Locating Corporate Business Income: Reconsidering the Tenets of International Tax Jurisdiction

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CONTENTS

The mark of noteworthy writing, and the source of its continuing influence, is its capacity to challenge preconceptions; to expose critically the vulnerabilities of, as well as hidden insights underlying, propositions or experience that may too often be taken for granted; to illuminate understanding and, in so doing, to provoke further critical analysis; and, if it is particularly thoughtful and well crafted, to engage the reader in a dialogue with the author that continues long after the last page is turned. Robert Couzin's book is such an achievement.[1] It will be of enduring use to practitioners (in the widest sense of the term) of "international taxation," who will be attracted to the careful, incisive legal analysis that informs propositions or assumptions that often are expressed imprecisely or impressionistically, despite having solid (if subtle) legal underpinnings. Couzin addresses what many would regard as a settled subject, in a way that can be accomplished only by someone equally adept as a practitioner with the strongest ability and instincts for critical legal thinking and as an academic commentator with the facility and obvious

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1 Robert Couzin, *Corporate Residence and International Taxation* (Amsterdam: International Bureau of Fiscal Documentation, 2002).

passion for exploring the "whys" of tax policy and practice—more art than science and certainly, in the realm of international taxation, more concerned with the reconciliation of intersecting tax systems than with the analysis of "a system."

Couzin's book will hold the interest of its readers for a variety of reasons. For some, the legal analysis of corporate residence in chapter two will be the singular attraction, disclosing as it does the foundation, as well as the imperfections, of "central management and control" as a "real business" test, but not merely a "formal" one. For others, and for me, Couzin's orthodox analysis of corporate residence provokes analytical curiosity about the adequacy of typical markers of tax jurisdiction and what may be reasonable, although not uncontroversial, alternatives. Couzin does not argue for either the integrity or the coherence of corporate residence as a necessary determinant of shared tax jurisdiction, or even for its being materially deficient in that regard. Rather, he inquires into, probes, prods, and explores the limits of corporate residence and in so doing reveals other opportunities for questioning how contemporary tax jurisdiction should, could, or may need to be framed. My comments, in the spirit of how and why, evidently, this book has been written, do not, then, seek to argue for or against any of the propositions considered by Couzin. Rather, they join the dialogue and inquiry that this book inspires, and, with the benefit of Couzin's analysis as a catalyst, attempt to make sense of seemingly separate strands of international tax change that nevertheless reflect consistent, or even integrated, tendencies. None of the contentions identified by Couzin, whether in relation to the notion of corporate residence itself or in connection with alternatives to this approach to tax jurisdiction, is immune from criticism or lively controversy.[2] This paper, however, is not the forum for that debate, nor can it adequately address what others (some of whom are identified in the notes to these comments) have already contributed to the discussion of these issues. My comments are, for the most part, confined to issues pertaining to the taxation of international business income.[3]

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2 The debate is and remains current both in the academic literature and in developing judicial thinking reflected in court decisions that address, in ways and on subjects that until recently would not have been expected, the arcana of international taxation and in particular the limits of tax jurisdiction. Couzin touches on some of these cases, notably those that address the compatibility of "controlled foreign corporation" legislation and tax treaty limitations on the taxation of business income. It is a sign to students and practitioners of international taxation that subjects once thought to be the exclusive, or at least the most likely, domain of academics and public finance economists are increasingly encountered in the course of everyday tax planning and dispute resolution. For recent broader discussions of international tax jurisdiction issues, see Richard M. Bird and Jack M. Mintz, "Sharing the International Tax Base in a Changing World," in Sijbren Cnossen and Hans-Werner Sinn, eds., *Public Finance and Public Policy in the New Century* (Cambridge, MA: MIT Press, 2003), 405-46; and Richard M. Bird and J. Scott Wilkie, "Source- vs. Residence-Based Taxation in the European Union: The Wrong Question?" in Sijbren Cnossen, ed., *Taxing Capital Income in the European Union: Issues and Options for Reform* (Oxford: Oxford University Press, 2000), 78-109.

3 The term "international business income" refers to income of a taxable person or "presence" recognized in normative tax terms as an acceptable or proper subject of taxation, which,

THE DIRECTION OF THESE COMMENTS

This appreciation has several modest objectives. First, it is written as a tribute to Robert Couzin, who is also a long-time colleague and friend. Second, it is meant to acquaint those not yet familiar with Couzin's analytical path, in this book or elsewhere, with its scope and significance, and the intelligence of its analysis in relation to much larger international tax issues. Finally, it is a personal indulgence on two fronts. It is an opportunity to view broadly, through the glass of corporate residence, issues associated with the increasing vulnerability of traditional markers of international tax jurisdiction. These issues, in one manner or another, dominate the developing architecture of national tax regimes as countries reconsider how to tax, or perhaps preserve taxation of, international income while intersecting reasonably with each other. The same issues affect the reactions of supranational bodies, such as the Organisation for Economic Co-operation and Development (OECD), to incursions, induced by the pressures of modern business practice and organization, on the reliability of typical delimitations of shared tax liability internationally as a means of adequately capturing, without distortion or absolute loss of tax base, income closely associated with the jurisdictions in which it may reasonably be considered to be earned. My comments will not address the issue of international tax arbitrage, except to note that one can justifiably raise questions about why international tax base erosion is or should be a proper subject of concern for domestic tax policy. Couzin's book is also a vantage point from which to consider the extent to which various contemporary developments in international taxation reflect a coherent pattern of interest, concern, and tax policy and legislative initiative.

SOME INITIAL THOUGHTS

Interestingly, but not surprisingly (because there are only limited ways to describe business income and how it is earned), all contemporary international tax developments reflect a struggle to better express where the "real business" of a taxpayer is conducted and to establish the closest connection of that real business to states according to reliable locational attachments referable to some measure of international consensus. This is precisely the objective served by the defining characteristic of the generally accepted notion of corporate residence grounded in the *De Beers* case,[4] around which Couzin's second chapter is organized. Possibly, as analytically unsatisfying as it may be, a migration, of sorts, of this real business focus is taking place from its principal force as describing personal connections of a taxpayer to a jurisdiction, to defining tax jurisdiction more closely, or perhaps more conveniently, with respect to earning connections that underlie the source concept. As

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because of how or by whom the income is earned, and if the latter because of the characteristics of the larger organization or enterprise of which that person is a part, has a connection to more than one country and therefore is exposed to tax claims by more than one tax jurisdiction.

