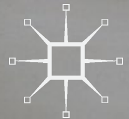
International Political Economy Series

Offshore Finance and Global Governance

Disciplining the Tax Nomad

William Vlcek



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Offshore Finance and Global Governance

Disciplining the Tax Nomad

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Preface and Acknowledgements

Abstract This section sets the tone for the book on the international politics of taxation and provides my acknowledgements

What Is It About International Politics and Taxes?

Taxation is an emotional subject, replete with a multitude of familiar quotations; for example, from Benjamin Franklin there is "in this world nothing can be said to be certain, except death and taxes". Jean-Batiste Colbert has been attributed with an agricultural metaphor for taxation: "The art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing." And more directly relevant to a book involving forms of cross-border tax avoidance, there are the words of Judge Learned Hand (*Gregory versus Helvering* 1934): "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes" (as cited in Vanistendael 1997, p. 132). These quotations are treated as aphorisms by some individuals, yet expose a further point about taxation that must be acknowledged from the start. It is the fact that the normative starting point for anyone writing or commenting on taxation in any form or function will have embedded within their analysis and commentary the political context and perspective that guide their thinking and view of the world. In other words, whether taxes are treated as a 'good' or a 'bad' for society and its relationship to the state (as much as the purpose of the state *for* society),

these views will be reflected in the tone and tenor of the text. Which means that if the reader finds themselves disagreeing with any of the points made in the following chapters, it is quite likely that the disagreement arises because they have a different view of the world, and their position in it, from that of the author.

Yet given everyone's intimate, personal familiarity with taxes—on their income, on the stuff they buy (beer, airplane tickets, gasoline), on their savings—why would anyone write a book on the topic, much less read it? (Well, other than the emotional release it may provide the author to vent their frustration over taxation, the state and how the state distributes the tax revenue in society; search the Internet for 'tax blog' to view a selection representing this approach.) One consequence of the global financial crisis was a massive increase in public debt by a number of governments as they sought to counter the impact of the crisis in their individual domestic economies. And because that debt is 'public' it is the public which must pay off the public debt generated to protect private entities in society. In other words, it is the *taxpaying resident* that must pay in the future for those efforts made to protect the present. In amongst the debates over new taxes, increased taxes, and the elimination of tax credits as part of the effort to increase government tax revenue collections has been a call to 'close down the tax havens' and bring home the money concealed by citizens in those distant locations. Such a call emerges from a belief that the active pursuit of anyone engaged in tax avoidance, tax minimisation, and tax evasion would in turn solve the debt problem. Because, clearly, 'I' already pay my fair share of tax, it's those rich people and multinational corporations that use tax havens to avoid paying their fair share that need to contribute more for the common good. But as the author seeks to demonstrate here, this problem is like so many other problems in life—there is no clear, simple solution.

Beyond the central position of taxation in the collection of stories that fill these pages, this is a text of global political economy and it is one for a number of reasons. First, taxes are economic measures that are politically defined and politically determined (as demonstrated by the statements of politicians explaining and rationalising any change in taxation). Second, to speak of a tax haven is to speak of another state, or in the context of international relations another legal, territorial jurisdiction. Therefore, any discussion of taxation and tax havens in the world is in truth a conversation about global political economy, whether it is about US banks using the Cayman Islands for overnight, interest-generating deposits;

multinational insurance firms using reinsurance corporations registered in Bermuda; or the kleptocratic 'President for Life' of a developing economy (e.g. Ferdinand Marcos and Sani Abacha) using an American or Swiss bank account to hold the wealth they stole from their citizens. The issues of interest here are both economic and political, and they cross state borders, which combined set this analysis in the discipline of global political economy.

I should also set out one disclaimer at this point, as with my previous work on offshore finance, the presence of the term 'tax haven' is to be understood as written 'under erasure'. Following Jacques Derrida, this action recognises the problematic nature of the term and its contested meaning as much as its contested usage. Its common usage in the media and the literature is inconsistent, conflicted, and often pejorative. Hence the absence of the term from the title of this monograph despite its appearance within these pages reflecting its (mis)use by the various actors and actions under consideration.

