[228] Since *A*, like most immigrants, is employed by a resident corporation and was present in the United States for most of the tax year, he will not be able to avoid United States taxation of his wages.[229] Applying the treaty may be relevant for obtaining a credit in India, yet it does not matter for the purposes of a case for a brain drain tax. This means that only a special tax imposed by India with the agreement of the United States, effectively resulting in double taxation of wages, could be useful as a brain drain tax of the kind sought in this article. This, in fact, is close to the Bhagwati vision in the first place.

Finally, two other elements of tax treaties should be mentioned, since they are instrumental in this case. First, effective exchange of information is key to India's ability to measure the relevant income and assess an accurate brain drain tax.[230] Second, assistance in the collection of taxes provision may reduce

224. *See* I.R.C. §§ 901, 904(a) (2006).
225. U.S.-India Tax Treaty, *supra* note 202, at 20.
226. *See* I.R.C. § 861(a)(3).
227. *See id.* § 871(a)(1).
228. U.S.-India Tax Treaty, *supra* note 202, at 15–16.
229. *Id.*
230. *See id.* at 22.

the administrative burden on India significantly.[231] This is particularly true in a country such as the United States, where the government will have the relevant information, regardless of actual tax payments by the immigrant. As a resident under the United States domestic rules (even if a non-resident for treaty purposes), *A* most likely will be required to file a federal income tax return in the United States.[232] A similar outcome would occur even if the tax treaty did not apply, so long as an exchange of information treaty existed.[233] Otherwise, more specific arrangements will be required to replicate the above scenario, in order to allow a brain drain tax to be implemented effectively.

In conclusion, a brain drain tax may be implemented under the current international tax regime, yet, as demonstrated by this very simple and non-technical illustration, the details of each bilateral scenario must be explored separately and solved between the relevant countries accordingly.

III. TAXING BRAIN DRAIN AS A NEW DEVELOPMENT POLICY MEASURE

Keeping in mind the complexity of the brain drain phenomenon, the prior section demonstrated that a tax on the brain drain may be implemented within the current international tax regime. This, however, is insufficient for the purposes of this article, which argues for development-supporting policy measures in connection with the brain drain and, in particular, a brain drain tax. The success of the proposed tax and related measures should be measured by how effectively they promote development in developing nations. This section discusses the properties and design features a brain drain tax needs to succeed in this regard. Specifically, it explains why designing a proper mechanism to effectively use the proceeds of a brain drain tax is as important as the design of the taxing mechanism itself. The tax and the program for using the proceeds must be developed and operated in tandem to be effective. This observation is part of a more general approach to development, termed here the "new development agenda," that advocates a gradual, trial-and-error, accountable, entrepreneurial, and local approach, in an attempt to discover what works in development. It rejects the currently dominant centralized planning approach that is aggressively mandated by international institutions and other major players in the development scene.

Earlier discussions of the brain drain tax idea in general, and the Bhagwati tax proposal in particular, were limited to the revenue-collecting element,

231. *See id.* There are various versions of these provisions, and they should be relatively easy to amend, if necessary, for the purposes of administering a brain drain tax.

232. I.R.C. § 6012.

233. A notable example is that Brazil does not have a tax treaty with the United States, but recently signed a tax exchange of information agreement. Agreement for the Exchange of Information Relating to Taxes, US-Braz., Mar. 20, 2006, *available at* http://www.treas.gov/press/releases/reports/braziltiea2007.pdf.

paying—at most—lip service to the use of collected funds.[234] A key element of the Bhagwati tax proposal was that it evolved in the context of traditional development policy that relied, and still heavily relies, on the current leading international organizations and their centralized planning, foreign aid maximization strategy.[235] One of the original proposals was that the tax may be collected and later distributed to developing countries by the United Nations according to its general aid strategy.[236] The failure of this traditional development policy makes this part of the proposal questionable, if development is indeed the goal of the tax. This development policy failure should burden any suggestion in the development field, mandating not only an effective contribution, but also effective distribution and implementation ideas. The new development agenda provides exactly that: ideas about what may work, acknowledging the failure of central planning and grand strategies. This article seeks to associate the brain drain tax with the new development agenda and the analysis of design requirements that such associations generate.

