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"Transnational Tax Law: Fiction or Reality, Future or Now?"

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SCHEDULE FOR 2016 NYU TAX POLICY COLLOQUIUM
(All sessions meet on Tuesdays from 4-5:50 pm in Vanderbilt 208, NYU Law School)

1. January 19 – Eric Talley, Columbia Law School. “Corporate Inversions and the unbundling of Regulatory Competition.”

2. January 26 – Michael Simkovic, Seton Hall Law School. “The Knowledge Tax.”

3. February 2 – Lucy Martin, University of North Carolina at Chapel Hill, Department of Political Science. “The Structure of American Income Tax Policy Preferences.”

4. February 9 – Donald Marron, Urban Institute. “Should Governments Tax Unhealthy Foods and Drinks?"

5. February 23 – Reuven S. Avi-Yonah, University of Michigan Law School. “Evaluating BEPS”

6. March 1 – Kevin Markle, University of Iowa Business School. “The Effect of Financial Constraints on Income Shifting by U.S. Multinationals.”

7. March 8 – Theodore P. Seto, Loyola Law School, Los Angeles. “Preference-Shifting and the Non-Falsifiability of Optimal Tax Theory.”

8. March 22 – James Kwak, University of Connecticut School of Law. “Reducing Inequality With a Retrospective Tax on Capital.”

9. **March 29 – Miranda Stewart, The Australian National University. “Transnational Tax Law: Fiction or Reality, Future or Now?”**

10. April 5 – Richard Prisinzano, U.S. Treasury Department, and Danny Yagan, University of California at Berkeley Economics Department. "Partnerships in the United States: Who Owns Them and How Much Tax Do They Pay?"

11. April 12 – Lily Kahng, Seattle University School of Law. “Who Owns Human Capital?”

12. April 19 – James Alm, Tulane Economics Department, and Jay Soled, Rutgers Business School. “Whither the Tax Gap?”

13. April 26 – Jane Gravelle, Congressional Research Service.
“Policy Options to Address Corporate Profit Shifting: Carrots or Sticks?”

14. May 3 – Monica Prasad, Northwestern University Department of Sociology.
“The Popular Origins of Neoliberalism in the Reagan Tax Cut of 1981.”

Transnational Tax Law:
Fiction or Reality, Future or Now?

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Abstract

There is an increasing contemporary literature on transnational law. In the tax law context, there is a substantial literature on international tax law. Recently, Genschel and Rixen (2015) have analysed what they term a “transnational legal order” of international tax. Yet tax law has historically been seen as a bastion and expression of national sovereignty, funding public goods in the nation state and legitimated by legislative authority. What does it mean to identify a transnational legal order for taxation? Does transnational tax law really exist? If so, what is its authority and legitimacy? Who are its subjects and its agents? How is it enacted, interpreted and enforced in national or international spheres and how is it embedded in practice? This paper will explore these questions through examining some case studies, relating to core principles of tax jurisdiction including residence and source, and incorporating discussion of recent developments in base erosion and profit shifting (BEPS) reforms, including the turn to substance and anti-abuse rules and the growing transnational networks of tax administration.

Keywords

Transnational law, international tax, globalisation, BEPS, tax reform, tax competition, treaties, tax administration, sovereignty

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“For today’s globalizing dynamics to have the transformative capacities they evince entails far deeper imbrications with the national – whether governments, firms, legal systems, or citizens – than prevailing analyses allow us to recognise. … the national is also often one of the key enablers and enactors of the emergent global scale. A good part of globalization consists of an enormous variety of microprocesses that begin to denationalise what had been constructed as national … They reorient particular components of institutions and specific practices – both public and private – toward global logics and away from historically shaped national logics.”

Saskia Sassen, *Territory, Authority, Rights* (2006, Kindle 172-173.)

1. Introduction

Sixty years ago, one of the great public international lawyers, Philip Jessup, gave a series of lectures entitled *Transnational Law* (Jessup 1956). The post-World War II international economic and legal order was being established, especially through new organisations of the European Community, the United Nations, the Bretton Woods institutions and the Organisation for Economic Cooperation and Development (OECD), formally established under the OECD Convention which entered into force on 30 September 1961.[1] Jessup was interested in a concept of “transnational law” in this time of dramatic international institutional development because of limitations he identified in the concept of the “international” which implies only relations between one state and another (nation-states being the only subjects of international law in this narrow sense). Instead, Jessup was concerned to describe – and promote – a new concept of “transnational law” that would include “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories” (1956, 2).

[1] See http://www.oecd.org/about/history/ for a summary history of the establishment of the OECD.

Jessup made only two mentions of tax in his discussion of transnational law. First, he observed that nations were co-operating in treaties to avoid international double taxation, including this in his broad conception of transnational law (1956, 108). International co-operation in taxation and the development of tax norms mainly to avoid double tax was a key element of the agenda of the new international economic order, building on antecedents in the League of Nations and some bilateral relations between countries, especially those with former colonial relationships. The first United Nations model treaties date from the 1940s and the United Nations Fiscal Commission was established in 1946. The first draft OECD Model Tax Convention was issued in 1963, based on a report of the OEEC from 1961 and a revised model in 1977 (Vann 2011). Second, Jessup observed that governments would not, according to well-established customary international law, enforce each other's tax laws unless there was a specific tax co-operation treaty to that effect. This refusal to enforce tax laws, and other "political" laws of a country, was a reflection of taxation as an expression of national sovereignty.

These two observations indicate that in spite of Jessup's broad view of transnational law, in the tax sphere this was generally only recognised as including the necessary but minimal engagement of sovereign states with each other to allocate taxation rights without overlapping. Yet today, international taxation and the role of states in dealing with it is high on the agenda of governments and of activists and theorists of globalization. There is a perception of global capital "run riot" over national tax systems, transnational corporations (TNCs)[2] failing to pay their "fair share" of tax, uneven allocation of taxing rights between rich and poor countries, eroding bases and shifting profits from governments causing the tax burden to be shifted to individual taxpayers; widespread tax evasion and avoidance by individuals especially those with high wealth; and either complicity or failure by nation-states and international organisations to address these global challenges. These indeed may amount to a call for a new kind of transnational tax law.

[2] Tax lawyers tend to prefer the term "multinational enterprises" (MNEs), which legally speaking may be a little more accurate. However, many political and social theorists about globalization use the concept of "transnational corporations" (TNCs) so I adopt that terminology here.

This essay seeks to explore whether and how tax law, domestic and international, which applies across borders can be properly described by the notion of "transnational law" and what the implications of transnational tax law might be. Can this concept of transnational tax law help us to understand better how taxation does, and should, operate in relation to transnational labour and capital; work and business? Or is it still only possible to think about tax law as legislated in the nation state or as the act of a sovereign executive carving up international territory into bordered and closed taxing spaces – that is, as exclusively national or international? What form does transnational tax law take? Does it need to be authorised in "hard" more than "soft" sources of law; in legal, rather than administrative, networked or private processes? Finally, what is the authority and legitimacy of transnational tax law?

A starting point in considering these questions is the recent paper by Genschel and Rixen (2015) in which they identify and discuss a "transnational legal order" of international tax. After considering this framework, this essay aims to explore more closely the interpellation of the international and the domestic, and the specific re-formation of tax laws, institutions and processes in new ways across borders. This exploration is more than an identification of tax sovereigns, the challenges of competition and double or non-taxation and the engagement of states in an international domain conceived of as separate and distinct from the national. Particularly helpful in this analysis is the work of three theorists of globalisation and the state: Anne Marie Slaughter on transnational networks (1994); Linda Weiss on survival, adaptability and evolution of the nation-state in the global arena (2003, 2005); and Saskia Sassen (1998, 2006) on the changing scale of the "assemblage" of territory, authority and rights that we associate with the nation state and the "denationalisation" of institutions and processes that we previously thought of as uniquely national.

Part 2 discusses the notion of a transnational legal order of international tax and then considers more carefully the meaning of tax sovereignty and tax jurisdiction, and specific ways in which taxation constitutes the state, as well as what is at stake as we consider extension in transnational context. Part 3 focuses on tax jurisdiction applying to the "subject" of transnational tax law, both individuals and corporations. Part 4 examines the making and content of transnational tax law, specifically the source jurisdiction to tax and the approaches that dominate in the G20-OECD Base Erosion and Profit Shifting (BEPS) project. Part 5 turns to consider transnational tax administration and the implications for rights and legitimacy of this change. Part 6 concludes.

2. Tax sovereignty and a transnational legal order of taxation

Jessup's concept of transnational law would address "individuals, corporations, states, organizations or states, or other groups", who act in "the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called 'family of nations' or 'society of states'" (1956, 1). The reason such a broad conception was needed, according to Jessup, was because of the expanding scale of human interaction across borders and the increasingly fine questions of power and degree that indicated when national, or international, law should apply. He gave an example in the highly controversial area of military intervention or state recognition, of a domestic dissident group which foments a local riot perceived as wholly subject to domestic law, but when the dissident group attains sufficient strength to engage across borders with other states or resort to arms, international law takes an interest (1956, 12). There is a "delicate shading between the situations to which international law traditionally applies and those to which it does not" (1956, 15). Jessup therefore saw a need for new and flexible contours of jurisdiction and law in a transnational sphere.

Jessup's concept of transnational law incorporated both "hard" law – such as treaties or statutes - and "soft" law although he did not use those terms. There has been much analysis of these diverse categories and sources of law, ranging from practices, standards and norms in particular industries or sectors, international commentaries, model rules and conventions (as in the tax law context), case law of international tribunals and treaties whether bilateral or multilateral (e.g. see recently Pronto 2015 and in the tax area, Christians 2007). The term "soft" law is usually applied to encompass kinds of "law" that are not made by authorised bodies or legislatures (or by treaties or courts) but may be promulgated by non-state actors, whether international institutions (such as the Model OECD commentary or transfer pricing guidelines), non-government organisations or businesses in forms of self-regulation (such as global accounting standards). These broader notions of "soft" law have enabled scholars and practitioners of global regulation to define and explain the evolution of law and regulatory systems when the narrow idea of "hard" law is clearly not satisfied, and yet "subjects" are bound and "law" is effective in a myriad of different ways.

