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KEYWORDS: INTERNATIONAL TAXATION ■ POLICY MAKING ■ PROCESS

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“I figure there’s got to be a pony in there somewhere.”
—Reaction of an optimist presented with “a mountain of horse dung,” in a story frequently told by former US President Ronald Reagan

For many years I would begin my law school course on international aspects of US income taxation holding up a thin folio in one hand and a thick volume in the other. The folio contained the text of the US constitution. The volume was the US Internal Revenue Code, which, in those days, could actually be printed between two covers

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and raised in a single hand. My question to the class: Which of these is the governing document of the United States?

If your concern, I would go on, is whether you can burn an American flag with impunity, whether you may freely publish and distribute pornography, what words you are allowed to print in the newspaper you own, whether the US Congress can act through the vote of but one of its legislative chambers—why, the must-have document is plainly the folio. However, if your thoughts are more attuned to what kind of house you can afford, where your children will be educated, how much disposable income will be yours to enjoy, and how wealth may pass between generations of your family, then more of your attention is due the volume of US tax laws.

I no longer engage in this performance. The Code now appears in two volumes, each of which is too heavy to lift with one hand. The point, however, remains valid: tax laws are concrete, immediate, and practical. They pervade the most familiar aspects of daily life in the United States, and presumably in other countries as well. There can be no other legal subject—no courts, no legislature, no functioning democracy—without a tax system. And conversely, as the tax system of a country fractures and loses legitimacy, so does representational government. There is nothing more important, because everything of value that a government does, from national security to health care, flows from the tax system.

National tax systems reflect the history, culture, values, and needs of the countries that adopt them. It is a fact worth noting (if sometimes conveniently forgotten by politicians) that there are many countries in this world. At a time of instant connections and interconnections, that implies a wide scope for relationships in tax matters between and among countries. This is where international tax policy, the policy designed to govern tax aspects of cross-border interaction, comes in.

There is, of course, an instrument—the tax treaty—devoted specifically to this subject. Tax treaties are tidy and satisfying. The Organisation for Economic Co-operation and Development has cabin’d the subject matter within a highly developed (and continuously interpreted) “model,” so that the potentially unruly material can be analyzed, discussed, and subjected to negotiation within clear boundaries. The manner and materials employed in interpreting tax treaties can be, and often are, discussed at length: Should extrinsic materials be consulted? What about the views of the negotiators? Should unamended treaties be subject to reinterpretation as domestic laws change? Are these agreements contracts, or are they laws? All of this is grist for perennial, quasi-philosophical, debate.

Moreover, there is magic in the purpose of tax treaties. They are intended, with modest exceptions, to help. They afford choices and, for taxpayers at least, choices are a good thing. Few persons are ever harmed by a tax treaty, so the treaties represent a non-controversial (insofar as taxpayers are concerned) topic for discussion and scholarship.

The appeal of treaties may also lie in the remarkable level of international agreement regarding their purpose and content—or perhaps that is more of an effect. It would be difficult to identify another area of international cooperation in which multi-nation agreement is so widespread even unto the smallest detail. For all these
reasons, tax treaties are appealing—for those who study them, those who teach courses on them, and those who travel around the world negotiating them.

Tax treaties, however, cannot serve as a primary vehicle for a nation’s expression of international tax policy. Treaties are the means whereby sovereign states endeavour, usually on a bilateral basis, to harmonize the rules of their national laws. The treaties seek to eliminate, or at least reduce, international double taxation and, through information exchange, to prevent tax evasion. They establish a dispute-resolution mechanism, the mutual agreement procedure. They are useful and necessary for many reasons, but they operate, and can only operate, on the basis of and with reference to rules of national law. Treaties restrict that law. They establish limits beyond which rules of national law may not extend. Even when treaty limits apply, it is the rules of national law that determine how much income enters the tax base, how many and which deductions are allowed, and how much tax must be paid. In other words, the repository of international tax policy making is ultimately the national law of each country.

Aspects of national tax systems have been subjected to comparative study for years. International organizations, government ministries, and scholarly research have all probed many facets of those systems. They have catalogued and minutely analyzed the rules adopted by countries throughout the world, including rules with respect to cross-border movements of income, investment, and persons.

