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Tax Legislative Process

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I do not have any doubt that when we proceed to shift the taxes around so that one set of taxpayers pays a lot more taxes and somebody else pays a lot less taxes, the people who benefit from it do not remember it very long. They tend to feel that it should have been that way all the time, and the people who are paying the additional taxes resent it very bitterly.

—Sen. Russell Long.

I. Institutionalizing the Tax Reform Process

A. In General

An enormous amount has been written on the ideal structure of tax laws or on specific technical problems in their design. Far less attention has been paid, both in the academic literature and in technical assistance, to the *process* of designing and drafting tax legislation in developing and transition countries.¹ Oliver Oldman, *Institutionalizing the Process of Tax Reform: A Comparative Analysis* (1975) and the sources cited therein; Richard Goode, *Obstacles to Tax Reform in Developing Countries*, in *Taxation in Developing Countries* 121 (Richard Bird & Oliver Oldman eds., 4th ed. 1990). In most member countries of the Organization for Economic Cooperation and Development (OECD), the tax legislative process has developed into a complex ritual whereby different groups compete to pass through the legislature their vision of an appropriate tax policy. A major tax bill in a country like the United States involves the input of thousands of professional lobbyists, policy analysts, lawyers, accountants, economists, and even ordinary citizens. By contrast, the tax legislative process is much simpler in most developing and transition countries, and has not had the opportunity to become established in many of these countries. Far fewer people are involved. This has advantages and disadvantages. A smaller group of well-qualified people can often do a better job in shaping a relatively coherent law. On the other hand, the lack of institutionalized experience with tax legislation means that the process often does not move forward smoothly,

¹With some notable exceptions. See, e.g., Michael McIntyre & Oliver Oldman, *Institutionalizing the Process of Tax Reform: A Comparative Analysis* (1975) and the sources cited therein; Richard Goode, *Obstacles to Tax Reform in Developing Countries*, in *Taxation in Developing Countries* 121 (Richard Bird and Oliver Oldman eds., 4th ed. 1990).

does not involve adequate consultation,² and often does not involve people with the necessary expertise at relevant stages of the process. Bureaucrats responsible for tax policy and their foreign advisors often see tax policy issues as a series of fires that need to be put out rather than an ongoing long-term effort. The thesis of this chapter is that substantial improvements in tax legislation can result if those responsible for tax reform focus on process as much as on substance. The process by which tax legislation is developed can be of key importance in determining its quality, effectiveness, and acceptability.

This chapter offers recommendations for establishing a well-functioning tax legislative process. These recommendations are in the nature of an ideal, and they will not all be attainable in most countries. Those responsible will have to establish priorities and tailor the details of the process to the institutions of the particular country. We would like to make it clear, therefore, that the discussion below is not intended to propose a model to be rigidly applied in all circumstances. The personalities of specific individuals involved can also make an important difference, particularly when relatively few people are involved in tax policy formulation and drafting. Generalizations are therefore difficult to make, but some basic issues common to most countries can be identified.

Management of the tax legislative process involves both internal bureaucratic organization and procedure and domestic politics as well as—for many countries—relations with foreign technical assistance advisors. Given our personal experience and ongoing role as foreign advisors, we devote particular attention in this chapter to how foreign advisors might fit into the process.³

B. Identifying the Problems to be Addressed by Legislation and Establishing the Pace of Reform

Problems in existing legislation can arise from different sources: new tax policy choices, changes in the economy, improved techniques of tax avoidance, and earlier bad choices in policy, drafting, and administration. To ensure that the tax laws are able to respond to each of these problems, the finance ministry should undertake a continuous review of tax laws.⁴ A single review committee, drawing on a single person from each area of substantive tax expertise, could coordinate the process.

Such a review committee should maintain close contacts with the relevant parliamentary committees. It should be chaired by a senior member of the ministry, perhaps a deputy minister. Once a problem area is identified as requiring more detailed review, a working group should be formed to develop a response.

²See *infra* sec. III.

³See *infra* sec. V.