4 *De Beers Consolidated Mines, Ltd. v. Howe* (1906), 5 TC 198 (HL).

Couzin's analysis reveals, the same kinds of considerations that inspired, and have defined and then formed the application of, the notion of central management and control at the heart of corporate residence may be attracting additional, though perhaps legally more opaque, roles in the international tax sphere.

It is accordingly acknowledged that these reflections may be less respectful, analytically, of the conventional distinction between residence and source underlying international tax jurisdiction than is Couzin's analysis. Couzin is careful (presumably, so as to ensure a proper analysis of residence as it applies to a legal construction, namely, a corporation) to describe jurisdictional connection—to reinforce, at least definitionally, the concern of the concept of residence with personal connections of a taxpayer with a jurisdiction, rather than the characteristics of income and its functional attachments to a jurisdiction according to how the income is earned. There has been much academic discussion as to whether and to what extent residence or source adequately accounts for how international tax rules should be designed and should operate, and even whether this distinction (in any case, perhaps more theoretical than real in practice) retains a useful role as a framework for how shared taxation of international income should be arranged. The debate has been fuelled by changes in corporate business organization and practices, and the importance of factors of production whose locational connections are at best mobile and not infrequently ephemeral.[5] Despite his care in distinguishing the personal aspect of residence, even Couzin acknowledges the opacity of this distinction. His analysis of the confrontation between ordinary business functioning and corporate direction, poles on the spectrum for discerning central management and control, also reveals his own anxiety, or at least uncertainty, about continuing to define tax jurisdiction in relation to business income with respect to personal connections exclusively.

Various international developments may imply either an attempt to reinforce and reinvigorate traditional notions of residence and source, or a concession to seemingly inexorable forces underlying commercial and business organization, implicitly at work in the notion of residence, so as to focus more directly on the location at which substantial business operations take place rather than the personal connections of the tax subject to that place as a (the primary?) marker of tax jurisdiction. These developments nevertheless do not avoid the necessity of establishing, in the first instance, the basis upon which a taxable subject enters a tax regime, either as a person or as another manifestation of presence. In a manner of speaking, corporate residence commonly has supplied both a means of making that determination and an indication of the compass or degree of taxation that should be expected, at least in relation to certain kinds of income, as a consequence. Present thinking with respect to where substantial business operations take place itself seems to assume the ability to reliably identify a suitable taxable presence, although, as some of the following comments suggest, it may be that the characteristics of such

5 For further discussion of the "source" versus "residence" debate, see the authors cited in note 2, supra.

a presence will be considered more easily established in a country, at least for purposes of a tax treaty, through the permanent establishment concept than by the degree of centrality of operations and intensity of control anticipated by central management and control and required to establish corporate residence.

AN APPRECIATION

In light of my long friendship and professional association with Robert Couzin, I cannot claim complete immunity from bias in writing these comments. Nevertheless, I believe many would agree that his book is a significant and unique contribution to the international tax literature. It situates important issues and concerns of international and domestic tax policy in a firm legal framework that allows each orientation to inform the other and supports a critical inquiry into the utility of corporate residence in defining shared tax jurisdiction. In addition to providing a thorough and lucid examination of the primary subject of corporate residence, Couzin writes from a perspective that takes into account taxation in a much wider context. Reflecting his attention to the value of rigorous analytical methodology, he also recognizes the difficulty of seeking "purpose" or "meaning" in a discipline of law the significance of which may be viewed as self-defining in the service of national fiscal and economic objectives, and which is therefore lacking in an overriding legal pedigree or objective apart from its own immediacy.

The commentary throughout the book is intellectually acute and reflects, among other things, Couzin's penchant for questioning what appears to be obvious and discovering what is unexpected. Despite evident hard thinking on the subject, Couzin nevertheless admits that a complete understanding of corporate residence eludes him. He suggests that there may be less coherence and "system" in the notion than is generally presumed. His analysis challenges received ideas about the concept, fundamental as it is to the architecture of tax systems and tax planning, and also recognizes the possible consequences of doing so. Couzin points out that the limitations of corporate residence are exacerbated by the ways in which contemporary multinational business is, and easily can be, organized and conducted so as to distort connections of income to tax jurisdictions. In this environment, depending upon adopted connotations of corporate residence, the jurisdictional markers in the international tax game may seem to be at risk. By way of example, Couzin undertakes a critical review of the central management and control test originating in the *De Beers* case. After examining what the UK courts actually said, and seemingly meant to say, in the applicable legal environment and circumstantial contexts, he concludes that, in practice, the test may be too formalistic. Moreover, in attempting to identify a taxpayer's "real business," the test may reflect a much more substantial concern with how, rather than where, important manifestations of business activity occur. Couzin's critique brings into question the prevalent international focus on such manifestations of business activity, not only as measurement devices for income, but, through functional business analysis, as a determinant of tax jurisdiction, entailing a blurring of the concepts of source and residence.

SITUATING THE ANALYSIS

The stated goal of Couzin's book is to "challenge both common habits and accepted wisdom."[6] Couzin acknowledges that there is no common law of taxation and no system of international taxation; rather, there exists a web of intersecting national tax systems that must somehow accommodate each other in deference to the efficiency and fairness of international commerce. The overt subject, corporate residence, is, in many respects, a point of departure for considering how a nation's tax jurisdiction is established in relation to that of other competing claimants, with respect to income earned in a fashion that reflects attachments to more than jurisdiction, either through the personality of the earner or the manner in which the earning exercise occurs (or, more likely, some combination of the two).