Much less attention has been paid to the forces that shape those rules of national law and produce the divergences in country practices that are thus catalogued and that treaties attempt to reconcile. This is not surprising. International tax policy, like any aspect of tax policy, lies close to the beating heart of national sovereignty and is inevitably subject to the contending forces of national politics. This makes international tax policy more difficult to describe than tax treaties and much harder to deal with in analytical terms. The product of national policy making, the substantive rules themselves, may be subject to periodic review and comparison, but the policy-making process itself generally is not. An observer might conclude that the process of reaching international tax policy decisions in any given country simply is what it is. Comparing the process that applies in, say, India to the process in, say, Spain comes close to comparing the political landscape in India with the political landscape in Spain. Except perhaps for political scientists, this does not seem a fruitful exercise.

This essay focuses not on the substance of international tax policy, but rather on the process whereby that policy is shaped and articulated. I believe that there are general observations that can usefully be offered with respect to the policy-making process, and that those observations can have relevance and application in a variety of national contexts. My own experience is primarily with policy making in the United States, but it seems to me that there are country-neutral factors that can, and arguably should, influence policy making in any tax jurisdiction. The summary that follows reflects at least some familiarity with tax systems in a variety of countries. Although it stems from thinking about, and focuses on, international aspects of the income tax, much of what follows applies to other areas of taxation as well.
This is, deliberately, a personal—perhaps idiosyncratic—essay. And it is not an article; articles have footnotes.

**THE MEANING OF “INTERNATIONAL TAX POLICY”**

It seems appropriate at the outset to define the subject matter. The term “policy” implies a choice of approach or approaches to the resolution of particular issues. The field of international taxation gives rise to a limited number of issues, which are essentially similar in all countries and relatively easy to describe. Circumstances differ widely, of course, and there are dramatic differences in the positions that countries adopt to address cross-border issues. But the issues themselves display a strong commonality regardless of where in the world they arise.

All countries struggle with the “inbound” question: how to impose tax on, and collect tax from, persons with whom the country has at most a limited connection. And all countries must face the “outbound” questions: whether and how to impose tax on income from abroad earned by persons having a substantial personal nexus with the country. These questions have many components, and they may be sub-divided and translated into rules of varying specificity. The answers, or rather the combination of answers, adds up to an international tax policy.

**GUIDELINES**

Those who would make tax policy in any country would be well advised to keep a few basic thoughts in mind. These will not yield any particular policy results, but they may influence the shape and articulation of those results.

First, policy must ultimately be expressed in language, and language has inherent and unavoidable limitations. Words and phrases are slippery, and their meanings far from immutable. A policy conclusion does not contain or suggest its own best expression; the final step must be to communicate that conclusion—to the taxpayer, the tax administrator, the courts, and the public. The drafters are likely to find that policies they thought clear in concept may not be so easily expressed. And formulations, when chosen, may meet with distorted interpretations. Any author who has had occasion to reread work drafted years previously knows that the content of words is not settled, and that meaning has a tendency to migrate.

Second, tax administrators and courts can be asked to bear the interpretive burden only up to a point. If the policy maker cannot articulate the results that are desired, it is folly to delegate the task to a party who has less time and commitment for the purpose of elaborating on the initial, ill-formed communication. The next person in the interpretive line is no more likely to be a philosopher king or queen. The duties of the policy maker—the basic duties—are not only to decide what is intended but to express it clearly.

Finally, policy derives from purpose, and not the converse. Results are apt to be unsatisfactory when there is only a hazy sense of ultimate goals. There will be
surprises in any event, but the entire undertaking may surprise if the pleasure of policy making is put before the far harder work of setting a clear and distinct course. It is worth adding that a tax system effectively floats atop a full-blown system of commercial law and practice, and although tax rules may shape commercial realities to some extent, they are principally a product of those realities.

These thoughts seem highly pertinent for all of the points discussed below.

POLICY CHOICE NUMBER ONE: THE ROLE OF DISCRETION

Probably the most fundamental aspect of any tax policy decision lies not in the answer or answers to substantive questions but in how the answer or answers are couched. Any given decision may be situated at any of a range of points along a continuum of generality. The result of policy making may be specific and detailed, subject to further interpretation and elaboration as and when a need arises. Or it may be broad and open, with an explicit or implicit delegation of discretion to persons charged with administering the law. A case can be made for either alternative and for many midway points along the spectrum. The choice of which point to employ is crucial.