⁴In most countries, the finance ministry is responsible for tax policy; this chapter is written on that assumption. Where another agency (most frequently, the agency responsible for tax administration) has this responsibility, the reference to the finance ministry should be changed to be to this agency. While there is no correct answer as to which agency should be responsible for tax policy, it is clear that problems arise where (1) this responsibility is not clearly assigned or (2) it is fragmented among different agencies. See *infra* sec. II.

Because tax laws tend to be numerous and complicated, it would be impossible to subject them to complete review at all times. It should be the duty of the review committee to work closely with the tax administration, which is likely to be a primary source for notification of problems, and with research staff. In addition, it is important for the review committee to pay close attention to the private sector. Private sector professional associations may be an excellent source of information regarding problems.

Foreign advisors can also serve an important function in identifying problems. To the extent of their expertise in comparative law, they are often able to note difficulties that have arisen with similar rules in other jurisdictions.

The establishment of a review process should include an effort to keep the tax laws as stable as possible by minimizing the frequency of change. Frequent changes in tax legislation upset the expectations of investors and make it difficult for taxpayers to understand and comply with the laws. A careful consideration of proposed reforms can minimize the extent of changes needed by way of technical corrections and by way of budgetary compensation for hastily enacted, overly generous provisions.

C. Research Support

For tax policy working groups to function adequately, they need effective research support. Three important research areas are (1) revenue estimating, (2) surveys of current practice, and (3) comparative law.

1. Estimating Revenue

Overall estimates of revenue must of course be made as part of the budget process, which is beyond the scope of this discussion. But revenue estimates of particular provisions (or proposed provisions) can also be critical in the tax policy process. Revenue estimates can be an important weapon in opposing special tax concessions. By showing the cost of the concession, the revenue estimate brings home the extent to which taxes on others must be raised in order to pay for the concession. Unfortunately, estimating revenues is an extraordinarily difficult task. The data required include macroeconomic projections, a detailed understanding of the effects of a tax rule, and data on what private sector firms will be affected, including size and number. In many developing and transition countries, these data may be difficult to come by, and the actual numbers obtained may not be very accurate. Nevertheless, it may be possible to come up with serviceable estimates. Sophisticated models for estimating revenues are now available for a number of jurisdictions, and private accountancy firms have designed tax calculator models for developing and transition countries.

2. Surveys of Current Practice

Experience with applying current law can suggest what tax reforms may be needed. One way of obtaining information about this experience is through surveys. They can be taken of those affected by a particular law, and can provide important information for those determining

tax policy. Such surveys can be taken through interviews, written questionnaires, or sampling of tax returns. They can also involve reports from local or regional tax offices on their experience with administering the law. The ability of a research department to carry out surveys of current practice may be one of the most important of all research skills. Such survey capability not only allows those formulating tax policy to be aware of the issues and problems they are likely to confront, but also allows them to do so without relying too much on individual taxpayers in the private sector. Too much reliance on individual taxpayers for information can result in at the very least the appearance of impropriety or excessive influence by a few. To avoid this, surveys are typically anonymous.

3. Comparative Law

Much can be learned from studying the experience of other jurisdictions with their tax laws. Comparative studies can suggest positive directions for change, and can help avoid potential problems. Examining the laws of other jurisdictions can also help show how their rules might interact with proposed rules in one's own jurisdiction to affect transnational business and trade. Comparative legal analysis is one area in which foreign technical assistance advisors with the requisite experience can be of considerable value.

II. Interdisciplinary Nature of Taxation

As with many other areas of law, taxation must be approached in an interdisciplinary manner. Given the specialization of academic disciplines, this may create a problem in terms of who is involved in the process. It is unlikely that any one expert will be competent to advise on all aspects, and managers of the process should be aware of this. To design a package of tax reform proposals, a variety of areas of knowledge must typically be brought to bear. Economists should analyze the economic effects of different policy alternatives, as well as their revenue effects. Tax law experts should develop the detailed design of proposed rules, based on knowledge of the details of tax rules of different countries. Tax lawyers with drafting experience should work on the actual legislative language. Lawyers should also ensure the integration of proposed rules with the rest of the legal system (commercial law, constitution, etc.). Accountants should advise on the compatibility of proposed tax rules with accounting rules and practices. Experienced tax administrators should evaluate the administrative problems arising from proposed rules and suggest alternatives based on relevant experience (again, with comparative knowledge of practice of different countries where relevant).