A. New Development Agenda

To understand the approach to development followed in this article, one must first realize the reasons for the failure of the currently dominant development policies.[237] Development literature has focused for a long time on increasing and maximizing foreign aid.[238] It is still the case that the most influential actors in the development world—the international organizations, non-governmental organizations, activists, and even prominent development economists—all insist on maintaining focus on the maximization and insufficiency of funds devoted to aid.[239] This is very attractive for the international organizations because they depend on aid funds for their existence and power, and because it makes these organizations seem like the only friend of the underdog. Focusing on maximizing aid also shifts the focus away from these organizations themselves and their failure to use the available funds productively. The bottom line is that development policies and

234. Alan Maynard, Book Review, 86 ECON. J. 909, 911 (1976) (reviewing TAXING THE BRAIN DRAIN I: A PROPOSAL, *supra* note 126 and THE BRAIN DRAIN AND TAXATION II: THEORY AND ANALYSIS, *supra* note 133).

235. *See id.* at 909 (noting Bhagwati's reliance on either the developed country or on established international organizations).

236. See *supra* notes 130–31 and accompanying text.

237. *See, e.g.*, Ban Ki-moon, *forward* to UNITED NATIONS, MILLENNIUM DEVELOPMENT GOALS REPORT 2010, at 3 (2010) (admitting that progress has been unacceptably slow), *available at* http://www.un.org/millenniumgoals/reports.shtml.

238. S*ee, e.g.*, C. Matthews, *Aid Policy and the EEC*, 1 WORLD DEV. 34, 34 (1973).

239. *See, e.g.*, JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME (Penguin Books 2006) (2005).

initiatives led by these organizations have repeatedly failed, and the gap between the developed and developing countries continues to grow.[240]

Aware of these disappointing results, the international organizations revise the content of their plans from time to time, promising time and time again that now they have really got the solution, if only they had sufficient funds to implement the plans.[241] Recent critiques, primarily among academic economists, observed that the problem is not only with the substance of the plans, but also with the approach and centralized planning itself.[242] They have challenged this paradigm, calling instead for a shift of focus to smaller-scale, more measurable initiatives that have a chance of success.[243] Moreover, more technical critiques have challenged the importance of the studies that attempted to demonstrate a positive causal relationship between aid and development (via growth).[244] Consequences of these critiques are that they question the mega-plans and singular solutions that depend on volumes of aid money and on large centralized and centralizing organizations and express preference for entrepreneurial, local, more easily measured solutions supported by a trial-and-error process.

A comprehensive description of the new development agenda is beyond the scope of this article, and it may also be impossible, by definition, because the central idea of this agenda is openness to a variety of ideas and methodologies, pluralism, and experimentation, rather than tight planning. Nonetheless, several principles may be extracted from the very recent literature that developed this agenda: 1) Development measures should be experimental; 2) All measures should be designed with clear and desirably measurable goals and methods to empirically test for success (preferably subject to independent evaluation); 3) No one-size-fits-all planning; 4) Preference for "searchers"[245] over planners, for entrepreneurship and local solutions over mega solutions; 5) Acceptance that progress may be gradual, piecemeal, and in small steps to be sustainable, and rejection of "big pushes."[246]

240. *See* Lant Pritchett, *Divergence, Big Time*, J. ECON. PERS., Summer 1997, at 3, 3 (examining the gap in growth between developed and developing nations).

241. William Easterly, *Can't Take It Anymore?*, *Introduction* to REINVENTING FOREIGN AID 1, 5 (William Easterly ed., 2008).

242. *See, e.g.*, EASTERLY, *supra* note 6, at 369.

243. *See, e.g.*, *Id.* at 370; DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 93–95 (2007); Easterly, *supra* note 241, at 6.

244. *See, e.g.*, David Roodman, *The Anarchy of Numbers: Aid, Development, and Cross-Country Empirics*, 21 WORLD BANK ECON. REV. 255, 264 (2007) (demonstrating the weaknesses of several studies that attempt to demonstrate the effectiveness of aid, concluding that aid is probably not a fundamentally decisive factor for development).

245. *See* EASTERLY, *supra* note 6, at 372.

246. *See, e.g.*, *id.* at 371, 382.