Detailed written rules have a tendency—not a guarantee, but a tendency—to limit the potential for two of the greatest threats to any tax system: unequal treatment of similarly situated taxpayers and corruption in the administration of the law. Inequality and corruption are found throughout the world, and either can overwhelm a country’s tax system. In the effort to achieve uniformity and prevent dishonesty, rule makers may be tempted to opt for clear, explicit, and detailed policy choices. But the attempt to reduce all policies to words, to maintain pace in writing with the development of economic life, is futile: the world is too complex, the pace of change too rapid, language too inflexible and, as noted, routinely construed in ways not envisioned by those who employ it. The policy maker would be mad to believe that rules can be developed rapidly enough, and in sufficient detail, to cope. And so discretion seems inevitable, regardless of what rule makers may wish. That may not dictate a particular choice to confer or withhold discretion, but it may be illuminating in itself. The fact of discretion needs to be faced, and its potential (and unwanted) collateral consequences acknowledged.

Discretion implies judgment, which is not an attribute in plentiful supply. Nor can the reasonable employment of judgment be presumed, especially when a task is delegated. Persons called upon to administer tax laws will certainly be required to utilize judgment in reaching decisions, but there should be no surprise when unanticipated results ensue. There is a large difference between, on the one hand, circumscribing an administrator’s range of decision making insofar as that is possible and, on the other hand, sketching broad policy prescriptions but deliberately leaving blank areas to be filled in by practice.

The fundamental point here is that the level of specificity chosen for the expression of policy choices represents, in itself, a policy choice of importance. Countries
approach that choice in different ways, and from different points of view, but generally without recognition that a matter of significance is involved. One has only to place the US Internal Revenue Code beside the tax laws of, say, the Netherlands to see that makers of tax policy differ markedly, if perhaps quietly, in their approaches to this “first policy choice.” At a minimum, it is worthwhile to unpack that choice from the morass of other choices that surround it, and to evaluate it by itself.

INTERNATIONAL TAX POLICY: THE SUBSTANCE

International tax policy revolves around two crucial “building blocks”: the distinction between “foreign” and “domestic” with respect to persons, and the same distinction insofar as the tax base is concerned. It is not possible to consider the taxation of foreign persons, or how to deal with foreign elements of the tax base, without a clear view of what “foreign” means in these contexts. Ideally, the definitions should be neutral and geographic, uncontaminated by policy choices about what to tax and what to exempt. The definitions embody policies regarding a taxpayer’s connection with the jurisdiction and how far the jurisdiction’s primary right to tax may legitimately extend—but they can, and should, be distinct from questions about how far the tax laws actually reach. It is perfectly possible to exempt “domestic” persons from taxation and to exclude “domestic” aspects of the tax base. These are standard policy choices and qualitatively different from definitions regarding the legitimate scope of the law.

Taxation at source and taxation on the basis of residence have long histories of international acceptance. Since every country has, at least potentially, a tax interest as both a jurisdiction of residence and a jurisdiction of source, nearly every country adopts both bases for the assertion of tax on cross-border activities. Even countries that are hesitant to impose tax on the foreign tax base of residents are often inclined to take an expansive view of what the domestic base is. Thus, international double taxation is a fact of life.

When unrelieved, such double taxation is widely viewed as unfair, unwelcome, and a threat to cross-border commerce. Tax treaties address the problem directly but cannot resolve it by themselves, both because they do not exist universally and because their application is sometimes impeded by country practices. Therefore, countries should, and generally do, include in their national laws at least some recognition that other countries exist. When a particular country imposes tax on a source basis, some other country presumably will be taxing the same base by reason of a claim to being the jurisdiction where the taxpayer resides. Conversely, a country imposing worldwide tax on residents should acknowledge the competing source-based claims of other countries. The results are usually measures in national law to alleviate double taxation by restraint in the reach of source-based taxing rules and by effective rules for reducing or eliminating the double taxation of residents.