Tax rules must seek to implement sound economic theory. They must, however, also be drafted in response to the realities of law, business practice, and bureaucracies, and the social and political settings in which these realities exist. This requires people from many disciplines to work together to craft rules that reflect the knowledge and experience of those disciplines. Local and foreign experts need to be able to work together as a team.

While it may not always be possible to mount such a full collaborative effort, steps can be taken to ensure that consultations among different experts are as extensive as possible. For example, a group consisting of at least one economist, one lawyer, and one public administrator

could be identified and made jointly responsible for the final outcome of a legislative reform project. Careful follow-up at each stage should be required, from policy evaluation through drafting to implementation. And, wherever possible, careful consultations should be made with those people (from both public and private sectors where feasible) who are most familiar with the particular circumstances found in the jurisdiction.

The problem of lack of coordination in the tax policy process is not peculiar to developing countries. For example, in a comparison of the tax policy process in Canada, Australia, and New Zealand, Professor Brian Arnold argues that the three major components of tax policy formulation (policy development, technical analysis, and statutory drafting) should be performed by a single agency.⁵ In Australia, problems arose because these functions were divided among three different units. The Tax Policy Division of the Treasury, consisting of about 30 individuals, mostly economists, is responsible for developing tax policy ideas. The Legislative Services Group of the Australian tax administration (about 60 professionals, mostly lawyers or accountants) is responsible for translating into legislation the tax policy proposals developed by the Treasury. The actual drafting is, however, done independently by about three full-time tax law drafters in the Office of Parliamentary Counsel. Arnold suggested that these three groups should be combined into one agency, similar to the practice in Canada, where the Tax Policy and Legislation Branch of the Department of Finance, with personnel consisting of economists, accountants, and lawyers, is responsible for all aspects of tax policy development including the embodiment of policy in legislative language.⁶

III. Communication and Collaboration in the Tax Reform Process

A. Reform Considered by Working Groups Composed of Ministry Macroeconomists, Tax Policy Experts, Lawyers, and Administrators

Different groups are usually involved in the design and implementation of tax policy. In many ministries of finance these are divided into bureaucratic groups by discipline, including macroeconomists, tax policy experts, lawyers, and administrators, each with their own perspective and expertise. If all are not consulted on an ongoing basis, and instead a law is developed in a sequential manner, serious problems may arise.

Such a sequential process can result in general policies that cannot be easily translated into detailed rules, detailed rules that cannot be easily drafted, and statutes that cannot be easily enforced. In a world full of legal and institutional constraints, when basic policy is adopted, legal and administrative problems must be taken into consideration. Provisions, when drafted, should reflect what the policymakers really wanted to accomplish. The drafting process requires additional policy choices to be made, and to be worked out with tax policy specialists. Finally, provisions must, when administered, reflect both the policy choices made and the provisions as

⁵See Brian J. Arnold, *The Process of Tax Policy Formulation in Australia, Canada and New Zealand*, 7 Australian Tax Forum 379 (1990).

⁶See *id.* In the United States, tax policy formulation for the executive branch is the responsibility of the office of the Assistant Secretary for Tax Policy, which is staffed by lawyers, economists, and some accountants.

drafted. In other words, the administration must be able to implement the system as designed. Where a new law will result in substantial changes in administrative practice, it is particularly important to involve in the drafting process individuals with responsibility for administering the law. There must be a mutual understanding of precisely how the new rules will be applied. Otherwise, there is a real danger that those applying the new law will ignore it or misunderstand it.

On the one hand, there is a danger in studying a tax reform project to death. On the other hand, one can easily underestimate the complexity of the undertaking. In many countries, adequate staffing and expertise are simply not brought to bear in drafting legislation. Sometimes this is the result of bureaucratic infighting or individual sensibilities, and it is not always possible to remedy the human foibles that get in the way of a good coordinated effort. But where these can be overcome, the country stands to gain a great deal from an effective piece of legislation drafted by a coordinated team. This is not to say that a committee approach is the most appropriate at all stages. Sometimes it is better for a small group, or a single person, to take on a problem, produce draft statutory language, and bring it back for consideration by a larger group.