B. The Potential Role of Taxation in a New Development Agenda

The role of taxation as a whole in this new agenda is likely to be quite minor, not unlike its minor importance in the current development agenda. Tax policy and development policies tend to intersect on two basic issues: tax reforms in developing countries and the use of tax incentives by developing countries to attract investment. The former usually involves the International Monetary Fund promoting its boilerplate tax reforms as a condition for receiving its funds; not surprisingly, these initiatives have met little success to date.[247] The story of tax incentives is a bit more complicated. Tax incentives were considered important to attract investment, mainly FDI, into developing countries based on the belief that FDI would then assist these countries to grow and subsequently develop economically.[248] This causal chain has proven to be largely unsubstantiated in reality.[249] Nonetheless, developing countries are often forced to continue granting tax incentives in order not to lose investment, a phenomenon often called "tax competition."[250] Lack of international cooperation and coordination of tax policies often trap them in this situation.[251] Since the effect of taxation on location of investment decisions is quite small generally, tax was never an important part of the development policy measures.[252] A comprehensive analysis of the role of tax incentives in a development agenda is beyond the scope of this article, but the next section analyzes opportunities to use tax incentives to promote development in the context of the brain drain.

Taxation is also a controversial policy tool in the development context because it is strongly guarded and regarded by all countries, including developed countries, as an important articulation of their sovereignty, particularly in our increasingly globalized world. Hence, countries will be naturally reluctant to give up taxing jurisdiction or powers, even for causes that they otherwise support.

Taxation is also not a natural candidate for new development agenda policy measures, because the current international tax regime holds that any

247. *See, e.g.*, Miranda Stewart & Sunita Jogarajan, *The International Monetary Fund and Tax Reform*, 2004 BRIT. TAX REV. 146, 155.

248. *See* Yariv Brauner, *A Framework for an Informed Study of the Realistic Role of Tax in a Development Agenda*, 42 U. B.C. L. REV. 275, 286 (2010).

249. *Id.* at 282.

250. *Id.* at 288.

251. *See, e.g.*, *id.*

252. *See* UNITED NATIONS CONF. ON TRADE & DEV., INCENTIVES AND FOREIGN DIRECT INVESTMENT, CURRENT STUDIES, SERIES A, NO. 30, at 45, U.N. Sales No. E.96.II.A.6 (1996). *But see* Harry Grubert & John Mutti, *Do Taxes Influence Where U.S. Corporations Invest?*, 53 NAT'L TAX J. 825 (2000) (giving examples that demonstrate tax can affect location decisions).

tax should take into account, if not ensure, compatibility with the regime.[253] This article has already demonstrated that compatibility is possible under specific circumstances or a more serious willingness to adjust current rules.[254] Additionally, taxes are governed predominantly by acts of parliaments, and as such, they are quite rigid, highly political (even the most domestic ones), and not easy or quick to adjust—the most important properties required from new development agenda policy measures.[255] Finally, real-world taxes are always distortionary and affect everyone, particularly the imposing country's constituency, as well as relevant countries that interact with each other.[256] Therefore, their success as policy measures is uniquely difficult to measure, since they cannot be fine-tuned to "only" promote development, for instance.

Nonetheless, the new development agenda, although it does not offer a panacea in this (or another) field, may be useful to refocus a tax policy measure such as the brain drain tax and make it more effective for, and beneficial to, developing countries. Moreover, it may be useful in improving and increasing cooperation and coordination of tax policies between productive countries in general, and in the development context in particular. Many developed countries spend significant amounts of money on aid in various forms[257] with little to show for it and no ability to evaluate their actions and reasons for failure. A new development agenda compatible tax will at least give them a chance to avoid wasting the vast development funds to the benefit of all.

C. A Brain Drain Tax as a New Development Agenda Policy Measure

1. Tying the Collection and Use Functions Together

As already explored, there are several ways to tax the brain drain to benefit development. The dominant paradigm, discussed in the more recent literature, is a tax imposed by the home country on the income of immigrants earned in the host country.[258] The tax is then enforced by the home country with a varying degree of help from the host country.[259] A critical missing part of this

253. *See* REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME 3 (2007).

254. *See supra* Part II.C.

255. *See* Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 733–34, 734 n.435 (2003).

