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Perspective Matters: One Country's "Offshore" is Other Countries' "Onshore"

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The inspiration for this post is "The Made In America Tax Plan" (https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf) recently released by the U.S. Department of the Treasury to outline President Biden's Administration's outlook on taxation, notably in so far as the "internationalization" of taxpayers' undertakings is concerned. This is a much shorter version of and directly excerpted from comments I make at tax.osgoode.yorku.ca (which can be read at https://tax.osgoode.yorku.ca/2021/04/perspective-matters-one-countrys-offshore-is-other-countries-onshore/).

What is the Place of Fiscal Policy in the Current International Tax Conversation?

Always, we need to be concerned with *why* countries engage their tax systems, what the purposes served are – fiscal purposes – that are enabled by tax policy, tax legislation and for that matter inter-nation contracts, i.e., tax treaties, that parse and allocation taxing rights. The U.S. plan is purposeful, quite clearly in the U.S.'s interest despite the veneer of normalizing international taxation via a minimum tax. It presents a kind of fiscal laboratory for detecting and illustrating possibly key tension and friction embedded in "multilateralism" initiatives in tax associated with the fiscal differences among countries. We could just as easily substitute the interests and conditions of any country, including countries with robust tax systems and typical fiscal needs, for the U.S. in this discussion and wonder about many of the same things. The issues targeted in the U.S. plan are outgrowths of the Organisation for Economic Co-operation and Development's ("OECD") "Base Erosion and Profit Shifting" ("BEPS") project begun in 2012 and carried forward in its ongoing Pillar One and in particular Pillar Two work, all now a focal point of the OECD-led "Inclusive Framework" of countries co-operating and collaborating in various ways to reconcile the application of their tax systems to stem unwarranted tax base leakage.

"Multilateralism" and Tax: Global Minimum Tax and Tax Base "Sharing"

"Multilateralism" and "globalisation" are not mere platitudes. They implicate the independence of countries in devising and carrying out various kinds of regulation including taxation and its undercarriage fiscal policy – both exponents of a particular country's self-awareness socially, culturally, and economically. Harvard political economist Professor Dani Rodrik explores the cross currents of "democracy, national sovereignty, and global economic integration" which he considers to be "mutually incompatible: we can combine any two of the three, but never have all three simultaneously and in full" in his book *The Globalization Paradox* (2011), which and as the distinguished tax thinker Professor Wolfgang Shön quotes in his recent paper *Taxation and Democracy (*New York University Tax Law Review (2019)) from which the quoted remarks are taken. Broadly, Rodrik observes that a consequence of ultimate multilateralism is the erosion of important manifestations of sovereignty and democracy necessarily in favour of global institutions that displace national institutions and independence they afford and create – an outcome that can be as much by circumstance as will. In the current and seemingly urgent attention being paid to possibly salutary effects arising from a more consistent international tax outlook by countries, Rodrik's observations may be apocryphal. Even the fact that these and other distinguished and thoughtful commentors are engaged by foundational governance subjects is important for how we critically understand, evaluate, and respond to international tax developments – a "wake-up call" or "sanity check" on herd multilateralism literally, whether absolutely or effectively, at all costs.

Whose Perspective?

Perspective matters. It will be said more than once in these comments. All countries are not created equal; they do not have the same outlook on cultural, social, and economic badges of citizenship including, for example, kinds and degrees of mutual responsibility among and accountability to fellow citizens manifest in whether and how public goods like healthcare, education, and economic development are promoted and funded. Nor do they have the same economic and fiscal tools at their disposal, based on their unique resources, to spend as they must or would like (see, for example, Edward Kleinbard, *We Are Better Than This, How Government Should Spend Our Money*, Oxford University Press (2015)) to fund collective consumption and provide assurance among their citizens that somehow they will be sustained even when exigent circumstances of the sort in our present consciousness because of the COVID-19 pandemic become real and pervasive and threaten their material existence and emotional well-being.