Reference

Vanistendael, F. (1997). Judicial interpretation and the role of anti-abuse provisions in tax law. In G. S. Cooper (Ed.), *Tax avoicance and the rule of law* (pp. 131–54). Amsterdam: IBFD Publications BV in co-operation with the Australian Tax Research Foundation.

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Beyond that workshop a number of the issues explored in this book have been presented in one form or another in workshops and at conferences over the past several years; I appreciate the feedback and comments received, both formally and informally from the other participants. Particularly useful have been conversations with Godfrey Baldacchino, Bob Kudrle, Bill Maurer, Ronen Palan, Mike Rafferty, Len Seabrooke, Jason Sharman, Baldur Thorhallsson, Eleni Tsingou, Duncan Wigan, and for anyone whose name I missed, apologies. My work contributing to a report prepared by the consultancy Blomeyer and Sanz for the European Parliament's Committee on Budgetary Control helped to focus my thoughts on the policy implications with a number of the government and multilateral initiatives covered in this text. I especially appreciate my conversations with the report's lead author and editor, Roderick Ackermann.

Among my colleagues at the University of St Andrews, several have been especially gracious in listening to me natter on about offshore finance

and international taxation over the past few years, and I honestly appreciate their graciousness for what was most likely quite boring for them. My warmest regards to Javier Argomaniz, Faye Donnelly, Caron Gentry, Rikard Jalkebro, Jeffrey Murer, and Rashmi Singh; and to family and friends who also have graciously endured listening to me prattle on about taxation over the years, including Miriam Allam, Rosemary Bern, Linda Dilley, Jim Miller, Robert Miller, Mark Stettler, and Catherine Vlcek (my Mum made the mistake one afternoon of asking what I was working on and ended up on the receiving end of a half-hour monologue).

And finally my thanks to the team at Palgrave Macmillan, Christina Brian, Tim Shaw, and Judith Allan, for their enthusiastic support with the writing of this book. Formal acknowledgement is also due to Taylor and Francis, publishers of the journal *Third World Quarterly*, in which my article 'Behind an offshore mask: sovereignty games in the global political economy' was published in volume 30, issue number 8 (December 2009), pp. 1465–1481. Elements of that article have been further developed in the chapter 'Sovereignty and the Tax Nomad'.

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Acronyms

ARA	Autonomous Revenue Agency
BEPS	Base Erosion and Profit Shifting
BVI	British Virgin Islands
CCCTB	Common Consolidated Corporate Tax Base
CRS	Common Reporting Standard
EC	European Commission
EU	European Union
EUSTD	European Union Savings Tax Directive
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
G7	Group of 7 (Canada, France, Germany, Italy, Japan, UK, USA)
G8	Group of 8 (G7 plus Russia)
G20	Group of 20 (G8 plus Argentina, Australia, Brazil, China, India, Indonesia, Republic of Korea, Mexico, Saudi Arabia, South Africa, Turkey, and the EU)
GAO	General Accountability Office
GFC	Global Financial Crisis
GNP	Gross National Product
HMRC	HM Revenue and Customs
HNWI	High Net Worth Individual
IBC	International Business Company
IGA	Intergovernmental Agreement
IMF	International Monetary Fund
IP	Intellectual Property
IRS	Internal Revenue Service
MLAT	Mutual Legal Assistance Treaty
MNC	Multinational Corporation

NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OFC	Offshore Financial Centre
OT	Overseas Territory
PAC	Public Accounts Committee (British House of Commons)
TIEA	Tax Information Exchange Agreement
UN	United Nations
WTO	World Trade Organization