256. *See* Sabine D. Selbach, *The Harmonization of Corporate Taxation & Accounting Standards in the European Community and their Interrelationship*, 18 CONN. J. INT'L L. 523, 539 (2003).

257. *See, e.g.*, DEV. CO-OPERATION DIRECTORATE, *supra* note 11. Regardless of one's position about the sufficiency of some countries' commitments, it is clear that it is significant.

258. *See supra* Part II.

259. *Id.*

paradigm is the manner in which the funds generated by the tax will be used to support development. These two parts of the tax (collection and use) technically may be designed separately, yet must be coordinated and consistent with the new development agenda to be an effective development supporting device. Past literature focused only on the first part—the taxing mechanism—and essentially ignored the second part of putting the collected revenue to work.[260] The former section mentioned that the original Bhagwati tax proposal discussed this only briefly, expressing a preference for a centralized collection entity, specifically mentioning the United Nations, and refraining from setting targets for the funds.[261] This meant that the funds would be left for the United Nations to use at its discretion, mixed with its other funds devoted to development. This choice by Bhagwati does not seem to be backed by methodical analysis, but rather a desire to avoid the more straightforward solutions of transferring the funds to the sending (developing) countries or using them mixed with the general foreign aid funds of the collecting (developed) countries. This is consistent with the general character of the proposed tax as a morally-based rather than a compensatory mechanism.[262] This article supports a similar type of tax, yet it argues that the use of the tax's proceeds must be more carefully considered. Blending the proceeds with the general funds utilized by the international organizations will be counterproductive, and the "new" tax may be viewed (correctly) as nothing but another excuse to increase aid and a wasteful addition to the arsenal of aid-increasing mechanisms at that.

One may object to the argument that the collection and the use functions of the tax should be tied together, claiming that it is simply an argument against current development policies in general. Another version of such argument may be that the problem is not with the design of the tax itself, but rather with the use function, so that function should be discussed separately without tampering with the already (relatively) well-designed collection function. Such objection misses the most important point of this article: that there is no clear independent justification for a brain drain tax other than the support of development, and therefore, there is no justification for collecting the brain drain tax standing alone. Further, the above argument falls into the same failing pattern, so familiar in the recent history of the international organizations: the constant revisions of plans when the problem may lie in the paradigm. A brain drain tax is worth the investment of time and administration only if it will transparently support development. To support development, consistent with the new development agenda, the tax's proceeds should be

260. *See, e.g.*, AVI-YONAH, *supra* note 253.
261. *See* Bhagwati, *supra* note 102, at 25–26.
262. *See id*. at 28.

used in a transparent manner, with clear goals and parameters to measure success in achieving such goals.

An equally important reason for the design of a complete tax measure, in which collection and usage functions are tied together, is that it should be politically easier to adopt. Designing responsible and effective usage of development funds should be easier in the context of a proposal of a new measure, especially a new tax, and it should carry more weight than generally protesting the waste of aid funds by the international organizations. This is particularly important for the brain drain tax, since legitimacy and participation seem to be the key to its success. It is not difficult to realize how powerful skilled migrants could be in their opposition to such a tax, especially if they could convincingly argue that the tax's proceeds are likely to be wasted.

2. Design

It should be clear by now to the reader that channeling the collected revenue to an international organization, such as in the original Bhagwati proposal, will not be realistically compatible with the new development agenda; this does not mean that compatibility is impossible. For example, one can envision a cooperative effort of some developed countries in the direction of the new agenda that will collect funds from a brain drain tax or, alternatively, from the general revenue base, yet the portion assigned to the collective effort will be measured by the brain drain or its potential positive contribution to the participating developed countries. This option, however, seems unlikely in the short term, so this section will focus on the version of the brain drain tax discussed in this article (a home country tax, collected with some assistance by the host countries).

Probably the most formidable argument against the version of the brain drain tax discussed in this article would be that the proceeds of the brain drain tax should simply go to the government of the home developing country. It is straightforward, fair, and legally required, maybe since this is the function of any tax: to provide revenue to the general budget of the imposing government. Moreover, there is no intuitive conflict between this solution and the new development agenda, since the first question would examine how that government uses the revenue, and one may want to direct the energy to support such governments in correct use of the funds. Second, the new development agenda encourages local solutions, and arguably, local government will be the ultimate source for local solutions—especially when compared to foreign advice about how to use the funds, the norm under traditional development policies. A related point is, of course, that denying the local governments the funds imitates the objectionable IMF conditionality regime and hated colonialist or other oppressive patterns.