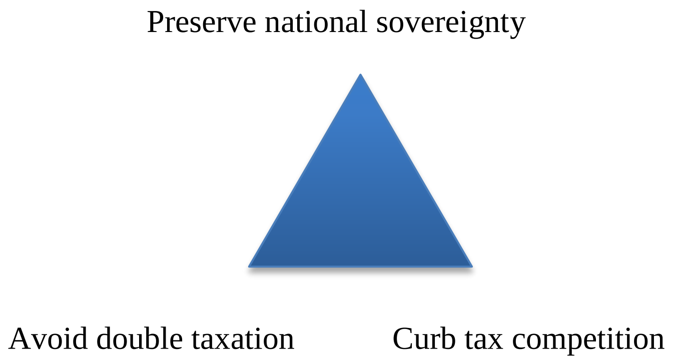
2.1. A transnational legal order of international tax?

Genschel and Rixen (2015) identify through a broad and transhistorical analysis (mostly over the 20th century) a "transnational legal order" of international taxation. They identify the two main challenges of international taxation as being international double taxation and international tax competition, and argue these are interdependent. Moreover, they are both caused by states: "International double taxation and international tax competition have a common cause: national tax sovereignty" (p. 3).

A first, early transnational legal order of taxation (they ascribe to the period 1920s to 1960s) focused "almost entirely on double tax relief" and, Genschel and Rixen argue, produced a transnational legal order through the allocation of jurisdiction of residence and source for cross-border investment. The stability and success of this transnational legal order to relieve double tax, which was centered on the OECD and rich countries (they focus largely on the Model Convention), itself "inadvertently invigorated tax competition". It did this by opening "new options for taxpayers to reduce their tax bills through cross-border tax arbitrage and left national governments free to vie for inbound tax arbitrage flows by aggressive low-tax strategies" (p. 2), a process which accelerated since the 1980s. Today, they argue that both governments through strategic rule setting and taxpayers through arbitrage (they focus primarily on TNCs) produce international tax competition in its particular forms today.

Genschel and Rixen then examine attempts to "reinterpret" or modify this "resilient" legal order of limiting double taxation, towards a new order controlling avoidance and evasion and find limited success so far. They conclude that the success of the transnational legal order to prevent double taxation itself "constrained the legal and political opportunity space for curbing tax competition", in which there were strong vested interests (among states and capital). The "normative settlement" of the previous transnational legal order "simultaneously created a demand for a TLO solution of the tax competition problem *and* hindered the supply of such a solution." (p. 2). Genschel and Rixen posit a "trilemma" of national tax sovereignty, double taxation and tax competition. Governments cannot solve both double taxation and tax competition while still preserving national tax sovereignty, but can only achieve (potentially) two out of the three points of the triangle.

Figure: Genschel and Rixen's Trilemma of transnational tax



Source: Genschel and Rixen 2015

Genschel and Rixen define tax sovereignty as having three bases: "legal sovereignty" (the exclusive right of national governments to make tax law), "administrative sovereignty" (the exclusive right to administer and enforce tax law) and "revenue sovereignty" (the exclusive right to claim all tax revenue for the national budget). They suggest that "The only way to simultaneously mitigate international double taxation and tax competition is to pool tax sovereignty internationally. The pooling may take different forms but always involves a loss of national tax sovereignty. Thus governments are always "sacrificing" either legal, administrative or revenue sovereignty in order to deal with the other two points of the trilemma. These conclusions seem right, indeed in some respects uncontroversial. An important insight is the overlapping and interdependence of legal orders constraining governments while sustaining particular relations between them over time.

Nonetheless, the analysis of Genschel and Rixen seems to be premised on a fairly blunt understanding of the nation-state as a unitary primary agent seeking to regulate private actors such as TNCs which are mobile in a global market. This leaves no room for a more nuanced understanding of state and international interactions, institutions and processes, or of the way that transnational processes may constitute states and TNCs themselves in interdependent ways. Nor is there room to examine the distribution of power within states in this analysis. In spite of the breaking up of the tax state into administrative, legal and fiscal aspects, as all three of these aspects seem to be subsumed into a single state actor represented by the executive in the international sphere. Transnational tax developments are also, in this analysis quite separate and distinct from the national constitution and legitimation of the state and its taxes, with reference to the citizens of that state.

2.2. The tax state as an "assemblage" of territory, authority and rights

In this part, before proceeding to explore transnational tax law, I seek to deepen our understanding of *tax sovereignty*, which in the international arena is then performed largely through the concept of *jurisdiction* (in Jessup's language). Tax sovereignty must be tied to the construction of the state itself. Tax law has a formative relationship with the territory and authority of a state and with the rights of its constituents: the power and ability to collect tax effectively, and the ways in which this was limited or constrained by citizens, was critical to the notion of statehood. [3]

Saskia Sassen in *Territory, Authority and Rights* (2006) theorises the past, present and potential future of the state through an evolving concept of "assemblages" of territory, authority and rights. Beginning in the Medieval era, she identifies these assemblages as established first in cities, then in nation-states and today in a global context. In its simplest definition, an "assemblage" is a collection of things, or a fitting together or connecting of parts. Sassen (2006) applies this changing notion of "assemblages" of territory, authority and rights in her analysis of the processes of *denationalisation* of territory, authority and rights in "globalisation", leading to new transnational assemblages in line with global or digital logics.

Although her focus is never on taxation specifically, Sassen explains the constitution of Medieval "city-states," and of their burghers as "citizens" (literally, of "cities"), in an assemblage of territory, authority and rights that developed largely through a fiscal bargain. The burghers agreed to pay taxes and granted authority over the territory of the city, but succeeded in holding the sovereign to certain and limited taxing rights, rather than arbitrary taxation. These burgher-taxpayers, the forerunners of the "citizen-taxpayer" of the nation-state, developed rights defined including "that citizens' obligations were to be set in advance

[3] As well established through fiscal sociology literature, e.g. Schumpeter (1917, 1954). See further on tax law, e.g. Martin, Mehrotra and Prasad (2009); on the politics of taxation see e.g., Levi (1988); Campbell (2001); Steinmo (1993); Hood (2003).

and that citizens could not be taxed on whatever else they might have gained" (2006 K1270). The establishment of these limited taxing powers constrained but also empowered and stabilised the sovereign, who could proceed over time to expand the scale of territory and tax collection.

The necessity of taxation for the constitution and success of the state was well recognised by Adam Smith (1776). Smith did not theorise taxation in a vacuum but was concerned about the greatness of the nation of Britain in the global order. He concluded that only taxes could provide "that sure, steady, and permanent revenue which can alone give security and dignity to government ... for a great nation' (Smith 1776 Book V.2.13, V.2.22). Taxes are needed for:

> defraying the necessary expence of any great and civilized state ... this expence must, the greater part of it, be defrayed by taxes of one kind or another; the people contributing a part of their own private revenue in order to make up a public revenue to the sovereign or commonwealth.

Not surprisingly, given his view of its importance, Smith developed his Axioms of certainty, efficiency and fairness in taxation – consistently with earlier demands for tax certainty. More generally, Smith brought private and public "revenue" or wealth together in his concept of political economy (ibid. Book IV.I.1):

> Political œconomy, considered as a branch of the science of a statesman or legislator, proposes two distinct objects: first, to provide a plentiful revenue or subsistence for the people, or more properly to enable them to provide such a revenue or subsistence for themselves; and secondly, to supply the state or commonwealth with a revenue sufficient for the public services. It proposes to enrich both the people and the sovereign.

This political economy that would "enrich both the people and the sovereign" was a major shift from Machiavelli's view, 250 years earlier, that a successful republic should enrich the sovereign and keep the people poor (1512, quoted in Sassen, K1978). It formed the basis for the co-development of states and markets – of private and public enrichment.

Schumpeter argued in 1917 that state capacity depends on tax capacity; he dubbed such a form of government the "tax state" (1917, 1954). Schumpeter identified a "crisis" of the tax state in 1917 because he doubted the ability of the state to harness taxation so as to deliver the social welfare that the masses sought. Yet by the time Jessup was writing about transnational law, a stable solution to the issue of "double taxation" had become significant precisely because states had massively expanded their tax bases, especially income and corporate tax, as well as sales taxes, consistent with growth in the size of the economy.

These 20th century tax states, which became rich in the global economy, were grounded mostly in forms of representative democracy with a secure taxpayer-citizen base, combined with effective bureaucratic technologies. The history of income taxes, in particular, in Anglo democracies including the United Kingdom, the United States, Australia, Canada and New Zealand, demonstrates the connection between taxation and effective democratic states (e.g. Daunton 2001, Mehrotra 2013).[4]

2.3. What is at stake in transnational tax law?

The authority to tax in most rich nation-states is in elected legislatures bound by Constitutional frameworks. This is well illustrated by an Australian case in which the High Court declined to review an allegedly "draconian" federal land tax:[5]

> "Assuming that the taxation which it imposes is drastic, as it is alleged to be ... We have not to do with … these things ... these are questions of the policy or wisdom of the tax, and belong to the people, directly or through their representatives, and not to the Court. And this is true even if the tax is so heavy and so carefully adjusted as to appear intended to produce the results foreboded. Questions of the abuse of power are for the people and Parliament."

Why does this strong grounding of taxation in legislative state authority matter for transnational tax law? The national tax state has clearly drawn boundaries in relation to other states and is defined from a basic assumption of the equality of tax sovereigns in international law. Yet, no tax state has ever been completely and securely bounded but rather, the domestic or national tax law and administration is constituted in part by the international and vice versa. Globalisation has accelerated these processes; still, the international or transnational order of taxation only becomes "operative, or performative", in Sassen's words when it is processed in the national domain (2006, K177). I suggest similarly that much that appears national or sovereign in taxation, especially corporate tax, only becomes operative, or is

[4] Recent "big data" analysis of democracy over time also provides empirical evidence of a direct link between economic development, the successful delivery of public services and welfare and the particular governmental form of electoral democracy: Knutsen et al 2015; Dincecco *).

[5] Osborne v Cth [1911] HCA 19; (1911) 12 CLR 321, p. *.

performed, through processes, networks or institutions in the transnational domain. Increasingly, the *effectiveness* of national tax law depends on the transnational. The shaping of tax law is being increasingly done through new processes and actors that are also be reconstituting the tax state itself.

Transnational tax law, considered through a more complex understanding of tax sovereignty, could change the way we think about some key elements of taxation and help us to escape, or reshape, the “trilemma” posited by Genschel and Rixen. It could, for example, help us to move beyond concepts of “residence” and “source” in tax jurisdiction that are creaking at the seams as we pile new fictions into these ideas. This analysis helps us to recognise the enactment of the international in the legislation of national tax law. It also helps us identify the new scale of the transnational tax administrative order, extending some national taxing powers across borders while it may not fully extend rights of taxpayers.