The source-based rules pertain to taxation of the foreign person on the domestic tax base. Once a country has decided who is foreign and what the domestic tax base is, the policy maker encounters a series of conflicting considerations. The country
will wish, in most instances, to attract investment from beyond its borders, and it may look to its tax system to play a role in that effort. Hence, the tax rules should not deter desirable inbound investment, and discriminatory treatment of the foreign person should be avoided—though it can be difficult and even circular to say precisely what “discrimination” means when the taxpayer is not present in the country, either directly or through agents or assets. At the same time, policy makers normally will be sensitive to the risk of over favouring the foreign person, to the disadvantage of domestic competitors. The rules may be further subdivided between those applicable to passive investors and those pertaining to persons with assets and at least some tangible presence in the country. As always, the rules must be capable of being administered by tax authorities, and transparent to the public. All these considerations enter into the policy approach to taxation of persons having limited contacts with the jurisdiction.

The resident presents an equally familiar set of tax policy questions. The domestic (that is, non-foreign) person should have a robust connection with the country, and there can be little doubt about the legitimacy of a worldwide tax base. But should tax be imposed on a worldwide base? That requires an effective means of achieving compliance. Once tax administration is called upon to collect tax with respect to events and activities occurring beyond the border, problems arise with respect to gathering and verifying information. International double taxation becomes a threat. There are credit systems and exemption systems to be considered, and a variety of mixed systems reflecting elements of both credit and exemption. In addition, the domestic tax base must be protected, so that residents cannot routinely achieve “foreignness” for their investments, their income, or themselves. This implies that the line between “domestic” and “foreign” must be policed at multiple junctures, with respect to both persons and the tax base.

The responses to these difficult policy choices will vary in accordance with the economic, political, historical, and cultural aspects of each country. Moreover, within any given country, the responses will vary over time and with changing economic circumstances. There is no useful guide to international tax policy that can serve from jurisdiction to jurisdiction—no general answers, no “models.” The rules that suit a developed capital-exporting country may not be appropriate for a developing nation with, for example, important natural resources. The pertinent questions, however, are more or less the same everywhere.

THE TRANSCENDENT VALUE OF SIMPLICITY

The hallmarks of an ideal tax system are commonly identified as efficiency, equity, and administrability, though other terminology is sometimes employed and there are associated and collateral values as well. The system should be efficient in the sense of intruding as little as possible into the realm of economic decision making. It should be fair in application and recognized as fair in application (perhaps not the same thing). It should be readily understandable by the public and capable of being applied by officials charged with the task of administration.
These qualities frequently collide. Rules that are fair in the sense of acknowledging the particularities of each taxpayer or group of taxpayers may not be easily administrable. A transparent provision may not be the most efficient. In fact, at virtually every stage of the policy-making process, there is a need to reconsider and weigh each of the ideal attributes against the others. In that weighing, the goals of efficiency and equity generally have more heft than concern for the tax administrator or the person simply attempting to understand what the rules are—their shoulders are assumed to be broad enough to support whatever burden falls on them.

Administrability of the tax laws is, however, undervalued. Together with its cousins, transparency and simplicity, administrability is fundamental to the effectiveness of any tax policy, adopted for any purpose. When administrability is sacrificed to the competing goals of efficiency or fairness, practice begins to diverge from rule. Uneven treatment of the similarly situated creeps into the system. The law in fact ceases to resemble the law as drafted and envisioned by the policy maker. It becomes hard to know what is being achieved by the policy choices that have supposedly been made—transparency is lost. The point is not lost on those with entrenched interests, who prefer rules that only they fully understand.

In recent years administration of the international tax laws in the United States has exhibited a sort of lethargy. In case after case, the Internal Revenue Service has pursued exceedingly complex issues up to the point of engaging with the taxpayer, and then fallen into a state of torpor, with nothing ensuing for years. These are not situations where the issues have escaped the administrator’s notice, though there are surely many of those as well. These cases involve issues on which the tax authorities have expended resources and articulated or at least sketched out a position, but then retreated into silence, except for periodic requests to extend the statute of limitations. Further pursuit is just too complicated, the issues too detailed and sophisticated, for the agency to maintain momentum. The laws applicable to these situations might as well not exist.