Technical assistance advisors from each field can play an important role in advising the working group. Such advisors who have experience in other countries with regard both to particular tax laws and to the process of developing tax legislation can provide at each step comparative information of great utility. Advisors with comparative experience in tax administration can also be of considerable assistance at all stages of the working group's consideration of tax reform.

B. Consultation with Other Government Experts

While macroeconomists, tax policy specialists, lawyers, and administrators should be directly involved in designing and implementing tax policy, other government experts should also be consulted. This may include individuals within the ministry of finance as well as from other ministries. For example, units concerned with company law, accounting standards, and regulation of the financial sector will often have contributions to make to the development of tax legislation and should be kept involved. In some instances, the importance of these topics will require that experts be full members of the ongoing working group. In other cases, only an ongoing process of consultation will be required.

C. Consideration of Related Tax Issues by Different Working Groups

Problems can arise when related rules are developed by different groups. Depending on the size of the bureaucracy, tax policy responsibility may be divided among several divisions. It is essential for those involved in designing different aspects of a single tax, or of related tax rules, to consult with each other. It is not uncommon, for example, for a division that develops an individual income tax law to fail to communicate with another division working on a corporate income tax law; or persons responsible for accounting rules under the value-added tax (VAT) may not consult with those responsible for accounting rules under the income tax.

Because the interrelations among various tax laws are important, most particularly among the different parts of a single tax such as the income tax, no one group should be working in

isolation from another. In most cases, this will mean that the chairs of each working group should consult with each other on a regular basis and that papers should be circulated among working groups.

D. Consultations with Parliament

Often, those involved in tax policy and implementation in the executive branch do not coordinate effectively with the legislative branch. This can cause serious problems; parliament is unlikely to respond well if its views are not adequately taken into consideration during the preparation of the bill. The method and degree of coordination will differ from country to country, depending on the traditions of openness between the government and the legislature, the legislative process, and the constitution. Within local institutional constraints, the finance ministry should consult with appropriate members of parliament, including members of the parliamentary committees charged with consideration of tax legislation, and with parliamentary staff. It is often preferable for the chair of the ministry working group to consult directly with the committee chairs, and perhaps with a number of key committee members. It may be appropriate for one or more chairs, or other committee members or committee staff, to be members of the working group for a particular tax law reform.

Part of the process should be to educate all deputies, who will often know little about the tax system. The ministry should identify key deputies to be involved in the process of education, and ensure that they understand the issues and can communicate to their colleagues the choices to be made and their consequences. While such "education" may not equal "consultations," these efforts can result in a smoother legislative process once a bill is submitted for consideration.

During the consideration of the legislation, the working group, under the direction of the minister of finance, should provide guidance to parliament, and assist it in understanding all the issues involved and in making any required changes. The earlier consultation, if successful, should minimize the extent of the changes that have to be made at this stage.

E. Consultations with the Private Sector

Often tax policy analysts fail to consult adequately with business interests. Unless the government is aware of the activities and problems of business, it will not be able adequately to design effective laws or fix defective ones. Adequate consultations will usually mean communicating with the main accounting and law firms engaged in tax practice, and with a number of interested business persons, often through sectoral business associations. It is important to consult with these persons because (1) they are familiar with accounting and other problems involved in complying with the tax laws, (2) they can point out unfair or burdensome provisions, and (3) their support for legislation can be politically important.

Depending on the particular economy, the concerns and activities of transnational business and nonresident investors may be of great importance. Foreign tax advisors, particularly tax lawyers and tax accountants, can play an important role in assembling information from this part of the private sector. They often have practical experience in, and may have informal contacts with, transnational law firms, accountancies, and companies.

There are, however, dangers in involving members of the private sector too deeply in the formulation of tax legislation. Fundamentally, the interests of any one group in the private sector will often be opposed to the general public interest in raising revenue in an evenhanded manner. Their knowledge of the details of proposed legislation can also lead to provisions being defeated in the legislature, because of the political clout that they exercise. Accordingly, handling relations with them is a delicate matter.