If we take the view that institutions matter (North 1990) then a shift from national to transnational institutions of fiscal policy, tax law and tax administration matters for the political economy of the state and its economic development. Zumbansen (2012, 309, 311) suggests that a transnational perspective on legal development “requires one to deconstruct the various law-state associations”, allowing “a better understanding of the evolution of law in relation to--as well as in response to--the development of what must be described as “world society.”” The necessary elements for the new transnational order are produced through the capabilities (in a broad sense) of actors established in previous episodes of globalisation or international political orders. This observation by Sassen is consistent with Genschel and Rixen’s approach, but Sassen suggests that the global is not separate from but instead is deeply imbricated inside the nation state. It is enabled, or enacted domestically and also reconstitutes the domestic legal and political order, even in a process of “denationalisation”. In the process, Sassen identifies a shift of authority from public to private, and from the legislature to the executive, which has worrying implications for the legitimate fiscal bargain that underlies the tax state in relation to the market. Ultimately, a focus on transnational tax law helps us to see the changing relation of the taxpayer/citizen and the state.

3. Tax jurisdiction: Locating the subject of transnational tax law

The traditional "subject" of international law is the sovereign state. In his conception of transnational law, Jessup (1956) identified the "subjects" of transnational law as all actors engaged across borders. When Jessup was writing, the borders of the nation-state in law were already permeable, as legal fictions had already allowed their transnational interpenetration in various ways.

Territorial concepts of residence and location of activities, contracts or property, have long been important to tax jurisdiction as to other forms of international law. Yet tax jurisdiction does not have to be territorially confined; the relation of territory to taxing authority may change over time. Jessup observed that historically, *before* the nation-state, jurisdiction – and sovereignty - was *personal* in nature. This "old notion of personal sovereignty" could "have been relied on by Congress to direct United States citizens, including corporations, to act or not to act in a certain manner *wherever they might be*" (1956, 41). The personal notion of sovereignty and obligation is "both older and newer than the territorial theory"; in the mid-20th century, "the common-law countries consider the territorial principle basic, but they have adopted and are constantly extending their applications of the personal principle, which has thus for them become the newer principle" while the civil law systems are in the reverse position. Thus, Jessup concludes, "territoriality of jurisdiction" is a rule of convenience – "it is not a requirement of justice or even a necessary postulate of the sovereignty of the State" (1956, 44).

3.1. Locating the individual taxpayer "subject"

Politically, as indicated above, we conceive of individual voter-citizens as the subjects of tax law with entitlements as well as responsibilities to the state.[6] Yet in reality it is the limits of

[6] Even this is tenuous: as demonstrated by Rubinstein (2003), the concept of "citizenship" within states and across borders is no longer a clear and generalizable notion but has itself been carved into various flexible categories and hierarchies of entitlement and obligation. Government benefits, public goods and welfare offered by the state may vary significantly for different categories of citizen and many who are resident and pay taxes in a jurisdiction may not be eligible e.g , the dramatic limitation in welfare benefits to citizens since the 1990s in the US in spite of the obligation and reality of legal and illegal resident migrants to pay social security, disability, income and sales taxes; a similar phenomenon has been embedded more recently in Australia.

governments' *ability* to collect tax, like the pragmatic aspects of jurisdiction at international law, that have formed the legal content of tax jurisdiction for most countries. The subjects of tax law have been those who can be taxed: those within the reach of the tax authority. Thus, jurisdiction to tax is usually grounded on *presence* in the jurisdiction. In most of the world, this is determined by a concept of "residence".

The term "resident" has a specific meaning in most country domestic tax laws and in the tie-breaker rules of the OECD Model Convention (Article 4) and commentary and in bilateral tax agreements. For individuals, it means the ordinary concept of a place where the individual normally resides, an habitual abode, the *foyer fiscal* in the sense of the family home and loved ones, the domicile or place where the individual comes from, or simply the place where they are for more than six months of a year. It is as a last resort tie-breaker that the OECD Model Convention turns to citizenship to allocate tax jurisdiction. These residence rules normally apply even in the United States for in-bound tax purposes, such that a non-citizen living in the jurisdiction is a subject for income tax and other tax purposes.

3.1.1 Extending the individual "resident" transnationally

This is a moderately flexible concept of a tax "subject". Still, is this definition of the locatable "subject" of the tax jurisdiction really suitable for the current era? Could we reframe taxing jurisdiction in a way that better captures individuals and their income, in a way that reflects better the potential mobility of both? We can consider two cases: first, the individual who stays home but extends their person "transnationally" through controlled entities elsewhere, and second, the mobile individual who was resident but moves out of the taxing state.

In fact, current national income tax laws often do seek to extend the concept of the individual with a presence that is subject to tax, by "consolidating" the offshore entities or investments of those individuals who are resident but who succeed in extending their personal control transnationally through establishment of separate entities in low tax jurisdictions. Many income tax systems seek to tax foreign controlled passive income in trusts and privately controlled entities on an accrual basis to resident individuals. This is usually described as an expression of taxation of "worldwide income" (sourced offshore). But if those entities are, really, "alter egos" or extensions of the individual, these kinds of rules can alternatively be seen as extending the meaning of the individual resident as a transnational being incorporating controlled entities, and subject to the national jurisdiction.

However, the success of these rules, and ordinary tax rules that seek to capture evaded income, is subject to the limits of effective taxing power. While the 20th century was a "good century" for the tax state, it was also a "good century" for tax havens which until very recently were highly secretive (Hood 2003, 215). This extension of jurisdiction over the tax subject requires pragmatic transnational enforcement. Thus, the increased attention now being paid by taxing jurisdictions to beneficial ownership of offshore trusts, nominee companies and opaque funds in tax havens, aimed at ensuring that actual residents do not evade the "residence" tax. Efforts to look through layers of beneficial ownership are not, yet, as far advanced as tax information exchange and are facing heated resistance including from subnational entities such as Delaware and similar "secrecy" states in the United States, which bring pressure to bear on the federal government. This contention is not surprising. Transnational tax administration, discussed in Part 5 below, will strengthen sovereignty of the taxing state and address double non-taxation, while not necessarily causing double taxation. However, it will clearly undermine the sovereignty of the tax haven – indeed, it may have the effect, ultimately, of reconfiguring the bounds of taxing jurisdictions into the territory of tax havens in substantial ways.

3.1.2 Extending transnational tax jurisdiction to mobile individuals

What about individuals who exit the tax jurisdiction? It is interesting to consider the implications of a *personal* attachment to the tax sovereign, *no matter where the individual is in the world*, as a way of grounding jurisdiction to tax. There are features of such a personal nexus to the taxing state that seem better suited to the transnational movement of individuals than one in which the state gives up rights to tax simply because a person is not resident. Leaving practicalities aside, if a benefit theory of taxation is accepted (Stewart 2015b), then why should the state from which the individual benefited from public goods not still have a jurisdiction to tax? The extension of taxation laws in this way implies ongoing obligations of the taxpayer-citizen travelling the world outside the tax-benefit jurisdiction.

Obviously, one proxy for this personal attachment could be – controversially – the use of citizenship as a basis for taxation, as in the (exceptionalist) United States. I do not advocate citizenship taxation for other countries; indeed, as currently applied, extraterritorial US citizenship taxation seems to generate unfair outcomes for non-resident US citizens (Mason 2015; Christians 2016). However, one reason for the concern seems to be that, at least for "accidental" non-resident citizens, they never actually received any benefits from the state. More generally, there is an issue, again, of enforcement. There also seems to be evidence that US taxation of its 7 million expatriate citizens is more voluntary than compulsory. The US provides an exemption for wages below a threshold, and presumably also a foreign tax credit as needed, for foreign tax in the resident jurisdiction. While recognising its serious impact for some individuals, the US citizenship tax controversy has been largely about the extension of taxation to capital income of non-resident citizens through FATCA (I return to this below).

While a handy identifier, citizenship may not be a good proxy for benefit taxation. A different example of the potential extension of national tax jurisdiction transnationally, which evinces a goal of extending progressive income taxation to the beneficiaries of government funding, is the treatment of higher education debt for former students who exit Australia and New Zealand. In some countries, tertiary education remains "free" (funded by general tax revenues) and on departure of graduates, because of the "residence" tax base, the fiscal cost cannot be recouped. For many other countries, including the United States, tertiary education fees may be funded by either government or private loans that are repayable even if the former student goes overseas, although the practical reality of collection may fall short because enforcement across borders is difficult.[7] A hybrid system is the Higher Education Contribution Scheme (HECS), now used by both Australia and New Zealand (and recently introduced in a number of other countries including a 2013 proposal, not enacted, in the United States).

Under the Australian HECS regime, domestic students are charged university tuition (currently between about $A8,000 and $A15,000 per year of study). About 85 per cent of students access a government loan to pay the tuition (the funds are paid directly to the University), which is then repayable through the income tax system depending on debtors'

[7] There is increasing debate about US College debt, see e.g. Robert Kelchen (2015), https://theconversation.com/is-student-loan-debt-really-a-crisis-44069 ; for a story about going overseas to hide from debt collectors, http://money.cnn.com/2008/10/23/pf/college/student_loan_fugitives/ .

future incomes, in a HECS levy administered by the Australian Tax Office. Currently, repayments start at an income threshold of $A54,000 per year; if below that threshold, they never repay. The HECS levy basically operates as a progressive surcharge on the income tax, of between 4 and 8 per cent to the marginal tax rate faced by the graduate, until it is fully repaid. If the former Australian student leaves and becomes a tax resident elsewhere, historically, the HECS levy did not apply because of its legislative basis on the income tax concept of "residence" of a taxpayer. However, this will change effective July 2017 when repayment obligations will be based on the *worldwide income of the non-resident individual*.[8] Thus, the HECS levy will have transnational legal effect.

As noted above, Sassen identifies privatisation as one of the consequences of new formations of territory, authority and rights through global logics. A kind of "privatisation" occurs in this extraterritorial HECS collection. The construction of HECS as a repayment of a fee debt rather than a tax constitutes both the government and payer in the mode of creditor-debtor rather than tax authority-taxpayer, even as the system adapts features of the tax state especially taxpayer identification, administrative collection and the personal tax rate scale linked to ability to pay. Of course, enforcement remains a challenge, as intermediary withholding and intergovernmental cooperation cannot be relied upon for collection, with only the prospect of a large and increasing debt payable on future return to the country as an incentive to pay up now.[9] We also run into one of the points of Genschel and Rixen's trilemma: the heightened risk of overlapping tax jurisdictions and international double taxation. The Australian HECS debt is unlikely to be eligible for a foreign tax credit from the country in which the former student is now resident (such as the US), as it is not legally

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[8] See Australian Tax Office, https://www.ato.gov.au/Individuals/Study-and-training-support-loans/Overseas-repayments/; http://studyassist.gov.au/sites/studyassist/helpfulresources/pages/2015%20budget%20-%20student%20overview . This is already the for the New Zealand government scheme, which continues the obligation and also charges interest to former students while overseas.