All of these objections have a grain of truth in them, yet they cannot lead one to the conclusion that a brain drain tax should simply increase the budget of the home countries. This would amount to a measure very similar to foreign aid and, therefore, is doomed to the same fate. Specifically, concerns about weak governments, corruption, insufficient institutions, et cetera make this version unattractive, and may portray a brain drain tax as a gimmick, simply to generate more aid, with no better chance of doing good.

Realistic versions of the tax will involve concessions and cooperation of the host countries with the home countries, and the former will do that solely for the purposes of supporting development. A simple increase of the home countries' budgets will not achieve that goal. This seems like a Catch-22, since on the other hand, excessive conditions or denials of the funds from these governments will be perceived as unfair. This article argues that there is no one solution for this problem, and success lies in closer cooperation between the relevant home and host countries, based on some general guidelines applied to the specific circumstances of each bilateral (or larger) scenario. One such guideline would be that the brain drain tax proceeds could not be intermingled with the general budget. Another would be that the proceeds could only fund defined projects, with explicit goals and clear methodologies to assess the attainment of such goals. De facto assessment and follow up, as well as post-experiment study and evaluation, must be required to receive additional funds. Finally, boilerplate solutions or proposed projects are not acceptable.

The legal framework for this type of solution is not fundamental to its success, yet it seems that, realistically, bilateral treaties offer the best chance of success. Bilateral treaties are likely to accommodate the specific needs and circumstances of the relevant scenario.[263] The treaty could be an addendum or protocol to a tax treaty between the countries, if one exists. It would not fit into the regular income tax treaty, since its policy goals are very different (support of development versus elimination of double taxation and cooperation in enforcing taxation) and since regular treaties are not very flexible and often take a long time to amend and renegotiate.[264] But some provisions in tax treaties may well serve an agreement on a brain drain tax: The exchange of information and the dispute resolution provisions come immediately to mind.[265] Countries may choose to establish a bilateral vehicle—a board of advisers, for example—that will review the use of the tax proceeds and audit its consistency with the guidelines in the agreement between the contracting countries.

263. Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 338 (2008).

264. *See* Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW. J. INT'L L. & BUS. 556, 605 (1996–1997).

265. *See, e.g.*, ARTICLES OF THE MODEL CONVENTION, *supra* note 183.

A general objection to this scheme may be that it is more likely to benefit the "haves" than the "have-nots." Countries such as India, China, and Brazil have more skilled emigrants, a higher potential tax base for the brain drain tax, and are, therefore, more likely to enter into agreements on the tax with the relevant developed countries than the least developed countries of Africa and the Caribbean region.[266] Such "have" countries may be politically and economically more important to the developed countries, may suffer less from the problems that make developed countries' citizens worry about the use of the funds, and may already be engaged in many more agreements with these countries. This would make cooperation easier, even at the individual human level. This is indeed a serious concern and, if true, could severely damage the legitimacy of the tax. One reason for optimism, however, is that at least in the tax context, countries tend to adopt general policies and be quite consistent about them, even if they are not required to do so.[267] For example, some developed countries grant developing countries tax sparing, which is an aid equivalent benefit.[268] This is rarely a negotiated part of tax treaties and is often accepted as a general policy with no clear reason behind its grant.[269] Another example is the United States's willingness to eliminate withholding taxes on intercompany dividends; once given in one treaty, this allowance was granted to many other treaty partners.[270]

Finally, one may argue that the scheme is not fair because the needs of developing countries probably do not correspond to their ability to collect revenue from a brain drain tax. Consequently, the tax may result in an increasing gap between the actually developing countries and the least-developed countries. This gap may occur, yet it would be inappropriate to expect every development policy measure to fully conform to one's sense of fair resource allocation. The brain drain tax is not meant to be a cure-all; in fact, it is quite clear the tax is only a minor measure in the general scheme of encouraging development, yet may be important and beneficial for countries that need it.

266. *See* Zachary Elkins et al., *Competing For Capital: The Diffusion of Bilateral Investment Treaties*, 2008 ILL. L. REV. 265, 300 (2008).