Sometimes ministries deal with the problem by inviting selected tax practitioners to review drafts on a confidential basis. This practice raises problems of conflict of interest and favoritism (if some private practitioners learn about the government's proposals in advance while others hear only when they are announced). The better practice therefore is not to make representatives of the private sector privy to tax proposals until they are publicly announced. They can then comment on them on the same basis as any other citizen.

Where this is the governmental tradition, members of the private sector should still be surveyed to discover relevant facts. Sometimes formal surveys can be undertaken, while in other instances it may be possible to assemble a group of experienced lawyers or accountants who can give advice without being apprised of the details of the particular proposals. Members of the government may, however, be tempted to allow private sector representatives access to the formulation of the tax laws on the theory that this will be politically advantageous for them. If this occurs, the minister should not hesitate to support the public interest and to call for balance in the process. For example, it has been known for representatives of a business advisory council to sit down with those ministry of finance officials drafting a tax law and (with the approval of officials at the highest level) to require them to change any provision of the proposed law that they do not like. This should be absolutely forbidden. The private sector should be listened to, but should not be permitted to dictate the contents of proposed tax legislation, this being the responsibility of the government and the civil servants entrusted with representing the public interest.

Once tax proposals have been publicly announced, efforts should be made to organize seminars between tax officials and private sector representatives to discuss the provisions of the proposed law. If these are open to the public, then the problems of conflict of interest and favoritism alluded to above can largely be avoided.

F. Responsibility for Process of Tax Legislation

It should be the specific responsibility of the finance minister to ensure that the working groups are sufficiently inclusive. The minister should also be responsible for coordinating consultations with other government departments that are not a part of the working group, with representatives of those in the private sector who are likely to be affected by the law, and the relevant parliamentary committees.

IV. Drafting Process

Once the details of proposed legislation have been agreed upon in a working group paper, a draft piece of legislation must be prepared. The drafter, who should be a member of the working group, should ideally be a lawyer thoroughly familiar with the laws and practices of the country. Ideally, the drafter should also be a specialist in the drafting of tax legislation. In some countries, such a person does not exist in the relevant government agency, and a foreign tax advisor can be used to do the drafting. In such cases, it is important for the advisor to work with a local drafter.

Once a draft law has been prepared by the finance ministry, there is usually a requirement that the justice ministry review the law for its legal adequacy, conformity with the constitution, and drafting style. If this review is conducted at the end of the process, mistakes can be introduced into the law. The lawyers in the justice ministry are typically not familiar with the operation of the tax laws. They may raise objections that are not well considered, but people in the finance ministry may be inclined to go along with them in order to move the law through the process, or may not themselves fully grasp all the implications of changes that the justice ministry suggests. A better approach would be to involve the justice ministry at an earlier stage, perhaps by including a person in the working group or by circulating group papers to the justice ministry, so that it becomes more familiar with how the tax law works and so that enough time exists to consider its concerns.

In OECD countries with common law legal systems, tax legislation is drafted by lawyers who are specialists in legislative drafting, and often subspecialists in drafting tax legislation. Depending on the legislative tradition, these may be found in offices attached to the legislature itself or in the finance ministry or equivalent. In the United Kingdom⁷ and Australia, the task lies with the Office of Parliamentary Counsel (in the U.S., the House Legislative Counsel and the Senate Legislative Counsel). In Canada, federal legislation is generally drafted by the Ministry of Justice, but tax legislation is drafted by the Tax Counsel Division of the Department of Finance.⁸ In civil law countries, there is less of a tendency to regard legislative drafting as a specialty, with the result that laws tend to be drafted by personnel in the ministries rather than by specialized parliamentary counsel. Nevertheless, those responsible for drafting tax laws tend to be lawyers.