International tax rules distinguish between residence and source to facilitate a determination of primary tax jurisdiction (or reference points for recognizing the primary tax jurisdiction of another state). These are imperfect conceptions of limits on the spectrum of tax jurisdiction, which may not be as dichotomous, theoretically but even more in practice, as they are commonly perceived to be; and they merely frame, but do not resolve, jurisdictional conflicts over the taxation of income. Essentially, source taxation recognizes the primary entitlement of the jurisdiction in which the income is earned, exacting tax as compensation for the economic and political infrastructure that supports the income-earning activity, even for those who are otherwise "non-adherents" of the tax jurisdiction. On the other hand, residence-based taxation, identified broadly with the imposition of comprehensive taxation on all income of the affected taxpayer, focuses on the person who earns the income and is closely associated with a jurisdiction's residual entitlement to tax income that is not so limited in terms of how or where it is earned (for example, investment income, the residual return from exploiting certain intangible property, and the after-tax profit from the conduct of a business). While this distinction is easily articulated, its tax policy underpinnings and resulting theoretical and practical utility are not beyond question. Indeed, the subordinate categorization of income, within the notions of source and residence, has been criticized as being the possible source of gratuitous distortions in the allocation of international income and the sharing of international tax jurisdiction.[7]

The subject of corporate residence is both a part and an extension of this basic jurisdictional divide. As Couzin demonstrates in his analysis of the defining characteristics of corporate residence in chapter two, it involves the bridging of the operational capabilities of a business that appeal principally to a source basis of taxation: the actual carrying on of a business and how income is earned, and the

6 Couzin, supra note 1, at ix.

7 John F. Avery Jones, "Are Tax Treaties Necessary?" (1999) vol. 53, no. 1 *Tax Law Review* 1-38. Avery Jones considers the origin of the income categories in typical tax treaties patterned on the OECD model tax convention, infra note 8, and provides insight into how character distinctions affect the integrity of allocative and distributive objectives of tax treaties.

elements of business "direction." The latter, though operational, also transcend normal operating activities and therefore provide a sufficient basis for a personal connection of a corporate taxpayer to a jurisdiction. Hence, even in the notion of corporate residence, as it has been analyzed in orthodox legal terms, there is something of a blurring or, perhaps alternatively, an institutionalized distinction between gradations of income-earning activity (which might be seen in source terms) and the attribution to a legal personality, based upon a high gradation of activity, of a taxpayer's personal association with a tax jurisdiction sufficient to make the taxpayer that jurisdiction's tax subject (residence).

Throughout his book, Couzin alludes to the pressure exerted on corporate residence, itself and as a determinant of shared tax jurisdiction, by organizational and transactional characteristics of multinational corporate behaviour. There are concerns that these influences, abetted by the borderless technology of modern communications, erode the utility of typical markers of international tax jurisdiction, whether reflected in the design of foreign tax credit or controlled foreign corporation (CFC) regimes or, more acutely perhaps, in relation to the application of the concepts of residence and permanent establishment that are fundamental to the effective application of international tax treaties patterned on the OECD model tax convention.[8] It is, however, facile to perceive these incursions on the integrity of international tax jurisdictions as necessarily enervating in terms of either tax policy or tax practice. It may be that the traditional markers of tax jurisdiction, reflected, for example, in usual notions of residence and permanent establishment, are simply exemplary of more deep-seated and subtle factors intrinsic to the nature of tax jurisdiction implicit in these notions, so as to imbue them with more underlying meaning than is commonly appreciated or conceded. Such factors are, of course, naturally limited, at least insofar as they *derive from* (and therefore primarily are or were responsive to) the manner in which commercial activity took place and personal connections necessarily were arranged at the time of their development. However, the displacement of particular manifestations of connection does not mean, necessarily, that the same jurisdictional forces and underlying imperatives do not still exist and continue, capable of articulation, understanding, and application in a contemporary setting.

Additionally, neither corporate residence nor any other dimensions of international tax jurisdiction can be understood or applied rationally without reference to the other dimensions of international tax policy and practice, notably when the framework for their analysis is the source/residence divide. As Couzin indicates and, I suggest, works toward as an important destination in his analysis in the concluding chapter, the issue of corporate residence is intimately connected with the integrated taxation of corporations and their shareholders; the nature and

8 Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital: Condensed Version* (Paris: OECD, 2003) (herein referred to as "the OECD model tax convention").

measurement of attributed income taxable in respect of permanent establishments as contemplated by tax treaties; the taxation of foreign income earned indirectly through foreign legal constructions under CFC and investment fund regimes; and sophisticated applications of modern transfer-pricing analysis. While perhaps not always perceived in this way, these are all aspects of the same subject. Corporate residence reflects influences or characteristics related to all of these other intrinsic and inherently jurisdictional notions.

It is evident that Couzin views these interconnections as rudiments of a more far-reaching inquiry into the legitimate determinants and compass of international tax jurisdiction. It is equally evident that he is not satisfied with imprecise apologies for the apparent inadequacies of traditional jurisdictional markers, such as protests about the effect of modern telecommunications (more particularly, electronic commerce). Without doubt, there is a prevailing concern that, within the traditional jurisdictional framework, taxpayers can quite easily reformulate or manipulate the location of their income-earning activities or presence, whether within the ambit of source or residence criteria, maintaining legal forms of organization and behaviour but making taxation in a sense selective at the instance of taxpayers. There is a concomitant concern that the hallmark of international tax—namely, the mutual accommodation among countries of the tax entitlement of others, based upon personal and business connections of taxpayers and their activities with those jurisdictions relative to each other[9]—may result in a cession of domestic tax even where there is no foreign tax counterpoint to be recognized in effecting international tax harmony. Although Couzin takes corporate residence as his point of departure, his inquiry into the significance of its legal aspects, originating in the *De Beers* case and other UK decisions, and his willingness to challenge the legitimacy of its role as a determinant of tax jurisdiction, establish a unique opportunity for the forward-looking perspective that evidently guides his thinking.

THE AUTHOR'S PATH

Couzin begins his analysis by questioning the fiscal significance of the corporate form. He asks, "Why tax corporations?" and answers that "it is not self-evident that they are proper subjects of residence taxation."[10] He considers the possibility that corporations may simply be in the nature of compliance devices to facilitate income taxation in a particular manner, as well as representations of the interests of their shareholders as owners of the underlying income. He notes, "Residence-based taxation of corporations was not designed having regard to any policy analysis. It followed inexorably from the determination that the incorporated company was a

9 J. Scott Wilkie, "Converging Tax Systems: Free Trade, International Tax Neutrality, and Non-Discrimination," in International Fiscal Association (Canadian branch), *Special Seminar on Tax Treaties: Policy and Practice* (Kingston, ON: International Fiscal Association (Canadian branch), 2001), 21:1-42.

10 Couzin, supra note 1, at 15.

person, whose obligations would include the liability to pay tax."[11] In other words, residence-based taxation is not a creature of the corporate form, although necessarily, within normative tax concepts, it had to accommodate that form of taxpayer. There is no tax policy imperative that would require this progression from recognized form to taxable person. Couzin's inquiry is thus in large part directed to evaluating legal notions that are not, themselves, natural exponents of tax policy, as instrumental as they nevertheless are in determining how the international tax base is shared. In other words, is it perhaps the case that the corporate form and the attachment of the notion of residence to it are simply expedients for connecting income in a functional sense to a jurisdiction?

