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SYMPOSIUM ARTICLES

TAXING THE INTERNATIONAL TRANSFER OF INFORMATION

*David Williams**

I. INTRODUCTION

Thirty-seven years ago, when my father-in-law came to New York to lecture, it took him five days to travel each way. Sending documents took even longer. It is now commonplace not only that we can quickly cross the Atlantic for brief trips but that we send texts instantly by bouncing them electronically down a telephone line. Others, indeed, do not now bother to come at all but rely on a live interactive satellite link to communicate their message. Such is technology. I have much sympathy with Max Frisch, when he defined technology as "the knack of so arranging the world that we don't have to experience it."¹

One result of rapid transit, and even more of international transfers of information, IT, as we now ominously term it, is that flows of information between countries have developed much faster than the political and legal frameworks within which we handle the results of such flows. This difference in development is apparent in the taxation of international flows of information or in the results of those flows.

Ironically, there seems to have been something of an information gap here for those handling flows of information. They seem significantly unaware of the ways in which tax systems interact with information flows.² That of itself is reason enough for

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1. PENGUIN DICTIONARY OF MODERN QUOTATIONS 123 (2d ed. 1980). Frisch is also quoted by the Penguin Dictionary of Modern Quotations as prophesying that "the day will come when there will be no more traffic at all and only newlyweds will travel." *Id.*

2. The main United Kingdom works dealing specifically with taxation of intellectual

these proceedings.

II. A CLASH OF TWO SYSTEMS

It may be that this information gap is a result in part of a mismatch between the two kinds of systems. Although our systems for transferring information, both directly and indirectly, have advanced in an exponential manner in recent decades, our tax systems have not. We are repeatedly told that an old tax is a good tax. There is much wisdom in that from a political standpoint. The result is that tax systems have a major handicap in confronting modern technological developments. They are acting with old — in some cases ancient — techniques to identify what is taxable in things much newer.

Those running tax systems also have another problem, though they themselves rarely categorize it as a problem. Tax systems are based on territorially defined units of government with mutually exclusive law systems, in other words, states. Both the concept of a state and the methods most often used to raise taxes for states were created before the flows which we are now considering were within human comprehension.

As we know, tax systems analysts have long learned to handle jurisdictional problems. When dealing with direct taxes, we have rules to locate the taxpayer. Most hold that the general rules of international public law require some effective connection between a state and a person it seeks to tax.³ That link can be found through nationality, or through some other material connection between the individual or legal person and the state. We generally label this connection as residence.

Alternatively or additionally, we can concentrate on the location of the tax base which we seek to tax. This approach, which we label the source approach, allows us to tax when we can identify the things, or the profits, that we seek to tax as being within the boundaries of the state. All we need is a set of rules that tell us how to locate taxable items or flows. Of course,

property, and information generally, are: A. SHIPWRIGHT & J. PRICE, *U.K. TAXATION AND INTELLECTUAL PROPERTY* (1989) and R. GALLAFENT & N. EASTAWAY, *TAXATION OF INTELLECTUAL PROPERTY LAW AND TAXATION* (1989).

3. For discussion on this point, see F. MANN, *THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW*, 1 *RECUEIL DES COURS*, 9, 109-19 (1964). For a discussion of the opposite view that there are no limits, see Qureshi, *The Freedom of a State to Legislate in Fiscal Matters under General International Law*, 41 *BULL. FOR INT'L FISCAL DOCUMENTATION* 14 (1987). R. MARTHA, *THE JURISDICTION TO TAX IN INTERNATIONAL LAW* (1989).

the choices of linking mechanisms available to a state often result in two or more states maintaining claims to tax the same source of revenue or the same taxpayer, and we have also started to learn how to handle that.⁴ This approach serves for both direct and indirect taxes.