[9] However, HECS debts could be collected by requisitioning any assets in Australia that are acquired by the non-resident former student, e.g. if they acquired Australian real property, deriving no rent or amounts below the threshold and thereby not paying HECS.

defined as an income tax but as a loan repayment in relation to a fee for service, although the matter has not yet been tested.[10]

More broadly (albeit not paying the full cost of the tertiary system), the funding of the "public good" of tertiary education in this system is partly privatised on a fee for service basis, carving out this aspect of government provision of tertiary education from general funding by taxation. The shape of the tax state itself is changed through a process of privatisation of putatively public functions.

Another way of addressing the issue could be an "exit tax" calibrated to benefit. However, the issue here is that such a tax would be payable at a time when the individual presumably does not have the capacity to pay. As a result, exit taxes – which are staging a come-back in Europe – are usually only able to be applied to capital income and assets. A broader application of this idea of transnational taxing jurisdiction is the "brain drain" tax (see Bhagwati 1971; Brauner 2010). Chapman et al (2015) suggest that a "brain drain" tax could be collected by a country such as Australia, to which an individual migrates, having completed tertiary studies in a (poorer) country such as Papua New Guinea, and then remitted by Australia to the PNG government. An extension of national laws and intergovernmental cooperation could enable collection and remitting of such payments; this is not yet achieved but neither is it entirely fanciful, especially as co-operation in transnational tax administration develops.

In a thought experiment, we could even extend this idea further to operate regionally, or globally. As technological advancement and knowledge is perceived as important for

[10] There are much older – and very substantial - examples of the national obligation of taxation in exchange for benefits, not internationally creditable against the tax of other countries: social security taxes that fund insurance-style old age, disability and unemployment benefits. Social security taxes are usually structured as wage taxes on people working in the jurisdiction, so workers or citizens who exit are not liable – unlike the US income tax applicable to non-resident citizens. However, non-citizens working in a jurisdiction are usually liable for such taxes even if they are excluded from benefits. The issues of transnational benefit as in the higher education example above does not arise here; rather the issue is, can workers who paid their dues or social security taxes to a state in the past, claim pension entitlements even if they have moved offshore? The international social security treaty network combined with domestic laws permits this, at least to some degree. However, there are complaints by those who fall through the net e.g. British residents in Australia who vociferously complain about the denial of British pension rights in some situations – and the ensuing cost to the Australian fisc. There are also complaints of the taxation in the (now) resident state of such benefits paid from another state to a recipient.

economic growth, we could envisage a regional or global regime of shared funding for tertiary study among countries, enabling mobility nd supported in part by a transnational system of fee collection applying when capacity to pay exists for university graduates – changing the contours of territory, authority and rights in relation to the funding of this public good. Europe has gone quite a long way down this path already.

3.2. The shrinking – or expanding - corporate "subject" of taxation

The corporation has been defined as a "subject" for national taxation at least since the existence of direct taxes including land and wealth taxes and income tax. Unlike individuals (except for those with legal alter egos), the corporation is a legal fiction. Taxation requires allocation of that fiction to a jurisdiction with effective authority and access to corporate income or assets; or, alternatively the "looking through" the fiction to some degree. The legal personality of the corporation has been both recognised and reproduced through this operation of tax laws as in other regulatory regimes.

The concept of corporate residence may or may not explicitly seek to identify the substantive individuals who own or control the company. All of the various definitions of corporate residence – ranging from the most flexible in today's world, the place of legal incorporation, to concepts of central management and control by directors or managers, to identification of majority shareholders or voters (e.g. OECD Model Convention; various domestic laws) – apply to the corporate fiction a location in a jurisdiction, so as to extend the territorial reach of national taxation. All these concepts, but in particular the place of incorporation, are able to be manipulated so as to enable the location of these companies and their allocated income in low-tax jurisdictions.

There is not scope to refer to the substantial literature on development of the corporation here; suffice to say that the separate legal personality, life, contracting power and limited liability of the corporate form was a brilliant technological invention of national law that has been central to the development of global capitalism The legal form of the corporation has also, as already discussed, been an essential "tax handle" for growth of the nation-state in the context of the development of industrial capitalism since the beginning of the 20th century and even earlier (Hood 2003). Not only was the new "technology" of the corporate tax levied on the corporation, so were all of the other significant taxes of the 20th century, specifically, wage income tax and social security taxes, and value added tax.

The corporate tax is a proxy for taxing the ultimate owners, or shareholders on net gain from their investments, and may be seen as a fee for the benefits for the owners of capital in using the corporate form in the source, or production country. In an international context, it enables collection of tax from foreign investors. There is a constant tension regarding how, and to what extent, the fiction of the corporation and its location will be enabled or confined by a tax state.

These nationally-based notions of the “resident” corporate taxpayer under domestic law and tax treaties combined with other forms of national regulation, to produce a new and powerful mode of transnational production, flow and investment of capital, contributing to the agglomeration and distribution of value-chains in TNCs across the globe (Held et al 1999, 242). Businesses operating transnationally have succeeded, through the application of national law, in subdividing the single company into multiple and specialised sub-entities with diverse rights and relationships across high- and low tax-tax jurisdictions. The difference between a single fictional legal entity and hundreds of different fictional legal entities that are wholly owned relates largely to taxation rules, and some other forms of regulation especially intellectual property, across different jurisdictions. Here, the narrative of Genschel and Rixen is compelling, as these processes are reinforced by the transnational legal order aimed at preventing double tax.

However, the process seems also to change the contours of territory, authority and rights of states themselves. As in the regulation of global financial capital, “part of the territoriality for global firms and markets is produced inside the nation”: TNCs are “simultaneously global and in need of multiple insertion of national territories” (Sassen 2006, K5642). The concept of corporate residence is combined with the principle of arm’s length or “separate entity” treatment, aligned (frequently perfectly) with the borders of each national jurisdiction. TNCs have essentially absorbed tax-free jurisdictions into their capital and intellectual property structures. With governments, they have also literally reshaped the economic and national boundaries of states. They have developed the alternative of “onshore” in zones of tax exemption or low tax within states. This creates a zone of private capital flow connected across state borders within which TNCs are almost the sole bearers of rights, and that is quite distinct from, but interpellated with, the taxing jurisdiction.

One way that taxing states may seek to address this is to overcome the arm's length, separate entity recognition by extending taxing jurisdiction over the transnational corporate entity as a whole, or part of it. Genschel and Rixen point to the attempt to institute a "consolidation" or "look thru" approach, first by the United States in its Controlled Foreign Corporation (CFC) rules, and then adopted by other states and finally accepted as not countrary to the Model Convention by the OECD. That approach is similar to the extension or look through of entities that are beneficially owned in offshore jurisdictions for individuals. The underlying offshore profits in separate controlled legal entities are taxable on a current or accrual basis to the "resident" parent corporation.

Many other countries now have CFC rules of various kinds and it is a recommendation of the BEPS project in Action 4 that countries establish and strengthen CFC rules. However, although the "consolidation" approach seems general in nature and conceptually rules are similar, the detail matters. CFC rules diverge widely from each other, effectively consolidating only some kinds of income for some kinds of taxpayer and some jurisdictions, while allowing full recognition of the separate legal entity form for other kinds of taxpayer, income and jurisdiction. The most notorious example is the exemption in US CFC rules enabling accumulation of offshore profits in havens and hence indefinite deferral of US resident taxation. Meanwhile, the most ambitious attempt at consolidation, the European common consolidated corporate tax base (CCCTB) has so far failed, with the consolidation aspect being a sticking point for some member states such as Germany. It may yet return to the agenda, post-BEPS.

4. The substance of transnational tax law

The BEPS Actions were originally presented under the three pillars of (1) coherence; (2) substance; and (3) transparency (OECD 2013). The concepts of coherence and substance, in particular, seem aimed at establishing transnational tax law as a stable system of rules that may connect, adapt or modify the rules of national tax jurisdictions.

Picciotto advocates increased international tax cooperation, but did not frame this as enforcing transnational tax law but, rather, said it would be aimed at "collectively reinforcing the effectiveness and harmony of national taxation as applied to international business" (1992, 305). Braithwaite and Drahos (2000, 107) however identified the failures of the international tax regime and its "polycentric, regulatory diversity" between "rogue fiscal sovereigns", which was constantly out-played by the "monocentric complexity" of TNCs operating across tax jurisdictions. This suggests the content of transnational tax law should be consistent across borders, at least in some core respects.

4.1. A founding principle?

Is there a founding principle of a coherent, substantive transnational tax law – or should there be such a principle? The founding principle of national tax law is, probably, to levy a tax. At the international level, one candidate is the "single tax principle" posited by Avi-Yonah (1997, 2014). This proposes that transnational profit (or net income) should be subject to *single taxation* determined as not more or less than the level of taxation based on the amount determined as the "right" source country amount (Avi-Yonah 1997; 2014). This principle would *authorise* taxation, and is the opposite of the view that the current transnational legal order is only (or mainly) about avoiding double taxation and tax competition. Both relief of double tax and tax competition have the common foundation of *eliminating or reducing tax jurisdiction* rather than *authorising* and *enabling* it. The single tax principle avoids the "trilemma" of Genschel and Rixen that poses tax sovereignty against these two points of double tax and tax competition. In this way, the single tax principle reflects the national tax bargain that supports the tax state, enabling the government to *impose taxation* on its residents/citizens under political and legal limits.

Does a single tax principle exist? For individuals, as a matter of tax law, it does, in a reasonably coherent way. As a general rule, the international tax law for individuals, when combined with the domestic tax law of his or her residence or source country, usually – albeit not always - applies to levy some amount of tax on income, gains or consumption of goods and services in the jurisdiction. Historically, and occasionally today, states apply a territorial rather than worldwide basis for individuals, thereby limiting their own tax sovereignty (or finding it limited in practice, because of an inability to administer tax across borders). Indeed, it is the reported wide extent of individual tax evasion that is the biggest threat to the principle of single taxation of individuals globally, especially for those individuals who can locate their financial capital and perhaps their residence in tax havens.

