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Taxation of the digital economy and forum shopping

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Taxation of the Digital Economy: Discussion of Assignments

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Navigating Global Tax Governance

Session 3



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A NEW MODEL OF GLOBAL GOVERNANCE IN INTERNATIONAL TAX LAW MAKING



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Questions

- Are unilaterally adopted digital services taxes at odds with the idea of multilateral cooperation? Why (not)?
- Can the proposition of an article 12B by the UN Tax Committee be interpreted as attempt to engage in “forum shopping” by countries? Was it successful?

Unilaterally adopted DSTs and multilateralism

At odds, because:

- Not covered by tax treaties in place
- Potentially not compatible with international trade law (Threat of tariffs by US)
- Multilateral negotiations already under way
- Potentially lead to double taxation of income

But:

- Unilateral moves can hinder or *advance* negotiations
- No formal WTO case was launched, only unilateral trade sanctions (US)
- But can be imposed as levy not having character of an income tax, e.g. India; no problem if no tax treaty in place
- Beyond treaties, no “customary” obligation to relieve double taxation

Unilaterally adopted DSTs and multilateralism

- Common approaches have been negotiated and inspired unilaterally imposed taxes
 - ATAF Suggested Approach to Drafting Digital Services Tax Legislation
 - UN Model Convention, Article 12B
 - OECD Action 1 report (although less concrete)
- “Multilateralism is not absolute”

Questions

- Are unilaterally adopted digital services taxes at odds with the idea of multilateral cooperation? Why (not)?
- Can the proposition of an article 12B by the UN Tax Committee be interpreted as attempt to engage in “forum shopping” by countries? Was it successful?

What is forum shopping?

- “strategic selection and use of policy venues by any political actor—a nation-state or non-state actor—in order to advance an agenda” (Murphy-Gregory and Kellow)
- Term originated from practice in US to choose favorable courts for being tried
- Reasons for choosing alternative venues in global governance
 - Membership
 - Decision-making rules
 - Legitimacy in the eyes of relevant actors
- There can be trade-offs!
- In the history of global tax governance:
 - Period after second world war, stalemate in UN, OECD takes over

Forum shopping for a solution to tax the digital economy

- More countries adopting DSTs, US Trade investigations, long negotiations at OECD
- UN Tax Committee: 25 members,
- OECD Inclusive Framework: 141 members, consensus, OECD country leadership
- → attempt to gain greater legitimacy to withholding taxes for digital services

Limits of forum shopping

- Path dependency: partner countries need to agree to change in bilateral tax treaty
- Economic power: Targeted enterprises resident in few jurisdictions (mainly US, China, EU)
- Legitimacy: UN Tax Committee still lacking status of inter-governmental body

Thank you!

Questions? Comments?

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