Historically, states developed their own individual or regional answers to the problem of defining the jurisdictional extent of their tax laws just as they evolved their own patterns of taxation, direct and indirect. States had what we might term their own tax "footprints" just as individuals have their own genetic "footprints," the explanation in both cases being embedded in individual ancestry. They could evolve their systems in isolation from other states — isolated not just geographically and legally, but economically as well. Often that isolation was reinforced by a lack of information. Not so now. IT has had a direct effect on tax systems as on all else.⁵

That insular approach to taxation worked well when real wealth lay in land and profits in basic merchandises. That was, of course, the way it was when customs duties were invented. The old tax structures of countries like England (only later was it to become a customs union called the United Kingdom) relied heavily on customs duties because they were easy to administer.⁶

4. I say "started to learn" because much double taxation still exists, despite the efforts of, for example, the Organization for Economic Co-operation and Development (OECD) with its Model Double Taxation Convention, widely adopted by member states, including the United States. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT MODEL CONVENTION FOR THE AVOIDANCE OF DOUBLE TAXATION (1977) [hereinafter OECD MODEL TREATY].

For a brief summary of the United States rules, see R. DOERNBERG, *INTERNATIONAL TAXATION* (1989). For a summary of the United Kingdom rules, see D. DAVIES, *PRINCIPLES OF INTERNATIONAL DOUBLE TAXATION RELIEF* (1985).

5. One of the fascinating developments in this area in recent years is the breadth of available comparative studies of national tax systems, both officially (through bodies such as the International Monetary Fund, the World Bank, and the OECD) and privately. Perhaps the best of the private comparisons is that published by Price Waterhouse in two annual volumes: *CORPORATE TAXES — A WORLDWIDE SUMMARY* and *INDIVIDUAL TAXES — A WORLDWIDE SUMMARY*. Coopers and Lybrand also publishes an annual volume of *INTERNATIONAL TAX SUMMARIES*. They ensure that a taxpayer is well able to take any decision aware of its consequences in any major legal system. This itself leads to the competition between tax systems that has been a growing feature of recent years, with a noticeable effect on the shape of individual tax systems (for example, the growth of tax havens and of "low tax" regimes in higher tax states).

6. It is easy to forget just how significant a share of national revenue used to be earned for many centuries in many states through import and export taxes, including internal import and export taxes between different parts of a state. For a fascinating brief history, see C. WEBBER & A. WILDAVSKY, *A HISTORY OF TAXATION AND EXPENDITURE*

The Bible and even older sources show us our forefathers have done this since commerce began. When goods were taken through the frontier, they were easy to identify, classify, and value. The debt could be quantified immediately and indemnified effectively.

III. PUTTING NEW WINE IN OLD BOTTLES

The idea that one day we could tax intangibles as they entered or left a state might have occurred to the churches, but not to practical men sitting at the receipt of customs.⁷ Even when Oscar Wilde claimed at the New York Custom House, as he did not so many years ago, that "I have nothing to declare but my genius"⁸ he would, I am sure, have been taken aback if he had been told that "genius" was taxable under some four figure number of the common customs nomenclature on a royalty basis. But why not if, as Edison told us, genius is one percent inspiration and ninety-nine percent perspiration?⁹

It is not only customs duties that present us with problems. Do not forget that when another genius — this time himself a Scottish Customs officer¹⁰ — invented income tax a couple of centuries ago, not only had the electric telegraph and electric light not been invented, neither had the joint stock company. Our income tax law in the United Kingdom is, as a result, very untidy¹¹ when it comes to dealing with intangibles, seemingly having a different answer for each form in which intellectual property can be encapsulated, and only compromise answers for dealing with know-how.¹² Unsurprisingly, it is lacking any general overall policy.

We do have some new taxes, in particular the Value Added

IN THE WESTERN WORLD (1986).

7. Matthew 9:9.

8. F. HARRIS, OSCAR WILDE 44 (1959).

9. EDISON, LIFE, ch. 24.

10. Adam Smith (1723-1790), author of THE WEALTH OF NATIONS (1776).

11. It is very untidy — period. Do not be misled by the irregular attempts to consolidate it (the latest of which is the Income and Corporation Taxes Act, 1988 (1988 Act) [hereinafter 1988 Act]). These acts consolidate and ossify, not codify. They conceal the law that has come unchanged from the first of the "modern" income tax acts in the United Kingdom, the Act of 1803. But the essential shape, and many of the key phrases, of the current legislation is still that of 1803.