For global corporate capital, however, this proposition remains, as Avi-Yonah (2014) acknowledges, highly contested. As the whole premise of BEPS indicates, taxation is not levied or enforceable in many respects across borders because of planning, arbitrage and evasion opportunities for corporations. Attempts to “reinterpret” or rewrite the existing transnational legal order of taxation into an order that would support a single level of tax on TNCs are so far quite incomplete as noted by Genschel and Rixen (2015). As recently as a decade ago, for example, the general view appeared to be that tax treaties did *not* have a general purpose of preventing double non-taxation (Lang 2004, sec. 2.2.6).

Business and its representatives actively contest the “single tax” principle (or, as it is alternatively phrased, the goal of eliminating “double non-taxation”). For example, in its submission to the Action 6 Follow-up Report, the Business and Industry Advisory Committee to the OECD states (BIAC 2015) that “BIAC supports the principle that Treaties should not create *unintended* opportunities for double non-taxation”. One scholar recently observed, “if double non-taxation was intended to be banned, there would be no distinction between abusive and non-abusive treaty shopping, and the GAAR would be supplemented with a subject-to-tax provision” (Wardzynski 2014, sec. 2.3). Moreover, the position of states themselves often appears contradictory in this debate. As Avi-Yonah observes (2014, 312), the US seems now to have adopted the “single tax principle” in some aspects of its tax treaty policy such as the limitation of benefits rules; and yet, in 1997 in its domestic law, it enacted check-the-box rules that directly facilitate widespread double non-taxation, and it has not repealed these.

4.2. Tax law making through multilateralism and arbitation

In the tax state, as observed in Part 2, tax law is made and authorised by a representative legislature. Of course, this simple proposition disguises the full extent of executive and bureaucratic engagement in the minutiae of taxation, and the work of the judiciary. Across borders, states operate bilaterally, in the series of tax treaties under an OECD or UN Model (but with many divergences in the detail), and within the transnational legal order mostly of relief of double taxation. Many have written on the difficulties of shifting this legal order, stuck in the diplomatic and time-consuming mode of bilateral negotiation.

The G20-BEPS project may change at least some of this, offering the promise of a new way of making tax law transnationally through a Multilateral Instrument (MI). The MI would automatically amend existing tax treaties for those who joined, and could be part of a new framework for the future development of transnational taxation. Work is proceeding to draft the MI under a Mandate, during 2016, so as to be open for signature by the end of 2016. Unlike the historically narrow mode of bilateralism or even OECD member state consensus, the Mandate has been open for any country to join. If the MI is signed and ratified (all as yet uncertain), it will be a new kind of international tax co-operation formalised in a way that we have not seen before.

The scope and content of the Multilateral Instrument is as yet unclear. In the Mandate (OECD 2015, Action 15, para 10), the OECD and G20 member countries state:

> the negotiation of the multilateral instrument should include implementation of the tax treaty provisions on hybrid entities adopted during the course of the work on Action 2, the work to prevent treaty abuse under Action 6, the work to prevent the artificial avoidance of the PE standard under Action 7, the work to improve dispute resolution under Action 14, and any other treaty modifications developed during the course of the work on the remaining BEPS action items.

Many of the rules suggested for the MI seem to be aimed at double non-taxation; indeed, the OECD-BEPS Actions to create coherence in the international tax system are intended to establish a new set of standards designed "to effectively prevent double non-taxation" (OECD 2013, 17), lending support to Avi-Yonah's argument about the single tax principle. However, this language is contradicted in some other places in the BEPS Action reports. Nonetheless, the goal of fixing the structure of the international tax system, for example, by preventing gaps or mismatches that might lead to no or low taxation, seems clear, at least where this did not appear to be the intention of the countries concerned. Each of Action 2, i.e. hybrid mismatch arrangements, Action 3, i.e. strengthen controlled foreign company (CFC) rules, Action 4, i.e. limiting base erosion via interest deductions and other financial payments, and Action 5, i.e. countering harmful tax practices more effectively, are all said to relate to coherence.

The BEPS Project, Action 14, albeit concerned with dispute resolution, proposes mandated arbitration between competent authorities of countries to settle tax disputes. This mode of dispute resolution could have the effect of privatising tax law making either between states or in negotiation with taxpayers or advisors. Sassen (2006) discusses in detail the very substantial hold of commercial arbitration worldwide as the privatisation of commercial law making away from states (in part, at least, because states lack the expertise to administer increasingly complex transnational commercial legal regimes). While the threat of arbitration in international tax may be intended to force countries to come to an agreement preventing double taxation, there is a risk that mandated tax arbitration could have more substantial effects in time, in shaping the law of different jurisdictions (even through negotiated tax settlements), behind closed doors and in ways not reflected in statutes or even public, technical guidelines.

It has been suggested that the BEPS Actions may lead to more disputes involving double taxation (consistent with Genschel and Rixen's thesis) and this has led to increased calls for clear, transparent and certain dispute resolution for taxpayers – especially TNCs – which are engaged in such disputes or at risk of double taxation. From the perspective of the legitimacy, transparency and coherence of tax law more generally, however, confidential transnational arbitration – whether or not it involves only country revenue agencies, or also the specific taxpayer or TNC - performs poorly. An independent panel or arbiter of disputes between authorities and taxpayers that publish its decisions could be a better way to establishment of a coherent and legitimate framework of transnational tax law including with regard to the BEPS initiative.

4.3. Locating economic activity and value creation: "Source"

The other mainstay of tax jurisdiction, besides "residence", is of course the concept of "source" of income. Avi-Yonah (2014) refers to this as the first principle of international tax – source taxation based on a benefit theory of taxing corporations. It is usually considered that "source" is a quite different basis of tax jurisdiction to "residence". The pragmatic limit of territoriality on jurisdiction to tax historically confined taxing power solely to source in some countries – Australia, for example, once had a purely "territorial" tax system, only taxing the income of any person, resident or not, that actually arose in the jurisdiction.

4.3.1 Economic substance

The mantra of BEPS is to tax transnational profits "where economic activity is conducted and value is created". I have argued elsewhere (Stewart 2015) that one concept that underlies most of the BEPS Actions on "source" is that of "substance". This refers primarily to the substance of economic or commercial activity or "value creation" in the digital and the anti-abuse aspects of the BEPS initiative. It is specifically addressed in Action 6, i.e. treaty abuse, Action 7, i.e. artificial avoidance of permanent establishment (PE) status, and Actions 8, 9 and 10, i.e. transfer pricing standards relating to intangibles, risks and capital, and other special measures. These Actions seek to "fix the flaws" in the existing treaty rules by "aligning taxing rights with substance", for example, in relation to triangular arrangements, shell companies with "little or no economic substance", and transfer pricing "related to over-capitalisation, risk and intangible assets".

A substance approach, in spite of respect for the corporate form, has a long history in international tax in allocating corporate taxing jurisdiction on the basis of source. The long-standing concepts of "permanent establishment", "place of business" and "attributable profits" all have the objective of examining the "real" business underlying the legal form of a single company or TNC. It is because TNCs comprising numerous subsidiary companies that are legal fictions that a set of international tax rules is required to address the underlying economic substance of business activities, so as to draw jurisdictional tax boundaries around the things that companies do. As corporate tax in the international context is primarily a tax on the net gains generated by non-residents from source-based productive activity in a jurisdiction (Avi-Yonah's first principle), it has been particularly important for capital-importing jurisdictions including many developing countries, but also wealthy countries such as Australia. Even as we may identify trends of increasing tax competition, declining corporate tax rates and wide use of tax incentives, the corporate tax provides the lion's share of revenues in many developing countries.

Not surprisingly, global and digital trends pose challenges for "source" determination. Hellerstein (2014) observes the need to align "substantive jurisdiction", by which Hellerstein means jurisdiction allocated under the international tax regime, with "enforcement jurisdiction", i.e. a jurisdiction in which taxes can actually be collected (2014, sec. 1). Corporate tax can be collected in the place where a legal entity can easily be identified that, importantly, has access to or controls assets of value from which tax can be obtained. Yet, as identified in the BEPS Actions that refer to locating taxation at the place of "value creation", it is difficult, under the current rules regarding legal entities and transactions, to correctly locate the tax burden at the corporate intermediary that has value.

One approach to the challenge of locating "substance" in a TNC is to change the rules relating to the source jurisdiction so as to support and preserve this jurisdiction. For example, Action 7 of the BEPS project seeks to "fix" the boundaries of source or "real" TNC activity, aiming to prevent the artificial avoidance of the status of a "permanent establishment" which enables source taxation. This approach is consistent with the current allocation of national tax jurisdiction and also with permitting double non-taxation where real economic activity is demonstrated.

Yet even where identifying economic substance is the explicit goal of international tax rules, it must always be identified through a set of factors, indicators or proxies. The extension of taxing jurisdiction using such proxies is similar to Jessup's observation that courts or governments may seek to use legal fictions to extend the concept of "jurisdiction" in public international law. The rules currently used, for example, in respect of place of business, have been established over time in the OECD Model (most recently, 2014), bilateral tax treaties and other sources of international and domestic tax law. The BEPS reports argue that current proxies for determining substance in current international tax rules are no longer accepted as a good reflection of the economic substance of the business or transaction and warrant modification; for example, use by Amazon of a warehouse for sales into a country may now be enough to establish a taxable permanent establishment. Yet this has with some reason been described as "tinkering" at the edges of base erosion, as the new proxy is likely to have the effect of converting the general principle into rules that can be engaged in arbitrage, or that may at the other extreme dissolve into executive discretion.

Alternatively, is it possible to change the rules so that the identification and location of substance or "real" activity within different divisions, subsidiaries or branches of the TNC becomes irrelevant? One approach, identified by Genschel and Rixen as the potential solution – a potential *new* transnational legal order of tax – is a "global TNC" approach. The most extreme version would be to apply a single minimum tax to the TNC's globally determined taxable profits. Would this be transnational tax law, or a single global law?

Taken as a whole, the TNC does not have a specific place of residence or operation. Should this be the parent company? It seems rather unlikely that other countries would cede to the parent company jurisdiction the right to levy such a tax. One option – that develops the idea, discussed in Part 3 above, that the public good of higher education could be transnationally funded - could be to seek agreement to place corporate revenues towards global public goods under administration of an international institution, perhaps for specified development purposes.

