Transplants of some aspects of corporate income tax law
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PART IV

CHAPTER 10

SUMMARY AND CONCLUSIONS

1. Summary

This dissertation is a comparative study of the transplants of corporate income tax in Malaysia, the Philippines and Vietnam. It follows the path described by Thuronyi, as “the historical method that traces the development of law over time and across countries, and studies how particular systems have been influenced by others or by transnational legal culture” (Thuronyi 2003). The aims of this dissertation are:

1. To make a historical comparative study of some elements of the company tax system of Malaysia, the Philippines and Vietnam in relation to that of the original donors (the UK, US, advice from IMF and other organizations) and in relation to each other. Purpose of this comparison is to prove that due to negative harmonization and convergence, some tax rules in recipient countries that are in the same region after some decades more resemble each other than they resemble the rules of the original donor countries although they have transplanted rules from different donor countries.

2. To examine some aspects of the legal system and legal principles which may influence the effectiveness of the transplants of (corporate income tax) law.

Legal Transplants

The term “Legal Transplant” was used by Watson to describe “the moving of a rule or a system of law from one country to another, or from one people to another” (Watson 1974). However, many scholars were not keen on using this term to describe the moving of law from one place to another. Indeed, they openly criticized Watson for using the term “transplant” and his ideology of law and society. Nevertheless in the last decade, the term has gradually gained popularity among legal professionals. The term “transplants” is used to describe the process of exporting the law from the West to former socialist countries, or to the non-Western worlds. Besides the traditional studies on the terminology, there have been studies on the factors that might influence the transplantation process, the success and failure of legal transplants, etc.

Legal transplants have a long history and are among methods to develop a legal system. Unlike the transplants of organs, in which “voluntary” is essential, transplants of law can take place with or without the consent of the donees. In the field of tax law, many “involuntarily” transplants took place during the colonial period and by means of conquest. The “native” people might not like the “transplanted” rules imposed on them. They might not even acknowledge that they needed any transplant at all. Nevertheless, many of these involuntarily transplants contributed to shape the today legal systems of the former colonies. After colonial times, former colonies could decide themselves whether they wanted to transplant any law from other countries or would make use of rules suggested by organizations such as the IMF, World Bank, etc. However, that does not imply that these transplants are voluntary. Nonetheless, many transplants are voluntarily. When countries
face the same problems, it is logical that there is a tendency to adopt solutions that have been created somewhere else.

Scholars classified several typologies of legal transplants such as cost saving transplants, externally dictated transplants, entrepreneurial transplants, legitimacy generating transplants, "potted plant" transplants, and hybrid transplants, etc.

There are many factors that may influence the transplant process. Like in the case of transplants of organs, the donees’ mental and physical conditions, the selection of potential donors, quality of experts (doctors), etc. are also essential for legal transplants. In the case of legal transplants, the donees’ conditions include social, economic, legal, etc. conditions; the potential donors comprise of countries, organizations and people who can give (the most suitable) rules, notions, system, etc. to the donees; and the experts of legal transplants can be domestic experts and foreign experts. Those experts can be lawyers, professionals, scholars, government officials, etc.

Determining whether a transplant is a success or not is not an easy task, especially in the case of legal transplants. Watson stated that: "a successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection" (Watson 1974). Thus, a transplanted rule or system should become the "local" rule or system and will develop in the new body. Unlike the case of organ transplants where the rejections can happen immediately, it often needs a longer time to discover whether a transplant of rules or systems is suitable for a country’s development. Therefore, in order to grow in the new body, as described by Watson, the transplanted rules need time. Moreover, a country should be aware of the long term effects of legal transplants when it decides to transplant rules not only because the old rules are no longer suitable to the changes in local social and economic conditions, but also because it expects that such transplants will cause changes in the society.

Transplants of tax laws

Transplants of tax laws may take place involuntarily or voluntarily. Involuntary transplants often happened when the colonists brought with them their own systems and imposed these on the colonies. For instance, the UK brought with them their tax system when they went to North America and Malaysia. Voluntary transplants have normally taken place when countries adopted solutions from elsewhere for their own problems (such as budget needs, investment promotions, anti tax avoidance, evasion, prevent double taxation, etc.). It is logical that they do not need to re-invent the solutions that had been created in other countries. Moreover, in the global economy, where labor, capital, and goods are mobile (Haufler 2001), it is essential that some common rules should be created so the workers, investors and traders will feel "at home" wherever and whenever they are.

Many factors will influence the transplants of tax laws. Tax law is interdisciplinary by nature. Tax is bound up with politics, legal, economic, ethical, social, etc. factors. Thus, those factors should be given full attention during any tax transplantation process. There are studies on tax reforms which provide many details on the economic, administrative,
Adopt solutions that have cost saving transplants, legitimacy generating transplants. Like in the case of the selection of potential transplant candidates. In the case of political, legal, etc. conditions; people who can give (the experts of legal transplants e.g. lawyers, professionals, etc.) The task, especially in the transplant – like that of a transplant – is to transplant just as the rule or the system and will develop in the development. Rejections can happen in order to grow in the new environment. Moreover, a country which it decides to transplant laws can cause changes in local social and economic conditions. Involuntary transplants have been created in other countries when they went through reforms (such as budget needs, double taxation, etc.). It is important to understand that these transplants will cause changes in local social and economic conditions.

This study provides two sets of comparative studies:

1) A historical comparative study of the corporate income tax system of Malaysia, the Philippines and Vietnam in relation to that of the original donors (the UK, US, advice from IMF);

2) A comparative study of the current corporate income tax system of Malaysia, the Philippines and Vietnam.