V. Special Considerations in Using Foreign Legal Advisors

Many developing and transition countries have used foreign legal advisors in drafting their tax legislation. Depending on considerations of language, the qualifications of local personnel, the qualifications of the foreign advisors, and the desires of the officials responsible for developing a draft, the contribution of foreign advisors can involve commenting on a draft written by local drafters, producing a draft in collaboration with local drafters, or producing the entire draft themselves for the review of local officials. Varying situations can lead to the need

⁷In the United Kingdom there has been a recent move to involve tax lawyers from the private sector as consultants in the drafting process. See Jim Kelly & Robert Rice, *Lawyers Set to Breach Inner Sanctum*, Financial Times, March 29, 1995, at 8.

⁸See Arnold, *supra* note 5, at 385.

for foreign advisors on drafting. Some developing countries may have considerable experience in administering taxes and may have some well-qualified officials in government service, but cannot afford to retain sufficient numbers of staff with the requisite experience in tax law, most of whom tend to leave government for the private sector. In addition, it will often not be efficient for a small country to maintain a complete staff of tax legislative drafting experts, particularly if the country only infrequently makes major revisions in its tax legislation. Talented staff can often be better assigned to other functions. Countries in transition also face the problem of attrition to the newly emerging private sector; in addition, although many officials in ministries of finance are highly educated, their degrees and experience tend to be in areas outside tax law. This is due simply to the fact that a market-based tax system is relatively new for these countries; the education and experience required to draft tax legislation will take years to develop. Other countries have well-educated and experienced tax staffs, but these do not necessarily have the extensive experience in comparative tax law that is required to draft measures to deal with more sophisticated problems; these countries may consult foreign experts on more limited questions.

For the above reasons, many countries have found it useful to consult foreign legal advisors in drafting tax legislation. Such advisors may have a great deal to contribute, assuming that they have considerable experience and knowledge of the detailed operation of tax law in different countries. There have been many successful cases where drafts were chiefly authored by foreign advisors. However, there have also been many cases where drafts prepared by foreigners have not been successful. While it is not possible to guarantee that the process will always work perfectly, some factors can be identified as leading to potential problems, even assuming that the foreign legal advisor is highly competent in tax law and has a good sense of tax policy. Awareness of these potential problems can alert the responsible officials to forestall them, thereby enhancing the likelihood of success of the drafting project.

One problem is language. It is desirable to use foreign experts who have at least the ability to read in its original language the law being drafted. Translation is a cumbersome process, and problems of ambiguity or terminology are often obscured by translators, sometimes even by those of the highest quality and longest experience. Moreover, the cost of translation and the time involved are such that the amount of local material that the foreign advisor can read will be limited. It is ideal to draft the text directly in the original language. It takes about three times the amount of work to draft a law in two languages (e.g., original in English and translation in the language of the country). An intermediate possibility that works if the foreign advisor does not know the local language well enough to draft in that language, but well enough to be able to read it, is for the foreign advisor and a local counterpart to first discuss the concept (perhaps with the help of an interpreter), then for the local counterpart to draft a provision. The foreign advisor can then review the draft and point out and discuss any problems, until the two jointly come to an acceptable version. Where the foreign advisor cannot read the local language well enough, he or she will not be in a position to guarantee the integrity of the draft, and local officials will be on their own to some extent. If the foreign advisor prepares a draft, it is helpful, instead of having a translator translate the draft, for the local official who prepares the local-language draft to be able to read and discuss the draft with the advisor.

A second problem lies in the appropriate choice of paradigm. Most developing and transition countries will choose to base a tax law on the legislation of one or more other countries. The extent of the similarity to foreign law will vary from case to case. In some cases, a few concepts and stylistic and organizational matters are borrowed. In other cases, large chunks of statutory language may be lifted. This process of borrowing from the tax legislation of another country often makes a great deal of sense. Tax legislation is so complicated that it makes no sense to reinvent the wheel each time a new tax law is written. By borrowing from the concepts of tax legislation in another country, the experience in interpreting and applying those concepts, and perhaps also particular legislative language, can be taken advantage of. For example, if the same statutory language is used, then the regulations, court decisions,⁹ and practice in the other country in applying that language can be drawn on in interpreting the same language in the borrowing country. Of course, this does not mean that the same language should always be borrowed verbatim. Often there will be rules that the borrowing country does not wish to adopt. By studying the entire complex of legislation in the source country, the borrowing country can decide which portions of the tax law to adopt. The technique of borrowing from a foreign jurisdiction can be seen in a broader context, in that such borrowing tends to go on in other areas of law as well. To the extent that such borrowing has occurred elsewhere in the legal system, it may make sense to do so for the tax law as well.