Chapter two, in some respects the richest component of Couzin's analysis in traditional legal terms, is a careful articulation and critical exploration of the legal underpinnings of corporate residence as defined by the notion of central management and control. Even by itself, this chapter is a significant contribution to the international tax literature. Couzin's inquiry reminds us of the importance of undertaking a fundamental reconsideration of seemingly settled law to reinvigorate legal analysis with its "real" implications. Central management and control has become something of a mantra in international tax parlance—one of those "old" notions that we think we understand. However, as Couzin demonstrates, the concept is more subtle than it seems. In contemporary practice, it is capable of attracting meaning or significance that is dynamic and intrinsically organic, notwithstanding that the basic judicial statement remains a constant. In particular, Couzin's analysis reveals the need to temper reliance on the mere formalism[12] of corporate governance in determining corporate residence. It also addresses the issue of the independence of a board of directors, which becomes a concern in multinational corporate groups where the parent company may significantly influence, if not indeed direct, planning strategies and policies for the group. Couzin's careful legal analysis reveals subtleties in the law's tolerance for directorial complaisance without disturbing corporate residence, as long as directorial authority is not effectively usurped so as to deny the independence of directors. In turn, this analysis reveals how orthodox notions of corporate residence can coexist coherently with patterns of modern multinational governance and operations.

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11 Ibid., at 17-18.

12 Although not a residence case, a recent decision of the Supreme Court of New South Wales, Australia, deals with the relevance of typical signals of formal attachment as they may affect the application of a tax outcome—in this case, the imposition of Australian withholding tax: *Unisys Corporation Inc. v. FC of T*, 2002 ATC 5146. The taxpayer had been very careful, in its determination to locate income of a partnership in the United States, to establish formally certain physical and "central management" connections of the partnership with the United States. However, the court was not persuaded, referring to those trappings of alleged location as not being pertinent to the income and income-earning arrangement in qualitative terms. The court's analysis takes its cues from, among other sources, typical treaty-based evaluations of jurisdictional connection and permanent establishment.

Couzin's analysis of the UK case law orients the significance of the formal aspects of corporate direction as a factor in determining the "real" owner of income and the location in which the income-earning activity should be considered to substantially occur. In practice, there is not infrequently a concern, in some cases almost visceral or intuitive rather than rigorously analytical, about the reliability of the formal associations of a corporation with a particular jurisdiction, particularly where the income-earning activity of the corporation does not require very much tangible or overt substantial commercial presence and is of a more "legal" nature—for example, in terms of the ownership and exploitation of contractual rights. Couzin's insights offer support, grounded in a penetrating evaluation of central management and control, for defending the separateness and jurisdictional integrity of a corporation in a residence sense, even if those directing the corporation act with reference to others, or consistently with reference to the recommendations or collective interests of others, as would be common in a multinational corporate group. In particular, Couzin's discussion of what "independent" governance or direction signifies in relation to the consistent and concerted practices and policies of contemporary multinational activity offers analytical assurance that, absent an abdication of actual and legal responsibility of those formally responsible for directing a corporation, the jurisdictional connection of the corporation to the country where it is intended to be resident should not be displaced. At the same time, the importance of focusing on and satisfying the "real business" element of the *De Beers* test remains deserving of continuing scrutiny in practice. The application of the test should be probed regularly for the suitability and reliability of jurisdictional conclusions apparently so grounded. Interestingly, for this reason, Couzin's analysis also may be refreshingly and uniquely useful in enlightening otherwise imprecise analysis or impressions that might too readily miss the significance of genuine legal limitations as a brake on the application of tax-avoidance doctrine or rules to contest the fiscal recognition of legally effective arrangements based on an economic or equally non-legal impression of where they should be considered to have occurred.

In chapter two, by carefully analyzing gradations of activity by, and responsibility of, those charged with administering and operating a corporation, Couzin exposes an inevitable connection between the personal attachments of a corporation to a jurisdiction and the manner in which its business (that is, its functional income-earning activities) is conducted, although he carefully distinguishes the two and is acutely aware of the tautology that would result from an identity of "carrying on business" and "corporate residence." Couzin's consideration of the relative significance of "strategic," "actual," or "effective" direction and other operational management levels as factors to weigh in determining whether the requirements of the *De Beers* "real business" test are in fact satisfied not only informs the test itself and its application, but also establishes a bridge to contemporary reflections on how income ought to be identified with a particular jurisdiction, regardless of how the taxable presence may be identified. In particular, Couzin deals with the distinction between genuine strategic direction and "actual" direction, and in that regard the significance that needs to be attached to actual direction relative to a prevailing interest of tax systems in identifying the beneficial owner of income in a functional sense. Although the test of corporate residence defines personal attachment to a jurisdiction, the test itself is informed by manifestations of business conduct that are closely identified with the location in which important elements of income-earning activity (value added, in transfer-pricing terms) may be found to take place.

This discussion also reminds us that the development of the central management and control concept took place in a legal context that attached more significance to high gradations of operational conduct by important human beings who are instrumentalities of corporate business than reliance on merely the formal actions of a board of directors might justify. In light of recent tax treaty developments, discussed below, concerning the meaning of "permanent establishment" and the possible significance of "effective management" for resolving corporate residence conflicts, Couzin's analysis in this area is timely.

Chapter three moves the analysis deeper into international tax territory by confronting frequently problematic formulations of residence in tax treaties. This review is primarily concerned with the use of tax liability (that is, whether a taxpayer is "liable to tax") to define residence, as, for example, adjudicated by the Supreme Court of Canada in the *Crown Forest* case.[13] With reference to the outcome of that case, Couzin observes that, essentially, the Supreme Court was striving to articulate a notion of residence for a corporation in the treaty context on the basis of the same kinds of connecting factors that establish the residence of a taxpayer in domestic law. The Supreme Court reasoned that the benefits of a tax system require the claimant to be a resident in the jurisdictional sense. Attempts to define or qualify that expectation by reference to the degree of taxation or other manifestations of actual tax liability are inconsistent with the jurisdictional notion and therefore misplaced.