The case for simplicity seems like raw common sense, but it is easily and commonly disregarded. The appeals of efficiency and equity are strong. Who, after all, can stand in opposition to economic growth, or fairness? As beacons in the development of tax policy, however, these bright values have intrinsic limits. Every taxpayer, every industry, has a “story” to tell, and it is entirely possible for a tax system to proceed in the direction of a separate set of rules for each case. The policy maker needs to recall on a regular basis that tax laws operate at a practical level, that they represent a point of encounter with taxpayers on a regular basis, and that policies addressing substantive issues must be administered by someone. Both those who are required to comply with the laws and those who must apply them are fallible, and their ability to deal with complexity is not infinite. Rules too complex to be adhered to are pointless and counterproductive—unless the true purpose is something other than what is articulated.

In other words, simpler is, or nearly always is, better. That implies rough justice—rules that operate reasonably and have general application, that are not tailored to fit individual circumstances. It implies rules directed to achieving the goals of tax
policy, and not to other, unrelated, matters. It mandates thinking about how policy choices will actually be implemented once they enter into the law.

**RAISING REVENUE AND REVENUE ESTIMATES**

The principal purpose of taxation is to raise funds to support government functions. The funds are required if desired expenditures are to be made, and taxation is the fairest, most direct, and least haphazard means of raising those funds. Certainly, taxation is more appealing from the standpoint of rationality and fairness than the alternatives: lotteries, borrowing, inflating the currency. These all might raise revenues, but they also hold the capacity to produce random, unequal, and even cruel effects. A government seeking to advance the welfare of its citizens does well to choose taxation as the principal tool for meeting revenue goals. Even a government having other aims will invariably look to taxation as an important and effective instrument.

A prime corollary to this proposition is that the use of taxation to modulate incentives and disincentives should be subsidiary, yielding to the goal of meeting revenue needs. The imposition of tax obviously has negative consequences: if something or some activity is taxed, there is likely, over time, to be less of that something or activity. It is therefore obvious that taxation can be utilized as a tool for encouraging or discouraging behaviour. This, however, is an incidental effect, and decidedly not the primary purpose of a tax system. In cross-border matters as in other aspects of tax policy, revenue must come first.

Moreover, incentive and disincentive effects are commonly exaggerated in tax policy debates because it is often to the advantage of participants in those debates to engage in such exaggeration. Taxes are a cost, like any other cost. There is nothing magical or special about taxes as a cost, except that they are subject to adjustment by government action. Necessarily, the cost of engaging in business or a particular transaction will have an impact on the price at which goods and services can be offered, the feasibility of raising funds in the marketplace, and the relative net benefits of activities or transactions.

Taxes, however, are not inherently bad or undesirable. They are necessary to their main purpose and, as noted, better than the alternatives. Therefore, judgments must be made. Higher taxes mean higher costs, but it does not follow that each and every unit of greater cost (of tax or any other sort) is problematic or that it poses a meaningful threat to what is being taxed, to the economy, or to the nation.

Nor does it follow that tax costs necessarily produce behavioural changes. Think of the matter this way. There is a zoo in Washington, DC, and in that zoo there are tigers in a cage. There is no zoo, and no tigers, in the city of Portland, Maine (for example). One’s chances of being mauled by a tiger on the streets of the city are therefore much higher, as a statistical matter, in Washington than in Portland. But the fact that one may be 10 or 100 times more likely to be mauled in Washington than in Portland hardly means that there is a substantial chance of meeting such a fate on the streets of Washington, or that one is substantially safer from tigers on the streets.
of Portland, or that tigers represent a good reason for avoiding travel to Washington. People act on intuitions of this nature every day, in countless ways. There is no reason why such intuitions should be absent when the discussion turns to taxation.

US businesses have traditionally compensated their executives more lavishly than have their competitors in other countries. Yet they are regularly heard to complain about the “anti-competitive” effects of higher taxation. Higher tax costs pose no greater threat to “competitiveness” than higher costs of executive compensation or, for that matter, higher costs of any other sort. Competition is surely more difficult at higher cost levels; but costs are costs, regardless of their specific nature—and, in any event, higher cost levels are not necessarily fatal. The alleged incentive and disincentive effects of taxation need to be carefully weighed, and not viewed as either special or beyond debate.