Globalisation and the Tax Nomad

In an article published in 2004, I argued that the efforts undertaken by the Organisation for Economic Cooperation and Development (OECD) at that time, exemplified in its report *Harmful Tax Competition: An Emerging Global Issue*, were in fact a 'rearguard action against globalisation' (OECD 1998). Central to that analysis was the claim that globalisation increasingly had limited the capacity of the state to collect taxes from its citizens. It was a concern justified by the significant contribution made by personal income taxes to the total amount of tax revenue collected in a developed economy juxtaposed against the myriad methods offered by globalisation to avoid taxation (Vlcek 2004). This condition of globalisation, of the speed available to transportation, communications, and travel today, as compared to 50 years ago, has facilitated the development of a new form of nomad. For the individual person, Jacques Attali named them the 'hypernomade' (Attali 2003, pp. 395–97). A similar condition exists for the multinational corporation (MNC), operating in and across multiple jurisdictions, though perhaps it is only the MNC's capital and intellectual property that is truly nomadic. These themes are discussed further in the chapter "Sovereignty and the Tax Nomad", while the methods developed to counter the practices used to minimise and avoid taxation are explored in the chapters "A Collective Response to the Tax Nomad", "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'" and "Global Tax Governance and the Tax Nomad".

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Debates over state decline due to globalisation versus the continuing role and power of the state in reproducing globalisation will not be rehearsed here (Strange 1996; Held et al. 1999; Weiss 1998, 2003). Nonetheless, the concept of globalisation remains prominent in the statements made by different parties to justify their actions in the domain of international taxation (European Commission 2015b, c; OECD 2013a, 1998). It is not globalisation, however, but rather it is the continuing influence of state sovereignty and the practices of international society with respect to sovereignty that are the determining features here. This book is not about the 'commercialisation' of sovereignty by some actors in recreating offshore finance and the role of offshore financial centres (OFCs) for international taxation (Palan 1998, 2002). Sovereignty for this analysis involves the capability to determine national tax legislation and regulation, along with determining the citizenship of the taxpayer. Citizenship in turn identifies some of the parties with a claim on one's income for purposes of taxation. These concepts of sovereignty for creating the tax nomad, as much as demarcating the limits of taxation, are explored further in the chapter "Sovereignty and the Tax Nomad".

The concept of the tax nomad is central to the analysis provided in this book. It is both a creation of the practices of state sovereignty and a challenge to state sovereignty. There is no single example as a representative model for the tax nomad because the concept applies to MNCs as well as to individual persons when they seek a process for minimising their tax obligations to any and all jurisdictions. The resulting dynamic for minimising tax obligations leads to different approaches among these MNCs and individuals when operating as a tax nomad. Some of these differences will be seen in the sample of MNCs considered in more detail throughout the book. Similar mechanisms may be used by the individual taxpayer, such as taking advantage of different national rules for determining a person's tax residency.

In the decade since I first suggested that international efforts to round up and corral nomadic capital was a rearguard action against the forces of globalisation, the world economy has passed through yet another boom and bust cycle. The global financial crisis (GFC, 2007–2009) reduced government tax revenue collections at a time when many of these same governments sought to support their domestic economies with massive infusions of money (Frank 2011). As already noted in the Preface, one obvious result of these events was the significant increase in public debt, as government expenditures vastly exceeded revenues. Naturally, government tax administrations

focused on increasing revenue collections, while legislatures increased tax rates, crafted new taxes, and redoubled efforts against tax minimisation, tax avoidance, and tax evasion.[1] One analytical strand provided in the following chapters is that major developed states, with actions initiated through the Group of 20 (G20), have in essence re-introduced the job of 'tax farmer' to the global economy. This action is needed in order to collect tax revenue from persons (natural and legal) that have been reluctant to pay income tax to their jurisdiction of residence for any income generated in other jurisdictions. In this instance, the tax farmer involves the process for getting other states to identify those untaxed assets and to report them to the appropriate home jurisdiction. Alternatively, these other states may collect the tax and rebate the revenue collected to the home jurisdiction which has been the case in the European Union (EU) since 2005 (explained further in the chapter "A Collective Response to the Tax Nomad"). But it is interesting to observe that not all wealthy citizens become tax nomads, perhaps in the awareness that their tax affairs attract media attention and public interest.