In Malaysia, one can find the corporate income tax in the Income Tax Act, the Philippine corporate income tax is part of the National Internal Revenue Code and in Vietnam the corporate income tax is stipulated as separate law.
To keep the scope of the research reasonable, not all of the topics of the corporate income tax law have been analyzed. The topics that were selected include taxable subjects, tax bases, tax rates, tax incentives and shareholder/corporate taxation. These topics are essential in the three countries where the tax system is considerably less sophisticated than in the developed countries. Rules such as participation exemption, group relief, tax on financial instruments, thin capitalization, Controlled-Foreign-Company rules, etc. are important in developed countries but generally have not been developed in Malaysia, the Philippines and Vietnam. Thus, it is very difficult to make an adequate comparative study. Among the studied countries, at the time of writing, only Malaysia offers some relief to groups of companies engaged in food production projects approved by the Minister of Finance. And in September, 2005, the Prime Minister presented the Budget 2006 to the Parliament, in which group relief is suggested to any resident corporate group in Malaysia.

The studied rules can be divided in three sets:

- The first set of rules includes structure of corporate income tax and taxable subjects. These rules have not changed much in Malaysia and the Philippines since the transplantation of income tax rules in these countries although some reform has taken place. The focus of this reform has been more on improving the quality of specific tax rules, the tax administration and tax judicial than on changing the structure of the tax code or the organization of the tax institutions. However, rules related to the tax administration and to tax dispute solutions have not been changed. In the three countries, which “person” is subject to corporate income tax is broadly stipulated.

- The second set comprises rules that are similar to rules in the original donor countries at the time the transplantation took place but have moved away to some extent and did not follow new developments in the donor countries. This group includes rules regarding corporate/shareholder taxation and tax base. Malaysia chose to have an imputation system in 1947, and has always had a form of imputation system while the UK has switched its system from classical to imputation and vice versa. The Philippines followed the U.S in having a classical system. However, unlike the U.S, the Philippines is not concerned about the double tax consequences that the classical system may have. The effective tax rate in the Philippines is so low that the total tax burden on taxpayers is not high.

- The last set of rules includes rules that were formulated independently from the rules in the donor countries, such as tax rates and tax incentives. There are more similarities in those rules between Malaysia, the Philippines and Vietnam than between the recipient and the donor countries. As tax competition is the result of an attempt to encourage investment in the region, there is a trend of negative harmonization of corporate income tax. Moreover, if ASEAN, as is its aim, wants to “create a stable, prosperous and highly competitive ASEAN Economic Region, in which there is a free flow of goods, services, investments, capital, and equitable economic development and reduced poverty and socio-economic disparities” (ASEAN Vision 2020), after finishing their agenda of removing the custom barriers, ASEAN may have to think of the possibility of harmonizing other taxes (including corporate income tax) as experiences have shown in the EU. In order to create an internal market, the EU has harmonized their sales tax, abolished
of the corporate income tax include taxable subjects, tax rate, tax allowances, tax deduction, tax credits, tax deferrals, tax holidays, and tax incentives. These topics are generally less sophisticated than personal income tax, group relief, tax on foreign income, international taxation, etc. are developed in Malaysia, the lack of adequate comparative study. Malaysia offers some relief to the corporate group in Malaysia. Although some reform has been made in Malaysia, the level of economic development and social conditions in Malaysia and the Philippines since the colonial period to the early socialist period there were many items of the corporate income tax in these countries moved away from that original version and to some extent became similar to each other. They have been influenced by the IMF and other international, foreign donors.

Among other reasons, this “coming together” might be caused by the following factors:

1. The effect of globalization. To some extent tax systems become closer to each other;
2. The level of economic development and social conditions in Malaysia, the Philippines and Vietnam are not too different from each other but they differ in many ways from the developed donor countries. Thus, it is logical that they chose to learn from each other;
3. Some positive harmonization followed the establishment of ASEAN, due to which investment among ASEAN countries became easier;
4. Tax competition in the region. In order to attract foreign investment and to encourage domestic investors to invest abroad, countries tend to create the investment environment that investors will feel comfortable with at home and abroad;
5. In drafting their law the three countries pursue similar principles of tax law such as equality, fairness, transparency, certainty, simplicity.

The early transplants of corporate income tax rules in Malaysia and the Philippines can be compared with the transplants of “potted plants” where plants came in the pots. In these transplants, the “pots” included, among others, the legal system, the legal principles of the donor countries, donor countries’ case law, etc. The transplant of the Vietnamese corporate income tax system took place in a different form. It took with it little “ground”. Thus, the non-socialist rules must grow in the socialist legal system and function under the socialist legal principles. Therefore, the conclusion is that when countries look for transplanting a (tax) rule they must not simply copy the rules but they should also be aware of the following factors:

In this dissertation, a different approach in studying the Vietnamese corporate income tax system was chosen than in studying the Malaysian and Philippine system. Vietnam did not keep the form of tax system that was developed during the colonial period or the early socialist period. Thus, it is difficult to compare its corporate income tax system to any original donor country’s corporate income tax system. The study gives some illustration on the development of corporate income tax in one of the few remaining socialist countries.
Further research in these areas is recommended.

(i) The differences of the legal system of the donor country and their own country such as the legal family that they belong to;
(ii) The law making process;
(iii) The interpretation of law;
(iv) The power of the tax administration and tax judicial organ in the donor country and in their own country;
(v) The possibilities to implement the transplanted rules based on the administrative capacity and functioning of their tax system.