Furthermore, it does not follow from the fact that taxes are first and foremost a device for raising revenue that policy choices should turn on revenue estimates. Anticipated revenue gains or losses stemming from alternative policy choices represent information of utility in the policy-making process. It is folly, however, to attribute talismanic value to estimates of revenue consequences. Even the most seasoned revenue estimator lacks the ability to predict the future. That ability is not given unto human beings, and no amount of extrapolation from past experience, no matter how technologically facilitated, is going to alter that fact. Estimates of outcomes flowing from specific policy choices are always problematic, always to be considered with their inherent limitations in mind. Policy making is not easy work, and any information that can be developed may be of service, but it is a perversion of the policy maker’s role for choices to be controlled by someone’s views of what the future holds. The precision of numbers here is an illusion.

The need for judgment at the level of tax administration has been noted, as has its relation to the discretion allotted to the administrator. Policy making, too, involves judgment, and its value here is paramount. Neither knowledge—a commodity in the modern world—nor logic is a substitute. The task of the policy maker requires choice. Choice will be informed by knowledge and aided by logic, but it is ultimately judgment (and in exceptional cases, wisdom) that plays the decisive part.

**ELECTIONS IN THE TAX LAW**

Like “right turn on red” and other slick ideas for easing the daily burdens of modern life, elections in the tax law bear heavy, if disguised, costs. In the first place, elections operate at cross-purposes with the goals of simplicity and administrability because they require more than a single set of rules. By definition, an election allows for a choice between regimes, so it is necessary to develop, articulate, and administer more than one regime for application at any given time. This should be sufficient in itself to indict the use of elective rules.

The problem with elections, however, runs deeper. Taxation is, by definition, compulsory. The taxpayer is called upon to part with a portion of his or her wealth as the price of the common good (a functioning government and social order). The
taxpayer may willingly agree, but that willingness is in no way inconsistent with the compulsory nature of the demand. There are no optional terms here, and the taxpayer’s acquiescence is not voluntary. Payment is required, and the requirement is backed by force of law.

The characteristics of elections run counter to compulsion. And once they begin to appear in the tax law, there is no convenient place to cut them off. Every taxpayer, or group of taxpayers, can legitimately lay claim to being “special,” because of economic circumstances, the particular nature of the income-earning activity, or the ability to make payment. In addition to complicating the laws, elections imply optionality in the very determination of tax liability and, therefore, in the obligation to pay tax.

**STATISTICS**

International taxation, like any other aspect of taxation, is dynamic. The economic situation is volatile, and particularly so in its cross-border aspects. Even the best policy maker will make mistakes, misjudge effects, rediscover that the one law never repealed is the law of unintended consequences.

Just as results cannot be reliably predicted, neither can they be evaluated in a vacuum. There is a strong need for continuous information flow, feedback from experience. This can only come from statistics assembled with care, in a timely manner, and by an unbiased hand. Numbers will tell the story of what has been accomplished, or not. The person to whom the task of making policy choices falls has an urgent need for that information, in order that gaps can be filled, mistakes rectified, alternative policies evaluated. It follows that an important contributor to the policymaking process is a functioning system for gathering, processing, and presenting the statistical information that will indicate how chosen policies have worked and where there is a need for additional rules. Statistics will tell that story only if a country has adopted the necessary measures to ensure that the pertinent data are on hand. A statistical compilation at regular intervals, as current as may be feasible, is probably the greatest single contribution to the policy-making process in any country.

**CORRECTIONS, RETROACTIVITY, AMNESTIES**

“Mistakes will be made”—and, it is hoped, eventually corrected. Nowhere in the tax law is this concern more pressing than in international taxation, a subject that involves worldwide effects and interactions. The most important single datum for international taxation is the corporate tax rate, and that rate changes frequently—sometimes dramatically, often suddenly—throughout the world. Course corrections are never removed from the policy agenda.

That fact translates into a variety of issues for tax policy makers. Is retroactive change justifiable? Does the answer depend on whether, and to what extent, the change is favourable to taxpayers? Can one-time changes, in the nature of forgiveness of taxes due, be accepted? Amnesties are commonly proposed in the name of
short-term revenue gains, “job creation,” accessing needed liquidity, or other seemingly urgent considerations.