Paying Your Taxes Can Be Public

In a liberal democracy, taxation is presumed to grant the taxpayer a voice in government; in theory, it is the right and obligation of voting for one's governmental representative while in practice the wealthy exercise their voice through campaign contributions along with lobbying (and funding lobbyists) for the case of the USA. Consequently, it was somewhat exceptional to have a leading high net worth individual (HNWI) in the USA decry the US income tax system and request that he be granted the privilege to pay higher income taxes.[2] The cover to the *Economist* for 24 September 2011 presented to viewers at the newsstand a cartoonish image for the stereotypical English fox hunt, only the fox had been replaced by the rich capitalist ('Hunting the rich' 2011). This story arose because Warren Buffett, the epitome for American wealth and 'Sage of Omaha', had publicly complained that he wasn't paying enough income tax and declared, 'Please, sir, I want to pay some more' (Buffet 2011). In response, a public debate on taxing the richer members of society echoed across the OECD member states.[3] These jurisdictions are highlighted here to underscore the point that wealthy citizens of developing economies were not petitioning their governments to increase their income tax obligation. Surprisingly, for a persistently domestic (i.e. national) debate, this question about income tax and responsibility targeted at the wealthy members

of society possesses a number of international dimensions. Commentators for and against the petition to increase taxation on the wealthy introduced those international aspects in support of their claims and arguments, while ignoring perhaps the other contextual aspects for the foreign society held up as an example and role model to their audience.

Let me start, however, with Mr Buffett, who based his petition on a survey among his immediate staff revealing they individually paid more income tax than he did. It was quickly pointed out in response to his op-ed article that this difference was, in fact, grounded in the definition of income (Politi 2011). Where income consists of salary and wages, the revelation that he paid less income tax than his staff is less spectacular because it is likely that Mr Buffett does not actually receive much 'income'. As an investment manager, his wealth and its continued growth is more probably a mixture of capital gains (which in the USA is taxed at different rates depending on how long the asset has been owned), interest, dividends, and that favourite of hedge fund managers, 'carried interest'. What is more interesting in the context of Mr Buffett's petition to pay more tax is the fact that the US Treasury's Bureau of the Public Debt has provisions to accept donations from citizens that want to contribute more to the federal government.[4] In other words, for any citizen that feels an unexplainable urge to give more money to the US government, such as Mr Buffett, the process is there and available to all taxpayers.

The *Economist* article noted that Mr Buffett's plea was echoed by socially conscious wealthy citizens in France, while the British wealthy remained quiet ('Hunting the rich' 2011; Hollinger 2011). It was noted that British citizens domiciled in the UK at that time were already subjected to the highest marginal income tax rate (50 per cent) of any OECD member state. Again, it is a tax on income, and the definition of 'income' varies from one situation to the next. Perhaps these European states do not have a process whereby concerned citizens can give more money to help their government pay its debt, but that is not really the issue with these pleas from rich people to raise their taxes. It's not the point that this minority does not have some way to give more money to their governments. Rather it is the fact that they don't want to do it alone, quietly, and anonymously. Mr Buffett closed his op-ed with 'My friends and I have been coddled long enough by a billionaire-friendly Congress. It's time for our government to get serious about shared sacrifice' (Buffet 2011). In other words, the 'Super-Rich' don't want to be unsung heroes of the Republic, they want the rest of the population, and specifically the non-wealthy, to know that

the rich are 'doing their bit'. Moreover, this is not an individual noble endeavour. The petitioners want to make sure that all the rich pay more taxes. Perhaps they are worried that the peaceful Occupy Wall Street movement would transition to violent protestors and follow historical practice by taking up pitchforks and torches to storm the chateaux of the super-rich, in echoes of 1789 and the unfair tax system of pre-Revolutionary France.