267. *See* AVI-YONAH, *supra* note 253, at 2.

268. *See id.* at 174.

269. *See* ORG. FOR ECON. CO-OPERATION & DEV., TAX SPARING: A RECONSIDERATION 19 (1998) ("[S]ome developing countries simply refuse to conclude treaties unless tax sparing is granted."). *See generally* Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low Income Countries or an Unnecessary Revenue Sacrifice?*, 34 QUEEN'S L.J. 505 (2009) (outlining the history of tax sparing policies and their ineffectiveness).

270. *See* Pamela A. Fuller, *The Japan-U.S. Inocme Tax Treaty: Signaling New Norms, Inspiring Reforms, or Just Tweaking Anachronisms in International Tax Policy?*, 40 INT'L LAW. 773, 794 (2006).

This section analyzed the design features required from a brain drain tax in order for it to be compatible with the new development agenda and achieve the set goal of development promotion. The key argument was that the use and collection functions of the tax must be tied together and cannot be analyzed or implemented separately. The conclusion was that, realistically, such a tax may only be implemented successfully by bilateral treaties that establish mechanisms to administer the tax cooperatively between host and home countries, set parameters for the use of the tax proceeds, and establish the mechanisms for enforcing such parameters. The difficulties of entering into a balanced and workable treaty are significant, and there are some potentially weighty arguments against them that may weaken the most important advantage this tax has as a development measure: political acceptability due to its perceived fairness.

D. Other New Development Agenda Policy Measures Related to the Brain Drain

A brain drain tax, and particularly the version of this tax imposed by the home country and enforced in cooperation with the host country, is the primary focus of this article. Nevertheless, to get a complete picture, there are several complementary and alternative measures needing exposure that are based on the same reality and legal and political grounds. The easy cases are the alternative tax schemes. Typically, two schemes compose this category: exit taxes and tax sharing (between the developed host and developing home countries).[271] Exit taxes seek to deter and reduce brain drain by making it costly to leave the home countries.[272] They are considered objectionable on moral and human rights grounds, similar to any other measure that limits movement of individuals.[273] Exit taxes are also unlikely to be effective since at the time of migration, emigrants are yet to benefit from the increase of wages, for instance. Alternative enforcements, such as deferral of payment of such taxes or posting bonds upon emigration, have not proved much better.[274] Revenue-sharing schemes as alternative or complementary schemes to regular foreign aid are interesting, but they require sophisticated cooperation between countries, coordination of their tax policies, and enforcement at levels beyond

271. *See* KAPUR & MCHALE, *supra* note 9, at 190–95.

272. Tesón, *supra* note 152, at 904.

273. Steven J. Arsenault, *Surviving A Heart Attack: Expatriation and the Tax Policy Implications of the New Exit Tax*, 24 AKRON TAX J. 37, 61–62 (2009) (listing the ability to immigrate as a basic human right).

274. *See* J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigoratiing Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437, 528–30 (2008) (discussing the United States' deferral of income earned by a United States citizen through a foreign corporation).

that which is required for the brain drain tax to have a chance of success.[275] The current reality of non-cooperation in tax matters, even among developed countries, makes one skeptical if this policy option is viable, at least in the foreseeable future.[276]

Tax incentives that will be complementary to a brain drain tax, however, seem a more viable option. The basic idea here is to design tax incentives that will encourage behavior beneficial for development in the context of the brain drain. Tax incentives can and should target specific, well-defined, and isolated behavior. Done correctly, such incentives may be compatible with the new development agenda. They also may be granted by both developing and developed countries, depending on whose behavior the scheme wishes to encourage, and in coordination between these countries, so the effects do not cancel one another. Note, however, that in contrast to the central idea explored in this article—the brain drain tax—an appropriate design of these tax incentives depends on a better and more accurate understanding of the economic effects of the brain drain. Each measure, therefore, will require a strong empirical basis and follow-up to adapt to changing circumstances to be effective.