12. The current laws are found in the 1988 Act, *supra* note 11, at §§ 520-533 (patents and know-how), §§ 534-537 (copyright and public lending right), § 538 (relief for painters, sculptors and other artists).

Tax (VAT) or general Goods and Services Tax (GST). But, as we shall see, even these present problems in devising the appropriate way to tax international flows of information. VAT can operate internationally on one of two bases — the origin basis or the destination basis.¹³ The origin basis assumes that tax is levied in the state where the supply commences. Tax is levied on the goods when created, and the tax is therefore “exported” with the goods. By contrast, the destination basis assumes that the tax applies in the state where the supply is received. The supplies are exempt from tax in the state of creation, but are taxed in the state of consumption. For imports, this means that they are subjected to a tax charge or “border tax adjustment” at the time of import.

The current basis of VAT within the European Community (EC) is the destination basis,¹⁴ which is easy to apply to supplies of goods. How does it work for a cross-border supply of information services? The answer is that it cannot work in any readily enforceable manner because you cannot intercept information at the frontier and inflict a border tax adjustment on it. Furthermore, you cannot tax the supplier of information where it is received, because he is not there. Only if you have something tangible can this approach work. These might appear to be trite statements, but they go to the very heart of the conceptual basis of VAT and they show that even with a new tax the problems we review today have no easy answer.

It is this set of faulty instruments which provides states with their current techniques for the task of taxing information flows. It is therefore not surprising that difficulties occur. I would like to raise and explore further two points of difficulty which particularly concern me.

A. *The Problem of Excessive Taxation*

The first difficulty is the extent to which these imperfect approaches result in excessive taxation on transfers of information. I have a straightforward concern in addressing that issue. If

13. For an excellent review of these issues, see B. TERRA, *SALES TAXATION: THE CASE OF VALUE ADDED TAX IN THE EUROPEAN COMMUNITY* (1988).

14. This is laid down for all European Community (EC) member states by the Sixth Value Added Tax (VAT) Directive. *Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the member states relating to turnover taxes - Common system of value added tax: uniform basis of assessment*, 20 O.J. EUR. COMM. (No. L 145) 1 (1977) [hereinafter *Sixth VAT Directive*].

there is excessive taxation, that is, taxation greater than that which will be met if the information does not cross frontiers, legitimate cross-border information flows will be impeded. That is of itself a bad thing, both in the developed world and in the developing world.

B. The Problem of Sharing the Cake

My second concern is that within the agreed levies of taxation, states share on a fair basis the available revenues. But what is fair, and on what defensible rationale can one attribute the value of an information flow to one state rather than another? Does a rationale valid for one tax apply for the others, or do inconsistent criteria emerge because of the different taxes involved, with the answers depending on the relative weight of the different taxes used? To set the scene, let us examine in turn each of the main forms of tax, and where the contrasting claims to jurisdiction arise. It may be convenient to start with customs duties as they are the oldest taxes.

IV. CUSTOMS DUTIES

The moment we examine the application of customs duties, we have to accept that the transfer of information takes place in many ways. To levy a duty, there must of course be a "good." If any of those ways achieves a material form, then it can amount to a good on which a customs levy can be imposed.

How do you distinguish goods from information? There is one kind of boundary to the levy of duty on goods, although it is very hard to define — it is the difference between letting the information itself go, as against the products which exploit that information. Hence, the invention of such things as copyright and patents, and the rights to enforce forms of intellectual property beyond frontiers. These extraterritorial rights create one of the bigger headaches in customs valuation.