Equally, not paying your taxes by taking measures to conceal your wealth and income can be public. Whistleblowers and leaked documents have been a critical contributor to the shift in attention placed on the tax practices of the wealthy individual and the profitable MNC in recent years. Up to 130,000 people had their account details revealed in the information collected by French tax authorities from a former employee of HSBC in January 2009 (Borger 2012). Meanwhile, another whistleblower, Bradley Birkenfeld, received a 40-month prison sentence in the USA for his part in facilitating the tax evasion activity of wealthy Americans. He also is the recipient of a US$104 million whistleblower's compensation package. The largest payout to date to a whistleblower it reflects 26 per cent of the amount of tax collected by the US government from UBS as part of its settlement (Saunders and Sidel 2012). Similarly, there are whistleblowers and leaks with details on citizens living elsewhere in the world. The details on the use of corporate vehicles to conceal financial assets and other property were contained in a large database of documents on a hard drive provided to the International Consortium of Investigative Journalists in 2013 (Campbell 2013). A focused analysis of the details on Chinese citizens with corporate vehicles identified in the database was later published in English (translated to French for publication in *Le Monde*) and Chinese (Ball and Guardian US Interactive Team 2014; Walker Guevara et al. 2014a, b).

Beyond the revelations for individual HNWIs were the revelations about corporate income tax minimisation accomplished with the assistance of governments seeking foreign investment capital and any accompanying employment for their citizens. Information and documents on the 'comfort letters' (advance tax rulings) provided by the Luxembourg tax authority to MNCs with subsidiaries registered in Luxembourg became public domain in November 2014. The revelation of these advance tax rulings became known as 'LuxLeaks' in Europe and raised the public profile of the government practice.[5] An advance tax ruling is provided by a tax authority to establish a clear indication for how an MNC's corporate income tax

would be calculated by that tax office (European Commission 2015a). The European Commission (EC) expanded the scope of its investigation beyond the tax authority of Luxembourg to request information on any similar advance tax rulings from all Member States in order to investigate the possible occurrence of illegal state aid. These events are discussed further in the chapter "A Collective Response to the Tax Nomad".

It also is important to recall that even though we may criticise the bankers for their excessive bonuses, in point of fact income tax was and is collected on those bonuses. A portion is deducted at source, in the UK by HM Revenue and Customs (HMRC) and more extensively in the USA by the Internal Revenue Service (IRS) at the federal level, followed by the state tax agency, the county tax agency, and very often by a city tax collector as well. It is at this point that Buffett's request to pay more income tax became an issue, not of a normative nature but of a fiscal balance nature. Where for Karl Marx 'religion is the opium of the people', for this issue area it is tax revenue that serves as the opium of a government (Marx 1844). Consider the situation experienced by the New York financial sector, where taxing the rich is definitely an opiate for the state and local governments. In the state of New York, the top 1 per cent of income earners paid 41 per cent of the income tax revenue collected in 2007, for New Jersey that group also contributed 41 per cent of all income tax collected, and in Connecticut they provided 40 per cent; the New York-based investment bankers and hedge fund managers did their bit. This is not just an East Coast phenomenon, California took 45 per cent of its income tax revenue from its top 1 per cent group (Frank 2011). As a result, when the incomes for the high earners dropped precipitously after the onset of the financial crisis, it was immediately felt by the state revenue collectors who were so reliant on that income tax revenue to meet the state's obligations for public goods (i.e. unemployment benefits). Consequently, the topic of concern is not just about the tax rate, but it is also about the tax base, what is to be taxed, and how wide or deep is that pool of assets to be taxed.

The Parable of Libussa

The experience of Mr Buffet is not unprecedented, for not only is taxation an emotional topic (as demonstrated by the quotations presented in the opening paragraph of the Preface), it is also a topic with a long history of debate. There is, for example, this passage from a nineteenth-century Austrian play retelling the story of the mythical Bohemian founder of the city of Prague, Libussa (Grillparzer 1941 [1872], p. 63).

That is the man whom you and I have sought.
What now is free and light he will make fast,
And he will be of iron like his table
That he may fetter you who are of iron.
He'll put an impost on the air you breathe,
And load the very bread you eat with taxes;
He'll give you justice, just at once and unjust,
In the place of reason he will give you law;
And these things will increase as time moves on
Till all you do for other men is done.