Couzin's discussion of Canadian statutory rules in chapter four highlights in a pragmatic way particular issues relating to the prescriptive definition of the residence of corporations and the inherent vulnerabilities of corporate residence as a reliable and predictable determinant of shared tax jurisdiction. The legislative ground that Couzin covers is useful not only in identifying the limitations of fact-based residence determinations and the potential utility of other solutions based upon the constitutional characteristics of corporations. It also provides a point of departure for considering, as Couzin does in chapter five, that corporate residence may be less a determinant of the scope of taxation in relation to a person and a particular jurisdiction than a means of identifying a taxable presence more generally. Once a taxable presence is established, a source-oriented determination of taxable income in relation to that jurisdiction may take place. Any bright-line or prescriptive determination of residence itself, at least in relation to business income, is not

13 *The Queen v. Crown Forest Industries Limited et al.*, 95 DTC 5389 (SCC), discussed by Couzin, supra note 1, at chapter 3.

necessarily determinative of the relative sharing of taxation entitlements by competing tax regimes in a treaty context, even though it may displace difficult questions about establishing the reference point for the application of a tax regime in relation to income otherwise proximate to it.

REFLECTIONS

The primary focus of my comments and (to admit another bias) my primary interest in this book are grounded in Couzin's curiosity, and perhaps skepticism, about the usefulness of corporate residence as a determinant of tax jurisdiction, discussed in chapter five. This book is about much more than corporate residence. It is also a reflection on the adequacy of existing tax rules, policies, practices, and guidelines, both theoretically and from a practical perspective, to adequately capture a reasonable connection or correspondence, in relation to a tax jurisdiction and a taxpayer's representation in that jurisdiction, between economic income and what may be loosely described as financial or tax income, based upon the circumstances in which the income is earned and identified with the person who earns it.

It is an oversimplification, but nevertheless a useful observation, to note that the circumstances in which income is earned are, to a degree, a defining element of corporate residence—not *the* defining element but still influential. The notions of residence and source notions are blurred even in establishing the definitional attributes of corporate residence. On the basis of evolving patterns of international tax theory, the connection may be growing closer. There seems to be a consistent focus on identifying where and how income is considered to be earned and who the beneficial owner of that income is, notwithstanding respect for the legal constructions, in organizational and transactional terms, that are the framework for the income-earning activity. For example, it is a hallmark, whether justifiable or not,[14] of international transfer-pricing analysis that regardless of corporate form and transactional integrity, income is determined with reference to the locations of valuable functions and risk assumption (although, correspondingly, it is also identified with some form of taxable presence). Interestingly, jurisdictional tax claims are infrequently challenged on the basis of residence, usually only in flagrant instances of particularly objectionable alleged tax avoidance. Perhaps the reason is that, as Couzin's analysis shows, establishing or displacing corporate residence based upon tests that require difficult factual conclusions is hard, and in jurisdictional terms perhaps not (any longer) really to the point anyway. In evaluating integrated corporate activity, which is now even more integrated owing to modern corporate organization and business communications technology, the tendency is not to "resite" income (in residence terms) by "resiting" its corporate owner, but rather to

14 See the reported comments of Richard Vann in Brian J. Arnold, Jacques Sasseville, and Eric M. Zolt, "Symposium: Summary of the Proceedings of an Invitational Seminar on the Taxation of Business Profits Under Tax Treaties" (2002) vol. 50, no. 6 *Canadian Tax Journal* 1979-2024, at 1997-2001.

evaluate the implications of its owner's significance in relation to income in order to determine whether and to what extent the income is taxable in relation to that putative owner.

A consequence of Couzin's analysis of the notion of corporate residence is the need to consider whether taxation based upon corporate residence is either necessary or even desirable in contemporary terms, inasmuch as it does not arise from any fiscal imperative. In chapter five, Couzin questions the fiscal relevance of corporate residence in determining how international income is to be taxed, assuming that there is some representation or connection with a jurisdiction that allows the enforcement of a tax claim. This discussion gives rise to questions about whether capturing business activities in a corporate form, which continue to be conducted by persons who are separate from the corporate personality or who are the continuing instrumentalities of that business, ought to change how income generated by that business should be taxed among contending jurisdictions.

The analysis in chapter five, presaged by that in chapter one, implicitly recognizes that so-called international tax rules originated in the context of trade regulation, inspired by late 19th- and early 20th-century "friendship, commerce and navigation" and other trade treaties, and by the work of the League of Nations in the early part of the 20th century, subsequently continued by the OECD. The objective was to rationalize competing tax claims in order, among other things, to avoid tax-induced distortions of commercial activity and to encourage the efficient deployment of capital and the exercise of trade between countries, respecting their mutual (and self-) interests but also deferring to national tax sovereignty. (Tax sovereignty refers to the entitlement of a state to apply its tax regime in the service of its unique fiscal and economic objectives; that is, public and tax expenditure decisions are to be made independently and not at the behest, through the operation of tax rules, of other states acting in their own, not necessarily consistent, self-interest.[15] The question remains how to define the owner of income and whether that definition, prescriptively or based upon its inherent definitional characteristics, fairly achieves these international tax objectives with respect to sharing a combined tax base. This question is critical because there is no system of international taxation, or even conventions of public international law about how these allocated decisions ought or need to be organized.

Here, Couzin admits that the defining characteristics of corporate residence may not, or may no longer, encapsulate reliable signals about how international taxation should be organized. Indeed, one might go so far as to suggest that he thinks that, in contemporary fiscal practice, this notion is far from being the reliable determinant of tax jurisdiction that is accepted by most legal, tax, and economic policy students. The corporate residence test is susceptible to manipulation as an instrument of selective taxation, and in any event it may not be excessively formal in relation to the measurement of income earned in a jurisdiction. Couzin observes:

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15 See Wilkie, supra note 9.