The more obvious such tax incentives would be provided by the sending developing countries. First, they may choose to use tax incentives to prevent or, more realistically, to diminish brain drain itself. This could be done by providing, for example, preferential taxation for educated or skilled workers staying at home for *X* years after their graduation or training. If the brain gain argument is correct with respect to such a country, this tax incentive may reinforce its effect. This is particularly true if it is correct that actual skilled immigrants are not necessarily the very best and brightest.[277] A second type of relevant tax incentive that the sending developing country may provide is on the other end of the cycle, i.e., providing incentives to return home for skilled workers. An example for this is a new Israeli program to reverse the brain drain.[278] Again, this incentive will be particularly effective if the sending country is able to pick and choose the best and brightest, or the most needed, returning skilled workers. Finally, tax incentives could be used to encourage desirable transactions between the emigrants to developed countries and those

275. *See* KAPUR & MCHALE, *supra* note 9, at 190–95.

276. *See* Arthur J. Cockfield, *Jurisdiction to Tax: A Law and Technology Perspective,* 38 GA. L. REV. 85, 111 (2003) (noting the lack of consensus in international tax).

277. And even more so if the sending developing country is able to identify the very best and brightest and incentivize them on a more particular basis. *See* KAPUR & MCHALE, *supra* note 9, at 12.

278. The program is designed to foster the reintegration of top scientists. Or Kashti & Haaretz Correspondent, *Cabinet approves NIS 1.3b Plan to Reverse Israeli Brain Drain*, HAARETZ.COM (Mar. 14, 2010, 2:39 PM), http://www.haaretz.com/news/cabinet-approves-nis-1-3b-plan-to-reverse-israeli-brain-drain-1.264731.

"left behind." Such transactions may include: no or low taxation of remittances; tax incentives to business investment by emigrants in their home countries; and tax incentives to domestic businesses that export to, or otherwise transact business with, diasporas.

Developed countries could also provide tax incentives to a similar end. A brain drain tax itself may impact the decision of skilled workers of whether to emigrate or stay at home. Additionally, education and training of workers in developing countries may be supported by tax incentives provided by developed countries. Migrants native to developing countries, now residents of developed countries, are the most likely people to temporarily return to their home countries and to support and educate new generations. Tax incentives granted by the migrants' new countries of residence may fortify these efforts, with potentially desirable effects. Research, of course, is required to establish whether such tax incentives in any country's case will: 1) actually affect behavior (i.e., encourage more people to go back to their home countries and contribute their knowledge in educating newer generations); and 2) have a desirable effect (i.e., increase the brain gain by the home countries).

Similarly, developed countries could provide tax incentives in the context of skilled emigrants returning to their home countries. In the case of the United States, for example, immigrants who naturalize are still required to file United States tax returns, even if they decide to return to their home country.[279] One may suggest that the United States can concede taxation of such citizens. This is consistent with the suggestions discussed here, yet it seems unlikely because the worldwide taxation of all citizens has been a fundamental feature of United States tax policy for a relatively long time.[280] Nonetheless, two additional routes to a similar result exist. First, citizens may renounce their citizenship.[281] Even if done for immigration and naturalization law purposes, renunciation may not exempt the returning migrant from United States worldwide taxation because the United States' Internal Revenue Code provides for taxation of expatriates for ten years after their loss of status in certain circumstances.[282] The United States could provide a specific exemption from this rule in cases of returning immigrants to certain developing countries. This would have an effect similar to exemption from worldwide taxation of citizens, yet it seems much more likely to be adopted. A second route may be to amend Internal Revenue Code Section 911 that provides a capped exemption from United States taxation to certain citizens living outside the United States. The exemption may be specifically amended or tailored to the needs of skilled workers returning to their developing home countries: an increased cap or

279. *See* Arsenault, *supra* note 273, at 39.
280. *See* Cook v. Tait, 265 U.S. 47, 56 (1924).
281. *See* 8 U.S.C. § 1481 (2006).
282. I.R.C. §§ 877, 877A (2006).

waiver of other required circumstances, such as a maximum amount of days spent within the United States in the relevant tax year, come to mind. These measures are desirable only if returning migrants are encouraged to return by the tax incentives and if returning migrants actually contribute to the development of their home countries.

Finally, transactions between the emigrants to developed countries and those "left behind" could also be encouraged by the developed countries. Tax breaks to businesses investing in developing countries may be the most obvious of these measures. Needless to say, this section merely raised some options for action, yet a more focused analysis of these options and better empirical study of the brain drain phenomenon itself are required if one were to make firm policy recommendations.