Countries are "Countries" – The World May Be Small, But Maybe Not That Small

Despite the allure of multilateralism and its possible benefits, countries do not cease to be self-interested, as for example the United States tax commentator Charles Kingson analyzed in his seminal 1981 paper, *The Coherence of International Taxation* (Columbia Law Journal (1981)). There is no getting away from this. In fact, there is a curiously understated awareness of this inconvenient truth in the BEPS project reports themselves, notably the report for Action 11. In commenting on how to identify BEPS, there is an irresistible implication that there is and can be no universal perception of "bad" tax policy and practices, because what is "bad" or "base eroding" from one country's perspective is from the perspective of another fiscal and tax policy in the service of worthy economic and social objectives, within its economic capacity and according to its social and cultural self-awareness. In other words, the fiscal perspective and fiscal policy matter as the inspiration for the ensuing tax policy and legislation that enable fiscal policy, and they are not homogeneous among countries in the sense of ultimate multilateralism.

So, is what we call BEPS in the tax context, with more critical insight we might ascribe to countries' pursuit of fiscal policy in their own interests while to that end accommodating each other in targeted ways, missing the point of "perception" in tax matters? Also, is it missing the point that there are non-tax ways that may or may not be impugnable under trade or competition law that would have similar effects beyond the pale of tax?

Back to Perspective – The U.S. "Laboratory"

This has been a long pathway back to the theme of this post. Perspective does matter. Fiscal policy and its enablers tax policy and tax law are statements of perspective. Even as ultimately formulated in tax law, they embed moral judgments (Lon Fuller, *The Morality of Law* (Yale University Press, 1964)) notwithstanding as a Canadian court has said "the morality of the taxpayer's conduct" does not have a place in the application of tax law (*The Queen v. Canadian Imperial Bank of Commerce*, 2013 FCA 122). Certainly, *exogenous*, and *episodic* moral judgments about taxpayer conduct may not displace the law as enacted. But the law as enacted is replete with moral judgments about how taxpayers ought to act and how the society whose tax system it is ought to treat them and be treated by them. They reflect a country's perception of itself and the responsibility of its citizens to each other collectively. Possibly the hardest aspect of statutory interpretation is detecting and giving voice to these moral undercurrents *in the law* in the language and according to the institutions of the law without dissolving into a self-possessed philosophical inquiry. One country's tax avoidance may well be another's fiscal policy. Even the OECD's BEPS initiative recognizes this, though in a subtle even understated way in the Action 11 Report.

What makes this realization so immediately relevant?

Well, possibly the United States' present embrace of the global minimum tax, a possibly worthy idea in some respects, in The Made in America Tax Plan. Before we simply assume that the U.S. has decided to follow the OECD along the pathway of global tax reform, maybe we should ask why, and why now, and to what end?

First, we might focus on "Made in America", rich with possible multiple meanings. What is made in America? The Plan? Yes, but that is not the point. What is made in America is what America could make in America but is not at the moment. At the moment that industrial enterprise is carried on elsewhere. That is the problem the U.S. is tackling, in its own fiscal interest. There is no doubt about it. What is billed as a tax plan starts out this way:

"This report describes President Biden's Made in America tax plan, the goal of which is to make American companies and workers more competitive by eliminating incentives to offshore investment, substantially reducing profit shifting, countering tax competition on corporate rates, and providing tax preferences for clean energy production. Importantly, this tax plan would generate new funding for investments in infrastructure research, and support for manufacturing, fully paying for the investments in the American Jog Plan over a 15-year period and continuing to generate revenue on a permanent basis."

The objective of the tax plan is to make "offshoring" income and the enterprise that generates it comparatively unattractive to U.S. domestic enterprise, and assuming that what is "offshore" – not just "intangibles" but ordinary "tangible" business too – becomes "onshore" to rely on enhanced tax revenue to fund various U.S.- centric fiscal objectives. That is not a fault, but it is a reality of fiscal policy. As earlier noted, what is "offshore" of the U.S. is "onshore" elsewhere else. Its reclamation by the U.S. is conceivably a material shift away from enterprise carried on in countries that for their own purpose depend on it.