Where a country wishes to borrow from the laws of country *X*, it is desirable, even essential, to use a foreign legal advisor who is familiar with the tax law of *X*. A national of another country will often not be equipped to do the job. Thus, in drafting an income tax law, what may be needed is not simply an expert on income tax law, but specifically a person who is an expert on the income tax legislation of a particular country or legal system.

This leads to an additional quality that a foreign legal advisor should have. The advisor should not be a person who seeks to impose the law of the advisor's own country on that of another country, or who, regardless of intentions, is equipped only to do so. Rather, it is important that he or she have a knowledge of comparative tax law. This will be less important where the country clearly wants to base its tax legislation on that of the advisor's home country. Even in this case, the foreign expert should not be one who unthinkingly will seek to impose all aspects of the legislation of country *X* on the borrowing country, but rather one who is capable of adapting this legislation to the particular circumstances of the target country. But where the country would appropriately model its legislation on that of a different country, or use a composite system, it can be disastrous to use an advisor who can work only within his or her own system.

A third problem that can arise when foreign advisors are used is lack of expertise in drafting. Often, foreign advisors are experts in tax law, but do not actually have substantial experience or skills in drafting tax legislation. Drafting is a subspecialty that most practicing tax lawyers or academics do not normally cultivate, often because it is reserved for specialists in their home countries. An individual who might be a perfect match in all other respects—knowledge of comparative law, language skills, knowledge of tax policy—might not be such a

⁹For example, courts in Commonwealth countries frequently refer to the judgments of other Commonwealth courts in construing statutes where the statutory language is similar.

good drafter. In such a case, it will be important to team the advisor up with someone who has drafting experience. In any event, a drafter should not work in isolation, and a second person with experience in drafting should check over the work.

Fourth, unless she or he is stationed in the country for a substantial period, a foreign advisor will not know all the ins and outs of the country's legal system. Tax law is to a large extent a domain unto itself; therefore, much can be done without a detailed knowledge of the rest of the legal system. However, to produce a draft that is fully suited to the country's circumstances, it is necessary to consult local lawyers. The foreign advisor must take care to do so, lest a draft be produced that is legally inadequate or inappropriate. Ultimately, only local lawyers can give a legal opinion on the adequacy of the draft.

Fifth, the draft must be understandable both to local officials and to taxpayers and must respond fully to the tax policy goals that the lawmaker wishes to promote. The foreign advisor must take care to explain the draft fully so that it becomes the product of local officials as much as her or his own. Paradoxically, working in a different language can help here because the process of producing the draft in the local language forces the local officials writing the local-language draft to understand the draft thoroughly. The process of drafting in the local language involves more than literal translation and in fact consists in writing a new draft. The foreign advisor who does not take the time and effort to make sure that every aspect of the draft is understood and accepted (or has been adequately rendered in the country's language if drafting is done in a different language) is not doing the job properly. Part of this function of explanation is the preparation of an explanatory memorandum, which should accompany most drafts. This would appropriately explain both how the new law functions and how it differs from current law. Detailing the differences from current law and practice is a particularly important part of the process of making sure that the new law corresponds to local needs.

Finally, the use of an outside advisor raises issues of the respective role of the advisor and of local officials. Where the ministry of finance uses its own staff to prepare legislation, the organizational hierarchy of the ministry makes it clear who is responsible for what. By contrast, where an outside advisor is used, the role of the advisor needs to be clarified. The best results occur when the foreign advisor is kept involved in all steps of the process up to final enactment. The foreign advisor should not have the power to make changes in a draft prepared by local officials—decisions on changes are a matter for local officials—but should have an opportunity to raise and explain problems that he or she perceives. When this has not been done, substantial errors have almost invariably crept in to the legislation. It may be helpful for the government and the outside advisor to agree at the outset on the procedure to be followed by way of regular communication on drafting changes, so as to help ensure that this communication will take place.