However, if that is not viable, an allocation of the TNC tax revenues to specific states would be needed. This could require a set of criteria regarding, for example, location of manufacturing, insurance, activity, employees, customers, intellectual property (IP) and so on. This allocation would be necessary whether or not one country collects the tax and shares revenue to others, or alternatively each eligible country is permitted to collect its allocated share of the tax. It requires the development of factors for revenue sharing that ultimately might be quite similar to those that would have been used for jurisdictional allocation of the tax base in the first place, or alternatively might radically change this basis and hence would redistribute corporate revenues across countries.

This suggestion of the use of indicators of real activity to allocate taxing rights also raises the issue of formulary apportionment, which is expressly denied by the Action Plan. As the OECD taskforce states in response to one "Frequently Asked Question": "the adoption of alternative transfer pricing methods like formulary apportionment would require development of an international consensus on a number of key issues (which countries do not believe to be attainable in the short or medium term) and could also raise systemic problems which could result in even more damaging problems for countries' revenues."[11]

4.3.2 Harmful tax practices: the global reaching into the local?

BEPS Action 5 refreshes the work on harmful tax practices conducted by the OECD during the 1990s (OECD 1998). Initially, this appears to relate to core structural domestic tax rules. It is the most explicit element in the BEPS initiative that addresses a potential "race to the bottom" on the mobile tax base. If accepted and implemented, it also has the potential to end double non-taxation. This is reflected in the objective of addressing the rules of some country regimes "that unfairly erode the tax bases of other countries". However, the OECD is careful to state in the Action 5 Report (OECD 2014b, p. 15) that this work:

> is not intended to promote the harmonisation of income taxes or tax structures generally within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates.

[11] FAQ 27, http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm .

The Action 5 Report addresses the contradiction between opposition to "harmful" tax practices (tax competition) and, at the same time, opposition to harmonized or minimum taxation, in two ways. The first is procedural. The proposal is to establish processes for determining preferential tax regimes, including requirements for disclosure, transparency and information exchange between countries, especially rulings given to taxpayers about tax preferences. The peer review of preferential regimes of OECD members and other countries in the BEPS project aims to provide information about harmful tax practices and government rulings, and to provide a lever for negotiation to establish minimum standards for such regimes. It is supposed to perform a similar function to the much more strong action just announced by the European Commission to shut down harmful tax practices among member states (European Commission 2016).

The second approach in the Action 5 report, as elsewhere in the BEPS project, is to turn, again, to economic substance as a minimum requirement (OECD 2015, 9, 27):

> Action Item 5 specifically requires substantial activity for any preferential regime. ... this requirement contributes to the second pillar of the BEPS project, which is to align taxation with substance by ensuring that taxable profits can no longer be artificially shifted away from the countries where value is created.

This substantiality approach enables the broadening of the harmful tax practices work beyond just ring-fenced or discriminatory preferential regimes, which were the focus of the OECD Harmful Tax Competition Report (OECD 1998). Countries can now consider in the peer review process the issue of general corporate income tax rate exemptions or very low rates in circumstances where there is no substance in the jurisdiction.

The G20/OECD has applied the proposed Action 5 "substance" approach in recent negotiation about concessionally taxed patent boxes in the UK and elsewhere, reported as successful in the recent OECD BEPS Report to the G20.[12] It has yet to be seen what rules would support economic substance, while still maintaining the coalition of OECD/G20 member countries that want to retain patent boxes and the BEPS initiative as well.

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[12] Secretary-General of the OECD, Report to G20/OECD (February 2015).

4.3.3 Digital space

All of the foregoing assumes that an activity or taxpayer (or the economic substance of the business of a TNC) actually can be allocated to a territory or physical place. However, there is also the possibility that, in the digital economy, a concept of place may disappear altogether or be fundamentally altered. Action 1 regarding the digital economy is recognized by the OECD as a cross-cutting issue running through all other Actions.

For example, where are the economic gains earned that are derived by those engaged in virtual online game trading? Is it at the location of the gamer, or of other gamers, or of the IP or servers? If 3D printing of products can be done by consumers in their own homes, then it appears that the place of production, as well as consumption, of the good are both located at the same territorial location, where the customer is located. Only the IP may be located elsewhere, but it could have been created in yet another jurisdiction or in multiple places by collaborating teams online: where is that the place of value creation? If it is not accepted that the taxing jurisdiction goes to the location of the consumer, or of the IP, a rule is needed to allocate that jurisdiction. But this rule is, again, most likely arbitrary.

On the other hand, as Sassen demonstrates (2006), much digital technology must itself interact with territory and with jurisdictions of states, and finds its location, frequently, in the individual consumer. The digital economy draws us inexorably towards uniqueness and individualization. Both production and consumption are increasingly moving towards individualized services, goods and experiences. We are back, again, with a concept of the “personal” economy. Perhaps Jessup’s notion of a “personal” jurisdictional link to the sovereign is also necessary for this aspect of transnational activity in the digital global era. The move away from a world of mass production – industrial capitalism, on which the success of corporate tax was build - to a world of tailored solutions for which each consumer pays a unique price. This change in consumption is occurring at the same time that modular production, value chains and centralized IP make the production of such bespoke goods and services ever more efficient.

Internally, each TNC also operates uniquely. A company and international tax system premised on notions of mass production, identical products and commoditisation and comparable pricing both within and outside the TNC and identifiably located to territorial jurisdictions is becoming less viable, as all aspects of the tax analysis become “case-by-case”.

Prices are either not arm's length at all, i.e. they may be fully integrated within the MNE, or unique market prices for services and products determined uniquely, in which case, comparability also loses its usefulness. We should not overstate this trend; after all, there are lots of identical iPhones in the world. Yet the services and products, and the process of use of these phones, is unique to each consumer.

4.4. Anti-abuse

As discussed, a consequence of the globalization process identified by Sassen does not, at first, look like the idea of a shift from the national to the global. It is a shift of power from the legislature to the executive, which she identifies as a central element in the constitution of new global assemblages (concomitant with a shift from public to private power). Do we see expanding executive power, internationally networked, in transnational tax law?

One site of potentially expanding executive power (located in the specific regulatory space of the tax agency) is the broad adoption of concepts of "abuse" of tax law or treaties. In particular, BEPS Action 6 Report presents a general treaty abuse rule at the end of a long and technical limitation of benefits rule. Many of the other Actions also rely on an abuse or economic substance rule that is going to require discretion and judgement for implementation by a nationally-based Competent Authority (the formal tax treaty name for the national revenue agency). The tax agency may, I suggest, often be thrown back onto a consideration of substance in the treaty abuse rule, a domestic General Anti-Avoidance Rule (GAAR), a domestic Specific Anti-Avoidance Rule (SAAR), or an analysis of artificiality or economic substance that is not confined by the terms of those rules.

As the Action 6 Report (OECD 2015) explains, a treaty abuse rule is not completely new to the OECD Model or to tax treaties. The issues of treaty shopping and beneficial ownership have a history of some decades and, in particular, the United States and a few other states have had LOB and conduit company rules since the 1980s. However, the BEPS initiative takes these anti-abuse approaches to a new level. First, the Action 6 Report recommends that tax treaties include in the title and preamble "a clear statement**"** that the Contracting states agree that the treaty is for "the prevention of tax evasion and avoidance". The new Preamble to the OECD Model Convention emphasises that treaties should not create "opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)". These statements aim to highlight features of an international tax bargain that are not limited to the transnational legal trilemma of double tax/tax competition/tax sovereignty. Instead, they seek to reinforce the last, through bringing recalcitrant non-payers (who *should* be paying) into the system and to whom neither the categories of double tax, nor tax competition apply.

Second, the new Commentary on Article 1 acknowledges the important role of domestic anti-abuse rules and judicial doctrines play an important role and concludes that national GAARs or judicial doctrines such as economic substance, sham, business purpose, step-transaction, abuse of law or fraus legis, would not generate a conflict with a tax treaty "in the vast majority of cases".[13]

Third, the Action 6 Report proposes new article X(7) of the OECD Model which will be a general treaty abuse rule to be known as the Principal Purpose Test (PPT). The proposed rule reads as follows:

> Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital *if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit*, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention. (Emphasis added)

The Commentary on the treaty abuse rule explains that it is intended to ensure that tax treaties (Action 6 Report, p. 68):

> apply in accordance with the purpose for which they were entered into, ie to provide benefits in respect of bona fide exchanges of goods and services, and movements of capital and persons as opposed to arrangements whose principal objective is to secure a more favourable tax treatment.

As has been identified by many in the nearly 1,000 pages of submissions on Action 6 and its Follow-up Report (OECD 2015b), there is not much guidance in the Commentary on what would breach the PPT, although there is guidance as to when a treaty benefit can be shown

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[13] OECD (2015) Action 6 Report, p. 89; paras 2, 12, 13 of new Model Commentary on Article 1; and see van Weeghel (2010_, sec 2.4.1.

not to be a principal consideration. The draft OECD Commentary on Article X(7) (p. 70) states that:

> in particular, where an arrangement is inextricably linked to a *core commercial activity*, and its *form* has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit.

Consequently, application of the anti-abuse rule will, in most cases, depend on an assessment of substantial and genuine economic or commercial activity, investment or presence in a treaty jurisdiction.

What is the function of a treaty anti-abuse rule? First, consider the function and effect of a national GAAR. In a domestic context, the application of a GAAR will operate to subject a taxpayer, in respect of a specific structure or transaction, to *more tax than would otherwise apply* under the core rules of the tax law. If conditions are met, it authorizes the tax agency to void or deny the transaction and in some cases to reconstruct a new transaction so as to impose tax (and sometimes penalties and interest). The GAAR also inevitably introduces uncertainty and discretionary judgment into the tax law, in varying ways depending on how it is drafted and applied in different jurisdictions. Therefore, it is of critical importance in the conceptual understanding of a GAAR that it is *not* a core taxing provision but is a kind of framework rule that aims to ensure that the "true" intention of the legislature is achieved. A GAAR thus operates to set the boundaries of appropriate behaviour under the core tax rules. It is in this sense a part of the fiscal constitution of those states which have such a rule.

Can the PPT be viewed in the same way as a domestic GAAR? It is clearly intended to protect the operation of the international tax system and if it becomes widely accepted, it may be an element of a growing transnational fiscal constitution.[14] The title of the Action 6 Report states, the anti-treaty abuse rule is intended to "prevent the granting of treaty benefits in inappropriate circumstances". But a judgement that a transaction is abusive or an outcome is inappropriate requires a benchmark against which to test what tax should be collected in a normal transaction of the relevant kind. What is the benchmark in international tax? Is this the single tax principle?