A question comes to mind about why the U.S. would be so ready to embrace equivalent minimum taxation elsewhere. In the pursuit of good global fiscal conduct? Is it fine if "U.S. enterprises" are carrying on their businesses "offshore" the U.S. as long as they are taxed to the same degree as they would be in the U.S.? Ask this provocative question: Is it just as good, given the plan's objectives, for tax that could be paid in the U.S. to be paid to another country as long as there is no tax rate arbitrage? Are taxes, from one country to another, fungible in fiscal terms? And, in this vein substitute any country for the U.S.; the point is not different. The question answers itself, doesn't it? What prevents the dispersion of economic activity encourages its concentration somewhere, does it not?

What would happen to the benefit from restored, i.e., "onshored" U.S. enterprise in the U.S. national interest and the tax revenue that would go with it if it were equally fine that that tax would be collected to an equivalent degree elsewhere? Is it fine, for this plan, that that tax revenue is elsewhere as long as tax systems do not abet a rate race to the bottom? Customarily, countries accommodate each other's income taxes, particularly generously for business income, by reducing tax to the extent of foreign tax levied directly or indirectly on their citizens and residents via some form of foreign tax recognition, i.e., a foreign tax credit. In light of the opening words of the tax plan, is it likely that the U.S. will be satisfied with the equilibrium of global tax affairs as long as tax that would have been levied and collected in the U.S. is paid elsewhere, at the same rates, recognized by foreign tax credit? Does that make financial sense as part of the plan?

Well, some indication of the answer to that question, possibly, is reflected in later comments in the plan that foreshadow levers to make earning income outside the U.S. unattractive including by limiting recognition of foreign tax claims even preemptively. The Plan says, in the spirit of "the devil is in the detail":

"The plan takes aim at offshoring through a series of reforms that reverse tax-based incentives for moving production overseas. Perhaps the most consequential of these are fundamental changes to the GILTI regime introduced by the TCJA. The Made in America tax plan would eliminate the incentive to offshore tangible assets by ending the tax exemption for the first 10 percent return on foreign assets. It would also calculate the GILTI minimum tax on a per-country basis, ending the ability of multinationals to shield income in tax havens from U.S. taxes with taxes paid to higher tax countries. The plan would also increase the GILTI minimum tax to 21 percent (up to three-quarters of the proposed new 28 percent corporate tax rate, as opposed to the current one-half ratio). In addition to these reforms to GILTI, the plan would disallow deductions for the offshoring of production and put in place strong guardrails against corporate inversions. Overall, the stronger minimum tax regime would substantially reduce the current tax law's preferences for foreign relative to domestic profits, creating a more level playing field between domestic and foreign activity.

The President's plan would dramatically reduce the significant tax preferences for foreign investment relative to domestic investment that are embedded in both the current GILTI and FDII regimes, including a near-elimination of profit shifting. Past scholarship suggests that profit shifting costs the United States $100 billion annually (estimated in 2017, prior to the TCJA), or $60 billion at current rates, two-thirds of which is from the profit shifting of U.S. multinational companies. Transitioning to a per country GILTI minimum tax is estimated by scorekeepers at both the Treasury Department and the Joint Committee on Taxation to raise more than $500 billion in revenue over a decade—beyond the current estimated corporate tax revenues generated from the poorly designed GILTI regime.

In parallel to these efforts to eliminate profit shifting by U.S. multinational companies, proposals *to repeal and replace the Base Erosion and Anti-Abuse Tax (BEAT) would counter the profit shifting of foreign-headquartered multinational companies. All told, these proposals would bring well over $2 trillion in profits over the next decade back into the U.S. corporate tax base."*

The "fairness" that this tax plan seeks is not fairness for the world, though it may piggy-back on the OECD's aspirations in this regard which may lack fiscal perspective or alternatively seek to impose an alternate global fiscal perspective with limiting effects on countries' fiscal autonomy. This is very much the U.S. asserting its fiscal interest through its fiscal policy according to its perspective of its interests and consequently of those of other countries in relation to it and its interests. Too cynical? I do not think so; responsible government are meant to act in their enlightened self-interest, which in a multilateral context means making self-interested trade-offs in favor of and in relation to the interests of other countries, where, using a financial mathematics metaphor, the rate and internal rate of return from investing foregone tax (tax conceded by foreign tax credit, for example) is higher in the national interest that alternative investments made by actually colleting the tax and deploying it domestically.