In 1984 the Committee on Customs Valuation recommended that one aspect of knowledge transfer need no longer form the basis for customs valuation — the software aspect of imported computer programs.¹⁵ Provided that the value of the software is encoded, for example, onto a diskette which is declared sepa-

15. *Decision of the Tenth Meeting of the Committee on Customs Valuation on 24 September 1984 on Valuation of Carrier Media Bearing Software for Data Processing Equipment*, COMMISSION OF THE EUROPEAN COMMUNITIES, CUSTOMS VALUATION (1988).

rately from the value of the diskette, the accompanying manual, and the packaging, it can be ignored.¹⁶

Another factor behind the problem of the value of information as it crosses frontiers is that it continues to have earning capacity of an uncertain amount beyond the price charged for the import, and that capacity can be exploited through any kind of enforceable royalty agreement. This has led to the common customs valuation rule that royalties and fees which form part of the price paid by the buyer have to be included in the customs valuation.¹⁷ This point has led to some practical difficulty, and therefore to elaboration by the customs codes, because of the need to recoup through what was designed as a one-off tax on unknown series of receipts.

Here we have our first tax charge, an inward barrier which can impose costs on the inward movement of information by reference to the customs value of any associated good, so that the taxable value can reflect not only the current price but the future earning potential of the item being imported. It can therefore be a continuing charge. In effect, our customs regime can become a value added tax regime levying internally generated revenues.

V. GENERAL TAXES ON SUPPLIES

Alongside the customs charge on the import of any good is a border tax adjustment for value added tax or goods and services tax, usually without any offset between the two taxes. In the case of the twelve member states of the EC, VAT is the only relevant internal tax.¹⁸ In some form, perhaps as a GST, it is

16. This rule is incorporated in the EC rules on Customs Valuation by article 8a of the *Council Regulation of 28 May 1980 on the valuation of goods for customs purposes*, 23 O.J. EUR. COMM. (No. L. 134) 1 (1980) [hereinafter *1980 Regulation on valuation for customs purposes*], as amended by *Council Regulation of 23 April 1985 amending Regulation No. 1224/80 on the valuation of goods for customs purposes*, 28 O.J. EUR. COMM. (No. L. 112) 50 (1985).

17. This rule is adopted by the EC in article 8 of the *1980 Regulation on valuation for customs purposes*. *1980 Regulation on valuation for customs purposes*, *supra* note 16, at art. 8. See also *Commission Regulation of 9 November 1983 on the incidence of royalties and licence fees in customs value*, 26 O.J. EUR. COMM. (No. L. 309) 19 (1983) which implements article 8.

18. This is provided by the Treaty Establishing the European Economic Community (Treaty of Rome), 298 U.N.T.S. 11, at art. 99, as implemented by the First VAT Directive, *Consultation publique no 559 de la République centrafricaine pour un programme financé partiellement par la Communauté économique européenne — Fonds européen de développement*, 10 J.O. COMM. EUR. 14 (1967).

now the prevalent approach of states.¹⁹ This tax allows us to impose an internal tax on both goods and services, and therefore allows the transfer for consideration of information to be taxed as such, rather than through its association with something tangible.

For those of you not familiar with VAT, it is designed so that it can tax the supply of any good or service in such a way as to tax the whole value of the supply to the ultimate consumer by reference to the amount of value added by each supplier. The value is measured, as one would expect, by reference to the consideration given for the supply, save where that cannot be measured or where the transaction is not at arms length.

VAT can deal with cross-frontier supplies in several ways, but broadly, as we have already noted, it operates either on an origin basis (relating to the supplier's state) or on a destination basis (relating to the state where the supply is consumed). At present the EC, and many other states, operate the tax on a destination basis. To achieve this, any export is exempted, with tax charged in the exporters state being rebated to the supplier. At the same time the destination state imposes a border tax adjustment on the item as it is imported at the rate of tax of the destination state and at the value on import. Earlier this year, however, the European Commission stated publicly that it would seek to have the basis of the VAT system changed in 1996 to an origin based tax. The first steps to that change were agreed by the Community Council of Finance Ministers at the end of November 1990.²⁰