[14] As has been suggested in relation to trade law, for example, in its "constitutionalisation" (e.g. Cass, 2005).

The PPT cannot itself authorize a revenue agency to impose taxation. The transnational legal order of the international tax regime only establishes the conditions for *non-taxation* by one country by allocating jurisdiction but not mandating taxation. If this is the main purpose of the transnational legal order (and of treaties), what then is the function of the treaty abuse rule? It seems to allocate tax jurisdiction, making it more like a substantive international tax rule, instead of a framework rule supporting *other* substantive international tax rules. Are we asking too much of this concept of abuse? If it is applied by tax administrations, then a state's jurisdiction to tax would be ascertained on the basis of treaty provisions combined with domestic tax law, applied with regard to the economic substance of the entity or transaction as identified through the lens of the treaty abuse rule. The result is a shift from transnational law to discretion (about substance and abuse), and so a shift from legislative to executive power.

An alternative approach (which there is not scope to explore here), consistent with a "single tax" principle, is a "subject to tax" or "minimum tax" requirement. The BEPS project also does not have the stated aim of a harmonised or global "minimum corporate tax", whether enacted through some multilateral forum or in national laws.[15] However, such an approach seems to be adopted in the new European Commission announcements about the EU's response to BEPS (2016). Moreover, those announcements aim for a CCTB (common corporate tax base), which would be a mandatory set of corporate tax base rules across all 28 EU member states (if agreed), generating a coherent corporate tax system, although not a coherent set of corporate tax rates.

[15] In just one case, the Action 6 Report recommends a minimum tax bright line test instead of the abuse rule. The existing Commentary on Article 24 of the OECD Model make a case for an anti-abuse rule in a triangular situation where intangible assets are transferred to a third state that has a "very favourable tax treatment" and "in certain circumstances the resulting income may not be taxed in any of the three States". The Action 6 Report (p. 83-84) proposes a solution that would enable a state to deny treaty benefits where the profits from the PE would be exempt in that state, if "the tax in the third jurisdiction is less than 60 per cent of the tax that would be imposed".

5. Transnational tax administration

Finally, we turn to transnational tax administration, which must be the key to these new approaches to transnational taxing jurisdiction. After a slow start, it seems clear that governments are moving at an increasingly rapid pace towards networked systems of transnational tax administration. In the context of globalization, which is frequently perceived as a threat to national sovereignty, new technologies of regulation that extend across borders may augment state power and have the ultimate effect of extending "the state's capacity to govern" (Weiss 2005, 345). Contrary to the suggestion of Genschel and Rixen that states are giving up tax sovereignty, the new transnational laws, institutions and processes of tax administration are empowering the tax agencies of participating countries.

5.1. Tax bureaucracy

It is clear that a tax state must be administered through a bureaucracy and its very existence depends on the capacity and effectiveness of that bureaucracy, which becomes a substantial exercise of governmental executive power, together "soft" norms of compliance rather than resistance, with enforcement supported by coercion (e.g. Braithwaite 2002, 2009). Tax is administered through numerous and diverse norms, procedures and technological systems.

The key elements for a good "tax handle" of (1) easy identification of the taxpayer population; (2) the ability to channel taxes through a manageable number of stable intermediaries; (3) standard clarity in identifying tax bases with limited effort and ambiguity; (4) the ability to cross-check payments from multiple vantage points; and (5) cross-sanctions in which one tax contributes to the enforcement of another, would all contribute to a highly effective and low cost tax for government (Hood 1988; 2003). The administrative technologies developed by states for administering their income tax, VAT and corporate tax include systems requiring businesses, most importantly large corporations, to do Pay-As-You-Go wage and social security tax withholding; financial intermediaries such as banks to provide individual account identification and withholding of taxes; the adaptation of tax agents as the primary source of information about both past and future taxable transactions; and payment instalment systems managed increasingly through automated electronic platforms.

These bureaucracies and systems are not exclusively public or governmental. Rather, their success depends on being deeply networked with private actors, in particular large corporate enterprises and banks but, more generally, all business or investment intermediaries. Tax bureaucracies developed hand-in-hand with corporate capitalist enterprises in the last century supporting the argument of a tacit "liberal compromise" established "between the corporate sector and government in the advanced industrial societies," producing "regulatory capitalism" that has been advanced by Braithwaite and Drahos (2000). Increasingly we see that these private enterprises are engaged not only in their own self assessed tax administration but in the management, design and norm setting of tax administrative systems in a complex inter-relationship of the private and public in tax collection.

Nonetheless, national tax administrations are still authorised through executive delegation of states under legislation, and monitored to a greater or lesser extent by systems of administrative and judicial review.

5.2. Transnational networks of tax administration

As taxpayers and income became increasingly mobile, states needed information, access and collection systems to operate across borders. This was, for decades, or even centuries, highly problematic. Transnational tax administrative networks are being established through a range of legal and non-legal mechanisms, institutions and processes which are becoming increasingly grounded in formal legal agreements, with their own institutions, technologies and governing practices. Perhaps more than other areas of global governance, legal authority has been seen as important for tax administrative networks, which enable the coercive exercise of power and imposition of real costs on the subjects on which they operate (rather than, say, being mostly enabling or facilitating of global action like industry standards or transport networks).

These networks fit the description of "a pattern of regular and purposive relations among like government units working across the border that divide countries from one another and that demarcate the 'domestic' from the 'international sphere'" (Slaughter 1994). They are global governance networks as Slaughter defines them, in which the nation-state "disaggregates" into separate, functionally distinct parts, which work directly with their counterparts abroad, such that the it through its separate parts participates in a dense web of relations that constitutes a new trans-governmental order.

5.2.1 The Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The most important source of authority for transnational tax administration is the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC*)*, as expanded in 2010 under auspices of the OECD, G20 and Global Forum. As of 17 December 2015, 90 countries are described as "participating" in the Convention, having signed it or being included as a territory of a signatory (up from 34 countries three years ago). The Explanatory Report to the MAC expresses its ambitious scope (OECD 2010):

> This instrument is framed so as to provide for all possible forms of administrative co-operation between States in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information to the recovery of foreign tax claims.

The MAC generalizes and expands existing tax administrative cooperation mechanisms in a number of areas, although in relation to tax information exchange, it overlaps significantly with existing bilateral DTAs and TIEAs. It is expressed in terms of States, and is implemented in the usual way of international treaties, by signature, ratification and as needed, domestic law implementation. In spite of its wide scope and signatures, the United States and some other key jurisdictions including Switzerland and Turkey (in spite of hosting the G20 in 2015) have yet to ratify and implement the MAC in their domestic law.[16] There are various reservations by different countries, for example as regards collection of tax debts, while side agreements are needed for numerous aspects, such as automatic information exchange.

In spite of such limitations, the MAC seems likely to be the framework for establishment of transnational tax administrative law, just as other international treaties and organisations have been the basis for other forms of so-called global administrative law (Kingsbury et al 2005). The "coordinating body" of representatives of the national revenue

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[16] OECD, http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm

agencies will “monitor the implementation and development of this Convention, under the aegis of the OECD” (article 24.3). The Explanatory Report suggest that this body should “encourage the formulation of uniform solutions to problems in the application and interpretation of the provisions … by furnishing its opinion on questions of application” in a general manner. The Explanatory Report also emphasizes the need for “direct and speedy contacts” between tax administrations as being “the only way to make the assistance effective”. It identifies trends in this direction already, and proposes the establishment of “a single, central body” in each tax agency to manage transnational tax assistance. This is also needed because of concerns about taxpayer confidentiality, which is only waived under the conditions established by the Convention.

5.2.2 Automatic information exchange and country by country reporting

Under the auspices of the MAC, automatic data sharing on significant technological systems is transforming and strengthening transnational tax administration. The MAC does not mandate automatic exchange but requires a separate “mutual agreement” between countries in relation to types of information and processes of such automatic exchange, this will commence from 2017. Since the BEPS project, more than 90 countries have committed to put in place the common reporting standard (CRS) to be used as the framework for automatic information exchange, and earliest exchanges on the platform will formally commence in 2017. The standard is now being implemented across the countries of the Global Forum, and will supplant, in due course, the case-by-case information on request process.

The 15 Actions endorsed by the G20-OECD as the implementation of the OECD BEPS Action Plan are now in final reports issued in October 2015. Many of the BEPS Actions are aimed at tax administration, through the goal of “transparency”, which generally means transparency of taxpayers to governments (and sometimes of governments to each other), rather than transparency of governments to their citizens. The “transparency” BEPS Actions include: Action 11, collect and analyse data on BEPS (for the benefit of governments and, perhaps, of citizens); Action 12, disclosure of aggressive tax planning by taxpayers to governments; Action 13, new and standardised transfer pricing documentation and country-by-country reporting; and supposedly, Action 14, dispute resolution mechanisms (but this really determines substantive tax jurisdiction as explained above).

Country-by-country reporting will commence among 30 countries in 2016, automatically sharing the information of TNCs from 2016. In Australia – which has gone further down this path than many other countries – the ATO has recently reported publicly the tax paid (or not) and taxable income, name and business registration number, of 3000 listed companies, subsidiaries of foreign multinationals and resource companies, under a law passed in 2015.[17] It is not clear, yet, what impact if any this new kind of transparency may have either on the taxpayers themselves or on the public or legislative approach to taxation.

5.3. The US and Europe (FATCA and its discontents)

The US Foreign Account Tax Compliance Act 2010 (FATCA) establishes a way of collecting information about the foreign bank accounts and financial holdings of citizens. Accepting that the US taxes on a citizenship basis, FATCA itself does not seem extraterritorial in operation; it is the way in which it reveals the potentially unfair effects of citizenship taxation that seems to have made it the focus of recent critique.

However, the *means* of collecting this information, through imposing legal obligations on banks and financial institutions which *themselves* are outside the US tax jurisdiction, has led to a different concern about extraterritoriality, from the banks themselves. Banks would have to breach domestic confidentiality and banking laws and there would be a massive administrative cost for banks with no connection to the US other than that some – unknown – investors or account holders happened to be of the US, if FATCA was enacted.

The US found a creative solution to this problem by negotiating bilateral agreements with the financial institution home country governments for their own revenue agencies to provide the information. The US has, using a "model agreement" approach, succeeded in obtaining FATCA agreements or "substantial agreement" bilaterally with 112 countries to date. The approach is a hybrid international administrative legal model that has been described – and critiqued - as not a real treaty, that is not properly and legally authorised by the US Congress, as treaties are required to be (Christians 2015). The reach is wide and most

[17] See ATO (2015), https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Corporate-tax-transparency-report-for-the-2013-14-income-year/ .