Is a possible conclusion about the U.S.'s apparent change of pace to embrace initiatives in the spirit, at least, of those advocated by the OECD and the Inclusive Framework, a kind of "Trojan Horse" in the more general spirit of the Made in America Tax Plan to shift what is now "onshore" elsewhere to be "onshore" the U.S.'s shores? And if so, is there really an impending convergence of countries' interests in a global tax society which would be enabled by a global minimum tax championed by the U.S. in the spirit of the OECD's aspirations? Or, in other words, would we do well to think first about countries' relative fiscal interests and ensuing industrial policy before we start measuring global tax co-operation and income source by "rates"?

Perspective Really Does Matter

In other words, as the title to this post reflects, perspective matters, notably fiscal perspective. Put differently and in a way that many with global tax aspirations might find unpalatable, countries do in fact use their tax systems to enable their fiscal policy – and they will continue to do that. It is a way for each of its citizens to pay part of their share of collective consumption or to invest in a pool to generate higher economic returns than they could achieve on their own with their material financial hopes and goals in mind. To be sure, this is not an endorsement of the "race to the bottom" thought to typify "tax competition". But these epithets are not self-defining; nor are they meaningful without due attention to fiscal considerations including the resources at hand for accomplishing what any responsible country envisages for the social and economic well-being of its citizens. The U.S.'s aspirations are clear in the very much "made in" America tax plan. But understated or not, other countries have their own "made in" plans and in that regard have equivalent interests to pursue. How likely are those interests served by tax policy politesse that allows production income to gravitate elsewhere as long as the destination rate is high enough? That is a question worth asking.

A Sublime Metaphor – Different is not the Same

Back again to perspective. One of Canada's most justifiably celebrated tax thinkers is Robert Couzin. Retired from tax practice, Dr. Couzin is now an independent art history scholar. He recently published an insightful book on what seems to be the neglected subject of "handedness" and "position" in early Christian and Medieval Art (Robert Couzin, *Right and Left in Early Christian and Medieval Art*, Brill (2021)). Couzin's artistic awareness of perspective offers a metaphor for images, indeed self-images, in fiscal and tax "life".

Couzin has noticed the symbolism of right and left handedness in images and more generally of right and left positioning of figures in images. A singularly important part of Dr. Couzin's analysis is that perspective matters. It matters so to be able to appreciate what one is "seeing" and to interpret its meaning – including because though occasionally by some misadventure or for other various reasons perspective may be inverted, usually its manifestation is deliberate and purposeful.

It seems fitting to notice this metaphor and to adopt Dr. Couzin's more sublime but in an odd way presently apposite comments on "position", thinking in the present of countries' relative fiscal and tax positions in the community of nations. Couzin writes:

"*A third aspect of position, critically important in the analysis of medieval imagery, is that it requires from of reference. Right and left are not the same for differently situated observers. Only if two individuals are facing in the same direction will their perspectives coincide. The relevance to visual representation is obvious. "To the right" will have the same meaning for the viewer and a pictured protagonist if this figure is depicted from behind, but not otherwise. When seen in full profile, its right and left point towards or away from the viewer. The most significant case is the common circumstance where figures are fontal, or nearly so. Here the perspectives of the observer and the observed are diametrically opposite. What is to the right for the one is to the left for the other.*"

"Right and left are not the same for differently situated observers. … What is to the right for the one is to the left for the other." Fiscal and tax policy, and tax avoidance are not the same for differently situated country observers either. What is fiscal and tax policy to the one is tax avoidance to the other. Possibly not sublime, but not ridiculous, as earlier tax references reflect.

Might some perspective on perspective be grounding, illuminating, instructive?

As in art so in life?

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