The idea of "origin" and "destination" seems fine for goods, but, again, how does that apply to the supply of information? How, for example, do you charge a telephone call from Italy to Ireland during which an Irish lawyer is given advice about Italian law, which is then confirmed by a meeting between the two at Brussels airport? The EC's answer, because it cannot easily locate the supply, is to locate the tax charge on either the sup-

19. See A. TAIT, *VALUE-ADDED TAX: INTERNATIONAL PRACTICE AND PROBLEMS* (1988).

20. It should be stated that the European Commission's proposal does not have the full support of states, and may not occur fully. However, it is occurring in part as the Commission and states work out how to comply with the requirements of the Single European Act amendments to the Treaty of Rome. This requires, *inter alia*, that there be no internal fiscal frontiers within the EC by January 1, 1993. As part of the abolition of these frontiers, member states must desist from imposing border tax adjustments from that date, although they may, and will, impose internal adjustments to similar effect on at least some transactions.

plier or the person supplied, depending on the kind of service.²¹ In my example of legal services, the supply is regarded as occurring in the state where the person being supplied is based. In other words, the tax goes to the state benefitting from the information flow, not that providing it. This is also the case where the services include the transfer or assignments of intellectual property, but other kinds of know-how would be regarded as being supplied in the state where the person supplying the information belongs.

While those are the rules, one may query why they apply to IT. After all, the economy receiving the information stands to benefit as well as the economy providing the information. There is a qualitative difference on that point between goods and services — at least information services. If I sell you my goods then my economy benefits, whereas yours is left neutral. If I pass on information, the benefits do not so obviously lie only with my state's economy. Note also another point. In trying to adjust VAT to this kind of supply, we have shifted the focus from the location of the supply to the location of the taxpayer. We have slipped from an indirect tax approach to a direct tax approach.

At present such a supply would, if located in the United Kingdom, usually be an international supply of services treated as zero-rated.²² In EC law, this should be an exempt supply. On either basis, it follows that no tax applies to it within the EC. It is the stated intention of some EC tax reformers to secure the abolition of zero-rating and the restriction of exemptions, along with the change of the system to an origin system. Will this mean that such flows of information will start to be taxed? It will, and under such a system the tax will go to the economy responsible for creating the information flow.

A. *Income Taxes*

Location is also of the essence for the charge to tax of international transactions by the main direct income-based taxes.

21. *Sixth VAT Directive*, *supra* note 14, at art. 9.

22. See United Kingdom Value Added Tax Act, 1983, sched. 5, group 9 (international services), sched. 3 (services supplied where received). "Zero-rating" means that a tax rate of 0% is applied to the supply, the effect being that no new tax is collected, but a rebate is allowed of tax incurred by the supplier in making the supply. Supplies that are exempt do not normally give rise to a reclaim of tax incurred by the supplier, although this does happen with exports. The United Kingdom and EC rules, therefore, have the same effect.

Here, as we have noted, two chief kinds of jurisdictional basis are advanced. A state may tax anyone resident in that state, or the state may tax something sourced in the state.

Reading this alongside the basis of a charge to value added tax, there is room for some confusion. The state to which the information is sent will be the *destination* state for VAT purposes. It will also be the state seeking to levy any customs duty on the supply if it is a dutiable good. But it will at the same time be the *source* state of any payment for the information, for direct tax purposes. Conversely, the supplier's state will be where the direct tax is to be levied if this occurs on a *residence* basis, but for VAT purposes this will be the state of *origin*, where an export tax might be levied, but where value added tax would not be levied on goods and often not on services either.

Returning to the direct taxes, both the source state and residence state may maintain claims to tax. This leads to the classic double taxation problem, with the state to which the information is being transferred levying a withholding tax on the payment made for that information.²³

B. *An Example*

Let us review the field at that point, and take the example of a flow of some item of information with associated material forms from State A to State B. Both are states with aggressive approaches to taxation. State B has a weak economy and relies heavily on all forms of taxation. State A has a government which has made itself popular internally by playing up its national independence, and it has an assertive tax authority.