The difficulties with retroactivity and amnesty are similar. Tax laws are binding obligations, and taxpayers are called upon to comply with those obligations. Retroactivity and amnesty represent shifts in the pre-existing rules to the benefit or detriment of a class of taxpayers who (presumably, sometimes indisputably) have adopted certain behaviour on the assumption that the laws in force at any given time will remain in force. Whether beneficial or detrimental to targeted groups of taxpayers, retroactive provisions and amnesties upset these expectations. For that reason alone, they may be perceived as unfair. They may present concerns for a target group, or for persons not included in a target group, but in either case, they are not fair.

If tax policy decisions are to deserve respect and acceptance, retroactivity and amnesty should be avoided. Considerations of simplicity, as well as fairness, argue for banning these tools from the policy maker’s arsenal. A do-over of the past is hardly beneficial from an efficiency standpoint, regardless of promised short-term benefits. Claims to the contrary deserve all the skepticism they normally receive.

THE EXPERIENCES OF OTHERS

In considering international tax policy, the experience of other countries can be enticing. Since the subject matter is investment abroad, or from abroad, the attention of policy makers will be attracted, and sometimes directed, to policies that other countries have adopted (for example, to the benefit of certain classes of taxpayers). There is, of course, every reason to pay attention to tax-related developments elsewhere, but caution is in order. The tax laws of any country reflect the traditions of that country and must be understood in that context. It is possible that ideas or rules can be imported from abroad, but the realities of others’ laws and practices may be difficult to understand, or even to know. Interpretations, administrative practices, informal applications, local taxpayer behaviour may all have considerable effects upon the rules as written. A great deal may transpire in the privacy of conversations with the tax administrator. Claims that other countries are more favourable in one way or another must also be weighed against the possibility of unmentioned, but countervailing, rules at work in the allegedly more generous jurisdictions. Before accepting the validity of comparisons, policy makers need to determine whether the more beneficial treatment is real.

The consequences of globalization have been overblown where matters of taxation are concerned. Countries have difficulty enough struggling with their own rules and their own policies. It is too early in our evolution as a species to think of harmonizing tax rules across borders, or around the world. Thus, policy approaches adopted by other countries may have educational value for a country in developing its own policies, but that value is necessarily limited.

A related point pertains to reliance upon the laws of other jurisdictions as tools in the formation of national laws. It is tempting to look to high tax liabilities in other countries as indicative of behaviour not motivated by tax avoidance. This is
an important feature of international tax policy in the United States, and doubtless in other countries as well.

The difficulty is that policy makers may not fully grasp the subtleties of other countries’ laws. It cannot be assumed that rules in force abroad function in the same way as rules at home, or that they are applied in the same manner. Assumptions about how foreign laws operate are perilous. The United States has paid a price for its naïve statutory assumption (embedded in the subpart F rules) that other countries generally employ place of incorporation as the test of corporate residence. That assumption is, of course, false.

Furthermore, there is incoherence in the view that substantial foreign tax liability constitutes a defence to charges of tax-motivated behaviour. It is true enough that a party encountering a substantial foreign liability has probably structured its affairs with at most a secondary purpose of avoiding home-country taxation. But does the home country really wish for its taxpayers to pay high foreign taxes? Or does it wish the opposite—and should reducing foreign tax be considered a proper business purpose? The questions are thoroughly confusing and contradictory, easily answered in one setting only to have unexpected consequences in others. Countries are best advised to develop policies within the four corners of their own systems, rather than relying on rules (apparently) in force elsewhere to serve the purposes of their national laws.

USES AND LIMITS OF PROFESSIONAL EXPERTISE

There are at least three professional groups plying the taxation waters, and it is worth focusing on what they can, and do, bring to the making of international tax policy. None of these groups—accountants, lawyers, economists—can be relied upon to remain happily within the boundaries of its professional competence. Indeed, most people seem to want to be someone else, and it is exceedingly common for the international tax policy maker to encounter persons extending reach beyond grasp in rendering opinions and making suggestions regarding policy.