> In order to evaluate the effectiveness of [the corporate resident test], be it de jure, de facto or a combination of the two, it is necessary to ask what it is that is being defined and whether the definition correctly encapsulates that essence. There are two quite different possible intentions underlying the corporate residence test. The definition may itself be a complete description of the intended taxation nexus, a reference to the very corporate characteristic which is meant to be the criterion for taxation on the residence principal. Or, the corporate residence tax may be merely a proxy or sign for some other underlying reality.[16]

Couzin's legal analysis of corporate residence provides a unique avenue for evaluating other approaches to the definition of jurisdiction or avoiding the constraints of present notions. For example, contemporary transfer-pricing analysis, whether in a typical entity-to-entity transactional setting or as an element of evaluating the attribution of profit to a permanent establishment, focuses primarily on where valuable income-earning functions occur and relevant risks are assumed. This approach is evident in a recent OECD commentary with respect to the attribution of profits to permanent establishments of financial institutions where a determination of the "reality" of a taxpayer's operations, regardless of how they are recorded or otherwise formally organized, would determine where income is taxed.[17] Even though these comments are directed to the allocation of profits within a single entity, they are nevertheless revealing of attitudes about how shared tax jurisdiction should be evaluated. The same observation may be made with respect to an orthodox transfer-pricing analysis involving income shared among separate legal entities within a commonly controlled group, the usual setting for the application of transfer-pricing principles. Despite criticism that a focus on a functional, and frequently economic, analysis of the way in which income is earned conflicts with the transactional premise for the application of the arm's-length standard,[18] the attachments of income to a jurisdiction are, indeed, functional regardless of the formal manifestations of participants in the income-earning activity. This analysis still requires the identification of taxable personalities or presences within a jurisdiction, although, given increasingly elastic notions of permanent establishment, attachments of this sort may be more easily established even by a limited or transient premise.[19] Indeed, the underlying tendency of transfer pricing is to be skeptical of how a shared tax base is allocated by taxpayers on a transactional or organizational basis, regardless of who the documented "legal" owner of the income may be.

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16 Couzin, supra note 1, at 263. For an interesting treatment of the implications of corporation/shareholder taxation for questions about international tax jurisdiction, see Sijbren Cnossen, "Company Taxes in the European Union: Criteria and Options for Reform" (1996) vol. 17, no. 4 *Fiscal Studies* 67-97.

17 Organisation for Economic Co-operation and Development, *Discussion Draft on the Attribution of Profits to Permanent Establishments (PEs): Part II (Banks)* (Paris: OECD, 2003), paragraph 64.

18 See Vann, supra note 14.

19 OECD model tax convention, supra note 8, commentaries on articles 1 and 5.

Couzin recognizes the correspondence between transfer-pricing analysis and the measurement of associated business profits with respect to contending national claimants.[20] In that connection, although he leaves the definition of other manifestations of taxable presence for another occasion, he acknowledges the practice of effectively splitting profits among members of a corporate group on the basis of their functional contribution or presence in relation to the income. Such profit splitting allocates income among taxing jurisdictions according to how the income is earned, taking into account the value (and therefore the significance) of gradations of contribution of those within the corporate group who are actually engaged in the income-earning activity. A source-focused regime inspired by this approach may be one among several alternatives to the corporate residence approach to determining a reasonable allocation of international income.

Couzin apparently accepts the international criticism of formulary apportionment, even though profit splitting typically manifests rudimentary characteristics of that approach. It might be argued that jurisdictional notions that we take for granted are in some respects formulary. In a typical tax treaty context, even under the existing presumptions of residence-based taxation, one might analogize prevailing jurisdictional notions of corporate residence, permanent establishment, and attributed business profits to reflect a basic formulary approach. If the main elements of a formula are capital, labour, and sales, these concepts have analogues in the physical and human dimensions of permanent establishment, the human and physical influence of personal connection implied by corporate residence, and the calculation of profit and therefore necessarily revenue (sales) typically anticipated by the business profits article of a tax treaty. This comparison is admittedly imperfect.[21]

20 Couzin, supra note 1, at 269 et seq.

21 Others also have alluded to this analogy. Richard Vann, for example, remarked on it in an earlier inquiry into the utility of bilateral tax treaties following the OECD model tax convention, a paper that continues to be an insightful resource for considering issues of tax policy and practice associated with international tax jurisdiction: Richard Vann, "A Model Tax Treaty for the Asian-Pacific Region? (Part I)" (1991) vol. 45, no. 3 *Bulletin for International Fiscal Documentation* 99-111 and ". . . (Part II)" (1991) vol. 45, no. 4 *Bulletin for International Fiscal Documentation* 151-63. Usually, the most significant impediment to formulary apportionment is not the common references, directly or indirectly, to various basic categories of factors of production or inputs, but the seemingly unattainable goal of achieving international agreement on a tax base: see, for example, Richard Vann's comments on formulary apportionment in the articles referred to in this note and in note 14, supra, and Organisation for Economic Co-operation and Development, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (Paris: OECD) (looseleaf), part IV. While this obstacle is difficult to overcome, it should be recognized that any manifestation of shared tax jurisdiction reflects basic agreement on the composition of the base and the qualitative nature and scope of the income of which it is constituted. Furthermore, whether in terms of international agreement on transfer-pricing documentation (for example, the transfer-pricing documentation guidelines adopted by Canada, the United States, Australia, and Japan, as the "Pacific Association of Tax Administrators"), modifications to corporate reorganization rules to defer taxable realizations even in a cross-border setting until there an

Nevertheless, in response to those who criticize global formulary apportionment as unworkable for practical and international tax policy reasons, it is well to observe that, to a large extent, the allocation of income among tax jurisdictions and the accretive development of so-called norms and practices to accommodate otherwise conflicting national tax claims are based on the relative significance of factors of production. Accordingly, this approach perhaps ought not to be dismissed out of hand, if only as a catalyst for future analysis and debate.[22]

A related area of contemporary international tax development is the refinement of the definitions of permanent establishment and, as a treaty device to break corporate residence ties, effective management, in recent pronouncements from the OECD—in the first case, in revised commentaries to articles 1 and 5 of the OECD model tax convention,[23] and in the second, in recommendations of the OECD's Technical Advisory Group (TAG) reporting on the place of effective management concept.[24] Broadly, these statements are oriented to detecting where the ("real") business of a taxpayer is substantially conducted, using language of business connection that is remarkably consistent with the *De Beers* approach to corporate residence.