A company in State A transfers know-how with related texts and materials to a company in State B on a royalty basis so that the State A company will share in the profits (if any) made in State B utilizing that know-how. State B imposes a royalty-based customs duty on the importer (the State B company).

23. It may be noted that the OECD Model Double Taxation Convention proposes that amongst developed states there be no withholding tax on royalties, OECD MODEL TREATY, *supra* note 4, at art. 12, and this is echoed in the United States Treasury Draft Model of 1981. Treasury Department's Model Income Tax Treaty, art. 12, Tax Treaties (CCH) ¶ 211 (1981). This was not followed by the United Nations Model recommended by the United Nations Group of Experts to developing states in 1980. U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, art. 12, Tax Treaties (CCH) ¶ 206. It is also still common to find withholding taxes on royalties between developed states (for example, between Canada and the United States).

It also has a value added tax working on the destination basis, and defines this supply as occurring where the know-how is received. It therefore imposes a self-supply VAT charge on the recipient in State B. Turning to the direct taxes, a withholding tax is imposed on the royalty at the basic rate of corporate tax by the state from which the royalty is paid, State B.

By contrast, State A, which also has a VAT or a general goods and services tax, defines the tax on an origin basis, and regards the supply of know-how as occurring in State A. Mercifully, it does not compound this by inflicting an export tax — it believes, it says, in free trade. But it is keen to impose appropriate direct tax on the profits made by the company in State A. It regards the supply, for direct tax purposes, as occurring in State A, as it did for indirect tax purposes, and it therefore imposes a direct tax charge of its own.

There are no tax treaties between State A and State B.²⁴ Further, because State A regards itself as providing satisfactory direct tax relief by being an exemption country (that is, it only taxes revenues sourced in it, not sourced overseas), it provides no unilateral tax relief for the withholding tax applied by State B because, it argues, State B has no competence to impose that tax.

VI. THE SCOPE FOR OVERLAP

In summary, it is possible under legitimate present alternatives for State B (to which the information is supplied) to impose a royalty-based customs duty, plus a royalty-based value added tax, plus a royalty-based withholding tax, while State A (to which the consideration is paid) also imposes a royalty-based value added or general sales tax, and an income tax charge on the full profits from the transfer.

There is, of course, no offset between the direct and indirect taxes or between border tax charges under VAT and customs duties. The one forum which could meet this issue, the General Agreement on Tariffs and Trades, has yet to tackle this problem and at present has other, more important issues before it.²⁵

The result is that the direct information flow will not occur.

24. For one effect of such a treaty, see *supra* note 23.

25. This remark was written in early December 1990, just as the four year Uruguay round was reaching what seemed to be breakdown point on other issues, thus preventing progress on the proposals before it for a general agreement on trade in services.

You may object that my example is too extreme, believing that things do not happen that way. But I ask you to consider why not? Who should back down — State A or State B? Is it any more valid that the recipient state should impose tax than the sending state? We need to identify criteria which tell us who should have the right to levy these taxes, and which taxes should apply. That said, I accept that the example is extreme and in practice things are not quite as bad. Withholding taxes are often mitigated, with credit being allowed for that tax when profits are taxed in the other state. VAT is usually imposed at the destination only.

I have left out of this example another area of controversy, namely the right of national tax authorities to enter reservations to the values put by the supplier and the supplied on these transfers. We can easily add the little complication to our flow from State A to State B, that the two tax authorities dispute the true value of the information flow, with State B, to which the information flows, suggesting the royalty value is, or should be, higher than that accepted by State A. I have also left out — and perhaps I should not have done so — any issues of stamp duties and payments from monopoly licenses.²⁶

A. *Cutting the Cake*

In my example, if the VAT rates and direct tax rates are at roughly the same rate level in both countries, then the customs duty will tilt the balance of relative amounts of tax collected in favor of State B, that is, the state receiving the information. If VAT or a general sales tax were to be on a destination basis in both states (as is usually the case),²⁷ the tilt would be further in favor of State B. If State A and State B had a standard model double taxation agreement on Organization for Economic Co-operation and Development lines and State A granted credit to State B in respect of its withholding, as again is usually the case,²⁸ State B's share might be further confirmed, although probably limited to perhaps ten percent for that particular tax. Alternatively, there might be no withholding tax. The practice of this is not consistent.