FATCA agreements were effective from 2014.[18] For example, the US has a FATCA agreement with Singapore (in force),[19] Hong Kong (signed) and Australia, among many others.[20] These are executive to executive agreements (memos of understanding) and in Australia, domestic implementing legislation is now in force.

In spite of the cookie-cutter models, the FATCA roll-out has not been a small exercise. These FATCA agreements commit the foreign country governments – such as Australia – to collect from domestic financial institutions and banks, and remit automatically to the Internal Revenue Service (IRS) of the US, information about the financial accounts of US citizens. Although FATCA itself is unilateral, where supported by other provisions (such as a bilateral DTA or Multilateral Convention), it is reciprocal. For example, the US has now committed also to provide automatic exchange of information to Australia about the accounts of Australian residents in US banks so as to provide "equivalent" levels of exchange.[21] This will all be achieved by administrative system engagement with no further congressional or legal involvement required.

In spite of complaints, many governments are impressed with the approach in FATCA which mandates information provision at pain of a withholding tax and essentially requires banks and financial institutions to internalize the costs of administration of tax information exchange about their customers. This co-option of business intermediaries mirrors the domestic models of tax administrative and information collection that have been adopted in many countries that are successful tax states.

It is hardly surprising that the 28 member states of the European Union – in spite of the many challenges and quarrels in and around that regional "united states of Europe", which is together, slightly larger in economic size than the USA - should be most advanced down the path of transnational administration. New initiatives are being announced – and endorsed by

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[18] https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx

[19] http://www.mof.gov.sg/Policies/Tax-Policies/Singapores-International-Tax-Policy/Singapore-US-Foreign-Account-Tax-Compliance-Act-Intergovernmental-Agreement-and-Regulations-Enter-into-Force

[20] http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Intergovernmental-Agreement

[21] The same does not apply for the Singapore-US FATCA agreement, which entered into force in March 2015, although it uses the same Model agreement.

consensus in the European Council – at a rapid pace, especially given the chequered history of tax cooperation in Europe. The European countries have decided, if those financial institutions are giving information to the US about US account holders – they can give similar information about both US, and our taxpayers, to us. An automated, FATCA-style approach has been speedily incorporated into the European regime under authority of the MAC and various Commission Guidelines and the Commission is now withdrawing the Savings Directive as no longer necessary.

5.4. Private actors in tax administration

Private actors are everywhere in transnational tax law making and administration, although there is not scope to examine this in detail here. We already see the privatisation of tax policy – and administration – at the national level. As the "big 4" firms operating nationally become more and more embedded as global advisory firms, they accrue expertise and knowledge that vastly exceeds that of any one Treasury or national tax administration – and bureaucracies, although becoming networked, are nowhere near as networked as the advisory firms. Professional expertise in taxation is frequently claimed as a significant justification and basis for action by tax revenue agencies in national governments, and by supranational agencies such as the OECD, as well as by individual academic or professional experts. However, the expert ground is now claimed by professional advisors who contribute to or participate enormously in tax administration.

5.5. Legitimacy of the transnational administrative state

5.5.1 Legal authority and effectiveness

Legal authority for tax agencies to act cooperatively on particular terms and conditions can be established through the MAC or a network of legally binding treaties. Applying a principal-agent model, the tax administrators operating in transnational tax networks act under this delegated legal authority. However, as this expanding transnational tax administrative bureaucracy established by agglomeration or accretion from exchanges in the network, increasingly takes on an institutional life of its own, we may begin to see the need, after all, for a global tax organisation. We may want an organisation that is legally and authoritatively established by states and accountable to them and to the taxpayer "subjects" of transnational tax, for the fair and efficient making and operation of transnational tax administration.

The global financial crisis of 2008 and the G20 has given impetus to this transnational tax cooperation, after apparent failures in the 1990s. Genschel and Rixen are sceptical, or non-committal, about the potential for success of such networks and they seem to imply that this coordination is a "loss" of administrative tax sovereignty. Yet it seems, on the contrary, to strengthen that sovereignty. It is through these new, closed networks of tax administrative cooperation that states may achieve effective tax administration across borders. Moreover, these are the likely international channels through which tax states will increasingly "perform" and operationalise their national tax sovereignty. We can observe a kind of "regulation up" from the national to the global, as bureaucracies institutionalize and engage with TNCs in transnational tax administration, with the first cab off the rank being the banks and financial intermediaries implementing FATCA (Stewart 2012).

Nonetheless, it is not so easy to measure the impact of these developments. The OECD, and new institutions like the Global Forum, seeking to shore up authority, have an interest in representing success; even taxpayers and tax havens have an interest in saying how much has already been done. Tax havens may either succeed, or crash and burn if transnational tax administration becomes really effective. Rawlings has previously suggested (in 2007, before the MAC really took off), that effective implementation of transparency by tax havens could legitimate those havens that have the resources to manage the information and disclosure obligations. They may exchange information: but they remain low tax jurisdictions, perhaps having "the reverse effect of what they originally intended: through allowing [offshore financial centres] to demonstrate their good governance to the world they maintain their client base and sustain an ongoing fiscal competition between states for tax revenues" (Rawlings 2007, 58).

For taxing states, the extension of transnational tax administration multiplies power. One can argue that the extension and building of a transnational tax bureaucracy today, just as it did in times of Medieval and later state-building, is contributing to a new assemblage of territory, authority and rights and thereby can change the shape of the tax state itself. The growth in transnational tax administration means that the new bureaucratic agencies and networks inevitably have the ability to magnify power through new transnational channels; which nation states, and which taxpayers, will benefit or bear the brunt of this power in future remains to be seen.

5.5.2 Rights in transnational tax law

The legitimacy of taxation is based primarily on a legislative mandate, while the legitimacy of administration is premised in theory on accountability to that legislature and procedural fairness or due process (involving the judicial branch of government) with respect to the taxpayer. It is also premised on the rights of the citizen-taxpayers in relation to the taxing authority. However, a key question is, which taxpayers bear rights in the new transnational "assemblage" of the tax state?

The extent of transnational tax administration, even at its most basic being the sharing of information across borders, leads to new concerns about how to protect taxpayer rights and privacy where information is provided to other countries. It seems likely that transnational information exchange will evolve into the development of central repositories of information. The approach of country-by-country reporting and automatic data sharing are already moving in this direction. Taxpayer anxiety will increase as processes such as automatic information exchange, become more typical. Regularization of data processes is important both for reasons of public perception and for practical reasons of the ability to use such data in civil and criminal prosecutions of tax fraud. A reason for slow progress in establishing transnational tax information networks in the first place, was a fear that countries were establishing "an extension beyond national frontiers of an organized system of fiscal inquisition" (League of Nations 1927, in Picciotto 1992, 251). Some concerns about privacy may be more perceived than real – but it is crucial that the system is perceived to be fair. Treaties and administrative processes for transnational information and audit rely on national tax laws to protect taxpayer confidentiality. There is no overarching enforcement or surveillance of the protection accorded by national laws in respect of transnational information exchange. In Australia, the Inspector-General of Taxation is currently carrying out an inquiry into Australia's Taxpayer Charter of Rights and potential issues including those related to transnational information exchange, while Cockfield (2010) argues that it is time for a "global taxpayer bill of rights" as a means of increasing trust and confidence in the tax administration.

6. Conclusion

Current international tax rules leave the power to tax and the definition of the tax base to each nation state. Where two states assert jurisdiction to tax, widely accepted international tax rules do the following three things: (1) identify the residence or other jurisdictional link of entities to be subject to tax in a state; (2) establish the territorial source or location of income, consumption or other activity which attracts jurisdiction and to which a taxable amount is attributed; and (3) provide a rule for resolving inter-jurisdictional conflicts, thereby countering double taxation by more than one state. The current transnational legal order does not have the purpose or the effect of imposing taxation, whether on individuals, or on TNCs, which operate in the global, digital economy.

However, if the move towards anti-abuse and economic substance under the BEPS initiative is successful, this may have the effect of changing some of the foundation principles of tax treaties and of the international tax system more generally. This requires close attention to the tension between source and residence; production and consumption; or capital-importing and capital-exporting countries, that has always been a feature of the international tax regime but that is not directly addressed in the BEPS project.

International co-operation to protect the source-based corporate tax seems the only realistic option for many countries in the immediate future, even acknowledging the challenges of the global digital economy. Successful tax coordination in a project such as the BEPS project pushes states towards greater tax administrative and even revenue sovereignty, and I would suggest it is a transformation rather than a sacrifice of legal sovereignty. Increased tax coordination may not cause increased double taxation where properly done. However, if that tax coordination is focused only on identifying economic substance and stamping out abuse – removing the “outlets” for TNCs and global capital flows in the current combination of tax havens and national but permissive tax systems – then this compromise may lead us directly towards the outcome of increased tax competition for “real” economic activity between states.

Are countries stuck on the points of the Genschel-Rixen “trilemma”? This essay argues that the matter is more complex than that. Transnational tax law, and the growth of tax administrative networks – the transnational tax administrative state – extends state capacity in a number of ways. However, more fundamentally, the “global logics” that we see enabled and enacted within nation-states, are changing the contours of tax states, denationalising some aspects and reinscribing them in new transnational forms.

This process can strengthen tax states but it also has tendencies that are worrying for a broader concept of democratic accountability and legitimacy of the tax state. One tendency is the *privatisation* of tax law making, norm setting and even the provision of "public" goods and a potential reduction of the public sphere. Transnational tax law may deepen this trend which is already occurring at the national level. Another tendency is a potential expansion of *executive* power, a shift of power from legislative to executive discretion through the increasing emphasis on uncertain concepts of substance and abuse, even as these present the most likely opportunities to strengthen national tax systems in dealing with global tax challenges.

Tax jurisdiction, or tax sovereignty may be changing as we observe the "denationalisation" of this most "national" of state powers. We are currently in "a highly dynamic intermediate zone with different outcomes depending on the types of political work that gets done" (Sassen 2006, K5685). We can envisage alternative paths, but this requires us to trace – and reconstruct - the shifting assemblages of territory, authority and rights of the tax state in a global, digital era. Most genuine alternatives to the current regime require us to rethink the territorial jurisdiction and authority of tax, but also, and crucially, the rights of taxpayer-citizens, securing this citizenship not just for powerful economic actors in the global economy, but for new "publics" in the transnational tax state.

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