In the OECD's revised commentary on article 1, it is recognized that a subsidiary corporation may be considered to be resident in the jurisdiction of its parent if, on the basis of

> [c]areful consideration of the facts and circumstances [it may be shown] that a subsidiary was *managed* in the state of residence of its parent in such a way that the subsidiary had a permanent establishment . . . in that state to which all or a substantial part of its profits were properly attributable [emphasis added].[25]

This position is asserted despite the typical tax treaty qualification that a subsidiary, in itself, does not constitute a permanent establishment of its parent. A recent Italian judicial decision dealing with similar considerations in relation to a corporation's presence in the jurisdiction of another corporation in the group (however analytically persuasive its conclusion may or may not be) at least is evidence that analytical

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actual separation from a corporation by its former owner (for example, Canadian tax rules associated with foreign mergers and share-for-share exchanges), and the like, in the context of prevailing international tax accommodations, there must implicitly be some common understanding or expectation of what is being regulated (that is, income, and therefore the tax base). Otherwise, these developments reasonably might attract some question.

22 See the accounts of presentations by Malcolm Gammie and Michael McIntyre, in Arnold, Sasseville, and Zolt, supra note 14, at 2005-16.

23 Supra note 8.

24 Organisation for Economic Co-operation and Development, Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits, "Place of Effective Management Concept: Suggestions for Changes to the OECD Model Tax Convention," discussion draft of May 27, 2003.

25 Supra note 8, at paragraph 10.2 of the commentary on article 1.

tendencies of this nature are not to be dismissed.[26] It is perhaps noteworthy that displaced "management" will suffice, as distinct possibly from "effective management" or "central management and control." The premise for the above statement in the commentary, however, is a situation that

> shows that the place of *effective* management of the subsidiary does not lie in its alleged state of residence but, rather, lies in the state of residence of the parent company so as to make it a resident of that latter state for domestic law and treaty purposes (this will be relevant whether domestic law of the state uses the place of management of a legal person, or a similar criterion, to determine its residence) [emphasis added].[27]

The OECD's revised commentary on article 5 and the TAG's comments concerning effective management are not as neat, analytically or even linguistically, in separating the manifestations of management and control, the defining characteristic of corporate residence, and carrying on business and implicitly, therefore, in establishing how profits might be attributed to a permanent establishment, as set out in Couzin's analysis. Nevertheless, these statements reflect sensitivity to the evaluation of tax jurisdiction on the basis of how income is earned and, presumably, how income-earning infrastructure is deployed within a corporate group. In the revised commentary on article 5, both in the general comments on permanent establishment and in the more specific comments on agency, the implications of electronic commerce for the location of the income-earning activity, and whether activities in or in relation to a jurisdiction are auxiliary or preparatory, reflect a focus on where the income-earning activity—the "real business"—directly or indirectly takes place. The OECD-based analysis seems willing to transcend the limitations of a typical legal analysis of corporate residence, but nevertheless makes reference to the kinds of connections that, as Couzin notes, have historically informed the attachment of personal jurisdiction to corporations through the residence concept. To a notable degree, corporate residence reflects fundamental circumstantial business to establish personal jurisdiction. It may be that, either because of the manner in which multinational business is conducted or for other reasons, the utility of corporate residence in itself as a signal, in Couzin's words,[28] of tax jurisdiction has been eclipsed by the need for a test that focuses more closely on the underlying business factors related to how income is earned.

It is interesting to consider the OECD's comments about the degree to which even a limited, temporary, or transitory presence may be sufficient to establish permanent establishment (despite a legal determination to the contrary in Canada).[29]

26 *Ministry of Finance (Tax Office) v. Philip Morris GmbH*, and *Ministry of Finance (VAT) v. Philip Morris GmbH and Another*, Corte Suprema Di Cassazione (Sezione Tributeria), Rome (March 7, 2002), reported in 4 *International Tax Law Reports* (Part 6, 2002), 903 and 947.

27 Supra note 8, at paragraph 10.1 of the commentary on article 1.

28 Couzin, supra note 1, at 264 and surrounding text.

29 Supra note 8, commentary on article 5. Consider, in the Canadian context, the decision of the Federal Court of Appeal in *The Queen v. Dudney*, 2000 DTC 6169.

Evidently, the evolving focus may be not so much on establishing the integrity of a personal connection to a tax jurisdiction as, on the other hand, asserting an income-earning connection in relation to exploited business opportunities consistent with how a resident *would have* behaved. Even in Canadian domestic tax law, there are instances of assimilation to residence status of actual non-residents in order to effect a reasonable correspondence between the taxation of residents and non-residents in equivalent circumstances.[30] Similar indications of the OECD's, and therefore the international community's, thinking are evident in the commentary about the conduct of substantial business operations through an agent; the emphasis on commercial coherence as a determinant of when an aggregation of business locations is sufficient to constitute a permanent establishment for any or all of them; and the review of when an inanimate presence in a jurisdiction (that is, equipment but not human beings) is sufficient to reflect a full metamorphosis of an income-earning activity into a permanent establishment, as well as whether functions that in some sense are connected to income-earning activity are "preparatory or auxiliary" or "core" business activities, with obviously different jurisdictional implications. These revisions to the commentary may mask a more subtle skepticism about the adequacy of traditional legal constructs to adequately capture the intended jurisdictional associations of income that, it might be argued, are the genesis of international tax rules.

The comments of the TAG on effective management reflect similar tendencies.[31] This development is particularly notable in light of distinctions that are pertinent in defining corporate residence among "managed," "controlled," "managed and controlled," and manifestations of the "actual" conduct of "management and control." Couzin touches on effective management in his legal analysis of the *De Beers* test in chapter two. However, he is careful to distinguish between "ordinary" operational aspects of business conduct and activities or functions that rise to the level of management and control, even if they also entail operational business elements.

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30 See, for example, part XIII of the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended, dealing with non-resident withholding tax.

31 This discussion, in a Canadian context, is far from academic. The recently announced protocol to the Canada-UK income tax convention adopts "effective management" as a residence tie-breaker for corporations. (See the protocol signed May 7, 2003, amending the Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, signed at London on September 8, 1978, as amended by the protocols signed on April 15, 1980 and October 16, 1985.) Leaving aside that this test may be quite distinct from the domestic tax law tests of residence in both countries (Couzin remarks on the complication of adopting such unique "third" definitions of residence), the treaty amendment is interesting for two reasons. First, this convention is one of Canada's most prominent, along with the convention with the United States. Yet, the approaches for breaking corporate residence ties in the two conventions are quite different. Second, the United Kingdom is the birthplace of the central management and control test, which is venerable in Canadian tax law also. In light of the TAG comments on the meaning of effective management, what does this say about the correspondence, if any, between these two articulations of corporate residence, at least as contemplated, presumably, by the tax authorities of both countries?

