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Carving a Path for Legal Scholarship during an Existential Crisis

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Carving a Path for Legal Scholarship During an Existential Crisis

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Wei Cui, *New Puzzles in International Tax Agreements*, **Tax L. Rev.** (forthcoming 2022), available on [SSRN](#).

The G-7 and G-20 recently announced a “breakthrough” agreement by over 130 countries to adopt and implement a “global minimum tax” proposal. The agreement [is reportedly expected](#) to raise over \$150 billion in new revenue by closing some of the most notorious tax loopholes in the world; ultimately the deal could reshape global commerce and shore-up beleaguered national finances following the global pandemic. Officials involved in the deal [have been quoted](#) as making sweeping statements that the deal was historic, and that it would reshape the global economy, make worldwide taxation fairer, eliminate incentives for corporations to avoid tax, and serve as a clear signal for global justice.

A consistent theme can be seen to emerge from this process – that the cause for most of the problems plaguing the international tax regime ultimately stem from a lack of political will, with global corporate interests exploiting the vacuum of an uncoordinated tax system. Regardless if it is true, such a theme carries with it two collateral implications: (1) there is no disagreement as to the substance of the deal from a legal or policy standpoint and (2) any questioning of (1) must be motivated by the same political forces preventing reform in the past. Wei Cui’s article [New Puzzles in International Tax Agreements](#) analyzes and criticizes this theme.

This theme creates a form of existential moment for international tax law scholars – precisely because a once-in-a-generation global overhaul of the regime appears within reach. Yet, as intellectual debates transition into real-world policy-making, even facially neutral contributions risk getting lost in the noise of the moment, or maybe even worse stuck in a form of intellectual purgatory.

This is where Cui’s article intervenes, and does so with refreshing clarity and candor. Cui brings academic rigor and precision to identify what he refers to as intellectual “puzzles” in the debate. His points could be thought of as a tax law form of observing that the emperor has no new clothes. To quote just a few representative examples:

- “[T]here is little evidence that, globally, the remote provision of services is increasing at the expense of trade through branches and foreign affiliates ... [t]his renders the OECD’s claim that any international reform must be based on global agreement ... puzzling.”
- There is “a glaring gap between what the G7 claims as already agreed-upon policies (a “global minimum tax”) and the actual policies under discussion nowhere in the OECD’s “Two Pillar” solution do countries actually commit to adopting a minimum corporate tax rate.”
- “Economic theory has in fact long struggled to explain basic features of the international tax system ... Even more importantly ... economists and other tax scholars have foregone a basic template for explaining actual and proposed cooperation.”
- “Tax specialists may be so far from coherent accounts of international cooperation that they hesitate to reject bad ones.”

Crucially, Cui’s article is not contrarian merely for contrarian’s sake. Rather, it appears to develop a set

of intellectual puzzles in the first part of the article as a way to open enough intellectual space to allow for consideration of a new and significant alternative theoretical model in the second part of the article. The success of the first part of the article, therefore, is not in its novelty but rather in the clarity of its precision; it manages to distill well-worn, even obvious, ideas into concise intellectual daggers that cut deep.

That said, the sharp tone of the puzzles section of the article stands in stark contrast to the tone in the proposal section. To some it could come across as more measured if not tentative, explaining for instance that “critiquing the design of the new international tax agreement proposed by the G7, G20, and the OECD is not my main purpose.” The result is a version of the “two papers” dilemma – a single article with two parts that analytically may form a coherent and thoroughly defended and supported article yet ultimately may be stronger as two separate pieces. While normally that critique might be fitting, in Cui’s article more appears to be going on. Upon closer inspection, the shift in tone seems to be doing work on its own. Rather than being better off as separate papers, in this case the severity of the “puzzles” section might well serve as the means to open enough space in the current climate to allow the Cui article to both contribute to and rise above the politics of the moment.

This is an important move, because the article’s proposed model is substantial and deserves attention. Cui proposes replacing the basic economic theory underlying international tax policy for generations – one based on maximizing efficiency of cross-border capital flows – with an existing but separate economic model focused on maximizing gains from trade (which Cui collectively refers to as “TTT”). At its core, TTT is a form of prisoners’ dilemma game-theory model where high capital-mobility paired with low labor-mobility creates opportunities for worldwide gains from trade under the theory of comparative advantage, but at the same time creates incentives for importing capital-rich countries to externalize costs onto labor-rich exporting countries in the form of import tariffs. TTT theory provides a rational incentive for countries to support free-trade and enter into free-trade agreements notwithstanding any individual country’s incentive to compete.

The article presents two separate but related reasons to consider TTT as applied to international tax, one backwards looking and one forwards looking. First, Cui proposes that descriptively TTT might better explain many of the currently unresolved puzzles identified earlier in the article than current models. Second, from a normative standpoint Cui proposes that TTT could help better design and structure a system that could actually achieve many of the purported policy goals of the BEPS project. Perhaps more importantly, however, the claim of the article is more fundamental: not that TTT is necessarily a better first-principles theory than current theories but that the current international tax system fundamentally lacks any underlying first-principles theory.

By systemically analyzing the existing international tax infrastructure within a competing economic model, the proposal combines some of the best parts of first-principles normative theories with those of the most useful inductive doctrinal proposals. Ultimately, however, there lies an internal tension throughout the article which both increases its ambition but also risks its potential effectiveness: does combining the descriptive enterprise of identifying puzzles with the normative proposal ultimately narrow the audience for either part to the sliver of audience that overlaps?

It would prove truly unfortunate if Cui’s article were in fact to find itself losing potential audience for this reason. In part, the descriptive section both serves as a lead-in to the proposal and also stands alone. But the deeper question is whether this would be more a failure of the field than of the article or the author. The ultimate lodestar of the scholarly enterprise is the collective development of knowledge generated over time and incorporating myriad perspectives into perhaps one day a coherent whole. Correspondingly, any pressure (implicit or otherwise) towards conformity, no matter how well intended, ultimately undermines that scholarly endeavor. As a result, at this moment in international tax law

perhaps Cui's article is precisely what the field needs more of. Even if Cui's article were to accomplish nothing else, challenging readers to confront many of the unspoken and uncomfortable tensions within the field may well serve the highest and best use for academic scholarship during an existential moment.

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