26. These may become important in states where the direct taxes are less important — for example, Hong Kong.

27. See *supra* note 20 and accompanying text.

28. See *supra* note 4 and accompanying text.

This example shows that current forms of tax systems seem to skew the tax collection operation in favor of the country receiving the information, as between the two states. Is that justifiable? If the response of the exporting state, in observing this, is to endeavour to increase its share of the value exported by means of profit adjustments, is that justifiable?

B. Compliance Problems

So far we have looked at the problems of the states involved in any clashes. What of the individual taxpayer? The presence of several competing taxes, all relevant to the shareout of the continuing royalty, suggest that, viewed from the taxpayer's point of view, there are two problems. One is the potential weight of the taxes themselves. The other lies with compliance costs, the administrative procedures necessary on the part of those undertaking information flows. The latter, as well as the former, might be viewed as a barrier to information flow. If there is such a barrier, is it a necessary evil? Should we be seeking international agreements to curb the use of some of these taxes? If we do curb, should we favor the receiving state or the sending state in our choice of curbs?

In reviewing any answers we have to these quandaries, we might have to come up with two sets of answers, those for developed states and those for developing states. It does not follow that the balance as between two states, both of which are well developed as generators and as utilizers of information and knowledge worthy of being turned into intellectual property, should also apply as between one such state and another which has no such abilities or resources.

Perhaps we ought to look at it more positively from the point of view of the suppliers of information. Professor Catherine Brown of the University of Calgary does this in her recent volume on *Tax Aspects of the Transfer of Technology*.²⁹ Her viewpoint is that both the developing nations of the Asia-Pacific Rim (which are the main subjects of her detailed survey) and Canada "are in accord that technology transfers are imperative to the future well-being of their respective economies."³⁰ But,

29. C. BROWN, *TAX ASPECTS OF THE TRANSFER OF TECHNOLOGY: THE ASIA-PACIFIC RIM*, Canadian Tax Paper No. 87 (Canadian Tax Foundation, 1990) [hereinafter C. BROWN].

30. C. BROWN, *supra* note 29, at 442.

she notes in that same passage, in concluding her excellent survey: "Notwithstanding this, Canadian transferors are attempting to conclude international transfer agreements under Canadian taxing norms that are replete with uncertainties as well as impediments to technology transfers."³¹

VII. CONCLUSION

I have made no attempt in these remarks to address detailed problems. Others will, I am sure, indicate where some of them lie. My chief point is to emphasize that the very nature of the various incompatible forms of tax we use make it unlikely that there are no impediments, and make it likely that states are — wittingly or otherwise — asserting jurisdiction for some taxes in a way that will dampen information flows, and may produce unfair shares between states. In saying that, I have not attempted to define or limit in any way the many forms in which information flows can cross states, by any form of intellectual property or agreement relating to intangibles, or by redeploying employees, or just simply telephoning someone.

We are faced with three areas for development in our approaches if we wish fully to remove the tax problems I outlined in this paper. First, we have to identify, and apply, criteria of fairness and efficiency as between the taxers and the taxed to the multiple kinds of taxation which can apply to information flows across borders. Second, we have to decide between the states involved, which has a claim to tax under all these taxes or, preferably, just some of them. If we do not, we may fail to deal with the first problem. Third, once we have decided on the optimal approach, we have to remove as many as possible of the technical snags that abound, lest those technical snags themselves increase both the tax burden and the compliance costs.

31. C. BROWN, *supra* note 29, at 442.