Couzin's subsequent invitation, in chapter five, to consider whether these connecting factors are indicative of a more subtle underlying reality makes the OECD TAG's commentary on effective management all the more intriguing. The TAG report envisages two possible ways for resolving non-human residence conflicts. The first is, essentially, to apply a definition of effective management. The second is to establish a hierarchy of tests very much akin to that which applies to resolve conflicts of individual residence. In both cases, however, manifestations of business conduct are important. Building on existing OECD commentary, the TAG identifies the

> place of effective management [as] the place where the key management of commercial decisions that are necessary for the conduct of the entity's business are [sic] in substance made, i.e., the place where the action is to be taken by the entity as a whole are, in fact, determined. All the relevant facts and circumstances must be examined to determine the place of effective management.[32]

While the TAG recognizes that this location would "normally be where the governing board or group of senior directors meet, other determinations are possible based upon how the substance of the business and the decisions associated with it occur."[33]

Some of the factors explained by Couzin in chapter two are relevant here—in particular, those relating to the formalities of corporate governance, the exercise of strategic direction, and the independence of boards of directors. However, the margins of effective management may be as elusive and opaque as those of corporate residence, as Couzin's analysis well shows. In any event, the tendency of the TAG's analysis is perhaps the interesting point. It seems to blur even more the distinction between personal associations with a jurisdiction (residence) and associations that are attributable to the source of a taxable person's income on the basis of the circumstances in which business is carried on (source). These developments, too, reflect an underlying skepticism about the reliability of a personal test of jurisdiction, particularly in relation to legal fictions, where the objective of international tax rules is to establish a reasonable sharing of international tax base among reasonable national contenders.

Another extension of Couzin's readiness to question the fiscal imperative for taxing corporations separately from their shareholders is the attribution or imputation of corporate income to shareholders. This also reflects current fiscal thinking, of particular interest and controversy in Canada, and at its core a jurisdictional issue. Although even quite recently such a general approach (outside the CFC context) might have seemed somewhat heretical, the tendencies of tax policy development reflect this response to the perceived inadequacies of present ways of establishing tax jurisdiction over income in relation to its "real" owners or, alternatively, ceding tax jurisdiction in favour of the primary entitlement of another jurisdiction. Implicitly, the concern must be influenced to some extent by the adequacy of typical residence

32 Supra note 24, at paragraph 24.2 of the proposed revised commentary on article 4.

33 Ibid.

or source determinants of jurisdiction and the facility with which these elements can be manipulated.

The OECD, in its study of harmful tax competition,[34] has been concerned to identify circumstances in which foreign income is subjected to unreasonably low levels of taxation, in contravention of the international tax principle that, as a quid pro quo for relinquishing tax jurisdiction, tax to some measurable degree will be imposed elsewhere. The OECD encouraged countries to adopt legislation to counter tax avoidance arising with reference to investment funds and deficiencies in their CFC rules. These developments are directly connected to recent experience in Canada, occurring contemporaneously with the gestation of Couzin's book. For example, since 1999, the Canadian finance authorities have been developing a significantly modified regime for taxing foreign investment income earned indirectly by Canadians through various legal constructions.[35] These rules, which have yet to be enacted, closely parallel the foreign accrual property income rules, the anti-avoidance provisions of the foreign affiliate system in the Canadian Income Tax Act, which impute underlying income of a controlled foreign affiliate to its shareholders as if the corporate earner had not intervened in the income-earning process using Canadian tax rules to compute the income. Essentially, the new foreign investment income rules seek to avoid the use of legal constructions to resite income to jurisdictions lacking intrinsic connections to it. Earlier versions of the rules contemplated imputation as a device to associate indirectly earned income with its economic owners. The present rules resort to two proxy devices to reflect, less than perfectly, a statutory association of what is assumed to be underlying income and those who are considered to own it indirectly through participating interests in foreign investment entities. However, for purposes of these comments, the implications of the two approaches are the same. The new rules, again more or less imperfectly, leave the taxation of foreign business income primarily to the source jurisdiction in which it is earned, although developing tax practice suggests an increasing likelihood that the most generous recognition of territorial jurisdiction, through the "exempt surplus" aspect of the Canadian foreign affiliate system, may be denied in circumstances, presumably, where the underlying expectation of taxation by another jurisdiction does not warrant a full relinquishment by Canada of the tax liability that it would otherwise assert.

These developments reinforce the conclusion that it is neither fanciful nor impossible, as Couzin recognizes in the concluding paragraphs of this book, to entertain

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34 Organisation for Economic Co-operation and Development, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998); and two subsequent progress reports, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (Paris: OECD, 2002), and *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* (Paris: OECD, 2001).

35 Rules dealing with "non-resident trusts" and "foreign investment entities" in draft legislation most recently published in October 2002, with effect, generally, from January 1, 2003. See Canada, Department of Finance, *Legislative Proposals and Explanatory Notes on Taxation of Non-Resident Trusts and Foreign Investment Entities* (Ottawa: Department of Finance, October 2002).

the possibility, in appropriate circumstances, of "ignoring" a corporation completely as a taxable form in the event that the most effective determination of international tax allocation is to recognize the economic ownership of income by interest holders. To that end, Couzin's careful development of the notion of fiscal connection, in chapter two, and his dissection of the notion of liability to tax as a determinant of residence for treaty purposes, in chapter three, serve as useful reference points for looking forward to other ways in which to establish tax jurisdiction. At the same time, his analysis supports understanding and perhaps criticism of alternative means that are not merely possibilities but in fact are already being adopted and applied in various ways in domestic tax legislation and practice and in international guidelines of the OECD.

A CONCLUDING REFLECTION

Robert Couzin did not set lofty objectives for his study. However, as a result of his analytical curiosity, he has in fact achieved objectives that could be so described. The subtleties of tax jurisdiction that invigorate Couzin's orthodox legal analysis of corporate residence within the residence/source paradigm are not foreign to students of international tax policy, but neither are they as readily accessible elsewhere, certainly in an applied legal context, as Couzin makes them. His book is a timely contribution to international tax analysis and a valuable resource for making frequently difficult judgments in practice about how to interpret and apply "norms" of international taxation that may, as Couzin demonstrates, not be as normative as they seem. Couzin sets out to find coherence and order, and in fact contributes to an orderly framework for discovering system in an area of law and practice where no "system" currently exists.