Accountants have familiarity and experience with numbers, and with the compliance aspects of tax laws. Their views deserve respect and attention where the practicalities of return preparation and related matters are concerned. Their views on numerical aspects of rules are always worthy of consideration even outside the realm of compliance. It has been my experience, however, that the approach of most accountants to tax policy is shaped by, and closely aligned with, their clients’ immediate interests. Especially in recent years, the writings of accountants have appeared to be more preoccupied with parsing language and the literal meaning of words than with purposive or broad policy considerations.

The legal profession is trained to respect language and to use it with precision. Its expertise leads it to shun ambiguity, and to be comfortable with the creation and elaboration of rules. Moreover, lawyers—at least, some lawyers—have been trained to connect language to objective, both to convert the latter into the former and to interpret the former with a view to ascertaining the latter. Not all lawyers meet this
description, perhaps, but the essence of the educational process at leading law schools points in these directions. Since the end product of tax policy decision making is a set of rules or laws, expressed in words that can be understood and applied and that reflect an underlying policy choice or choices, legal training is suited to many of the core requirements of the process.

A principal task of the economics profession is to predict the future, generally on the basis of models developed from the past. Economists tend to formulate issues in broad strokes, and are sensitive to the tendencies of policies to produce broad outcomes. Their views tend to assume or hypothesize rational and predictable decision making by persons subject to policy choices, and they are alert to incentive and disincentive effects. They identify transmissions of value not easily noticed, and put estimated values on those that have been noticed. These characteristics yield predictions regarding the likelihood of particular policies to produce definable outcomes. Such information is highly useful in weighing alternative policy choices.

Economists tend to lose interest, however, when the task at hand turns to writing rules, and it is a mystery why their views should play any role in such efforts. They generally appear to be more comfortable with broad tendencies and trends than with specific prescriptions that will work in practice for taxpayers and tax administrators. The concepts of “on the one hand” and “on the other hand” must be discarded at that stage. A law must be firm and clear, and economic training does not appear to be geared to such a product.

It falls to the policy maker to make the best and most efficient use of each of the disciplines. This is as true for the international area as for any other area of tax policy, and perhaps even more true in light of the complexities inherent in dealing with other countries. A policy choice must be expressed in unambiguous language, with precise consequences that the tax administration can apply. In the weighing of policy alternatives, each of the professional competencies has something to contribute. But it is not clear that they all have equal value to contribute at each stage of policy making, or that the translation of policy into law should be a shared task.

THE NATURE OF THE BEAST

A lion is not a lamb and tax administration is not a “service” provided to “customers.” Taxpayers in many countries are compliant, and will do their duty; but, as noted previously, taxation entails an involuntary exaction. Taxpayers are compelled by binding rules to surrender money, regardless of whether they understand the rationale for the demand or have serious objections to it. And taxpayers in all countries come in many stripes; inevitably there will be “customers” who refuse to pay for the “service” they receive.

A country is of course well advised to remove needless obstacles from the path of taxpayers wishing to fulfill their obligations. The country will wish to provide information and interpretations that assist taxpayers in their task. Viewing the tax function as a service is, however, complete nonsense. Such language detracts, and detracts substantially, from enforcement of the law. If tax laws are not enforced, there will
inevitably be dramatic differences among similarly situated persons, with resentments festering among taxpayers who do, in fact, make payments as required.

There is no need for policy makers to adopt draconian rules, or to assume the attitude of a tax police. In fact, countries that adopt coercive tactics on a broad scale may find that they do harm to compliance results. In a democracy, however, the majority speaks, and policies adopted by constituted policy makers have the force of law. There is every reason to expect that persons falling within the scope of the rules will comply with them, and just as good reason to take reasonable steps to ensure that those who do not comply willingly are made to do so regardless of whether it is to their liking.

**CONCLUSION**

As with so many subjects, when all is said and done about the process of making international tax policy, there is a lot more said than done. The crucial elements in the process, in any country, are *judgment* and *purpose*. Neither can be learned or taught, at least not in conventional ways.

There are, however, some useful guideposts. Some are positive: keep it simple! Some are negative: use others’ policy choices with caution. I have attempted to describe those that I believe most important.

The policy maker can expect to grow with experience and, yes, experimentation. Some countries will choose outlier policies in response to perceived national needs. Some of those policies will work well; others will be failures. All countries can benefit from devoting more attention to the process whereby they go about the task.