Ten Observations Concerning International Tax Policy

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1. International tax policy is an ongoing N-person game in which there is no consensus about the payoff structure.

--Carbon tax: prisoner's dilemma with clear structure.

--What about CFC rules??

2. For residence countries, allowing foreign-to foreign profit-shifting is normatively ambiguous.

--Foreign (unlike domestic) taxes are just a cost.

--Suppose “tagging” arguments apply to tax haven income or highly mobile items.

3. For source countries, allowing profit-shifting for inbound investment is normatively ambiguous.

--May like informally lowering the effective tax rate for TPs that are highly mobile.

--But how much tax reduction is “too much”?

4. “Worldwide vs. territorial” is a poorly framed choice that conflates two margins.

--What MTR (& effective tax rate) for residents’ foreign source income (FSI)?

--What marginal reimbursement rate (MRR) for foreign taxes paid?

--No intermediate values allowed (other than via the effects of deferral)??

5. Treaties barring “double taxation” don’t require that one either set the tax rate for FSI at zero or else provide a 100% MRR.

--Bifurcation complies formally & is not unreasonable substantively.

--If not, then the 2004 dividend holiday violated tax treaties(!).

6. While both residence & source are highly flawed concepts, we don't face a "horse race" between them.

--Better 2 dull tools than just 1.

--The single-bullet global welfare norms (CEN, CIN, CON) are long past their sell-by dates.

7. Lessons of inversion, part 1: U.S. companies' "loan carry" from deferral has gotten too big.

--Wipe the slate clean even if we can't agree re. how best to replace deferral.

--Deemed repatriation tax rate TBD – but don't replicate the 2004 "holiday" fiasco; don't confine attention to the budget window.

8. Lessons of inversion, part 2: change the balance (whether or not the level) in the U.S. anti-profit-shifting regime.

--Residence-based (CFC) and non-residence based approaches have distinct pluses and minuses.

--The U.S. currently over-uses residence-based, relative to non-residence-based, anti-profit shifting approaches.

9. Lessons of inversion, part 3: Learn to expect more regulatory "tailoring" to new developments.

--The anti-inversion regulations depart from 1980s-style comity – but guess what, it isn't the 1980s anymore!

--For better or worse, changes in tax legislative politics should be expected to change informal regulatory norms.

10. There is reason to expect (& I believe, to regret) declining judicial deference to Treasury regulations.

--Doctrinal changes may matter less here than structural factors.

--A ludicrous illustration: the *Altera* case.