– Franz Grillparzer, Libussa, Act 2 (1872)

Embedded here is a quotation that is particularly popular among anti-taxation writers: 'He will place a tax [impost] on the air you breathe and on the bread you eat', though it has admittedly been taken out of the context of that play and the political and social conditions present at the time the play was written. The play and its author have been the focus of literary analysis for more than a century incorporating the full spectrum of analytical frameworks and critical methods popular throughout that time (see e.g., Pizer 1998). Most of these literary studies interrogate aspects to the play and its author that are not relevant to the topic of this book. At the same time, this passage carries meaning for the identification of the modern international tax farmer.[6] The above passage is from a translation published in 1941. A more modern translation of the phrase ('He will place a tax on the air you breathe and on the bread you eat') appears across a wide range of blogs and Internet websites. A Google search found 50 instances on 1 July 2011, over 3000 iterations in March 2013 and 9590 results in June 2014.[7] The repetition of the phrase around the Internet speaks to the resonance it holds for those that believe in resisting the tax collector. It is a resistance due to a fear that tax not only will be forcibly extracted but also anything and everything will have a tax imposed on it.

While this individual phrase as well as the longer text at the passage above is somewhat out of context, it points at the larger political economic issue raised by the monologue. The play was published posthumously, having been completed in Vienna in 1848 and therefore informed by the revolutionary foment in Europe at the middle of the nineteenth century. John Pizer, for example, has summarised several analyses of the play that situate its main characters as reflecting eighteenth-century Austrian politics and monarchical rule, that Libussa and her consort (Primislaus, the 'he' in the quotation) offer a disguised commentary on Franz Joseph I, who ascended the Austrian throne with the 1848 Revolution (Pizer 2001).

This closing speech to Act II is made by Libussa when acquiescing to public requests that she take a consort, in order that a 'man' would join her on the throne she inherited from her father. The obvious analytical point is that this action in the play represents a shift from matriarchal to patriarchal rule in pre-Christian Bohemia just prior to the founding of the city of Prague (Reeve 1999, p. 93). By extending our reading of this text beyond the popular 'tax on the air you breathe' sound bite and incorporating the preceding four lines, I suggest this 'man' represents a global governmentality regime that seeks to 'make fast' the global capital that was previously 'free and light' (Bauman 2000, p. 58). It is his responsibility to pursue capital that has become increasingly nomadic in the condition identified as globalisation in the world economy. Here Primislaus assumes a new role, serving to represent the tax farmer and echoing the fact that before marrying Libussa he was an ordinary Bohemian peasant. The story of Libussa crystallises the relationship of taxation with state control (and prior to the state with the control exercised by the Chief, Warlord, Elders, Prince, King, Emperor, etc.).

Frequently set against the challenge for taxing nomadic or 'highly mobile capital' (in the post-capital controls age) is the claim that the tax burden has shifted to the shoulders of immobile labour. Except that labour is not immobile in the way that land is immobile. Consequently, there is a related argument for increasing the tax on land as a way to increase taxation on the wealthy because land cannot relocate to a Caribbean tax haven. The ownership of the land, however, can relocate to a tax haven through a transfer of ownership to a corporate entity registered in the tax haven, a technique believed to be used to conceal money laundering (Financial Crimes Enforcement Network 2016; Story 2016). Labour, for reasons of language, culture, or family, chooses to remain relatively immobile. The fact that developed economies over the past few decades have debated multiculturalism and bilingual primary education attests, however, to the substantial presence of mobile (foreign) labour in society. Central to concerns over migration (legal and illegal) is the simple fact that immobile labour does not want the competition presented by the presence of mobile labour. In the terminology of *A Thousand Plateaus* (Deleuze and Guattari 2003) introduced in the next chapter, the sedentary are resisting the presence of the nomadic. This aspect for the perception and treatment of the nomad in society today is always and everywhere present in the background throughout the following discussion. The sovereign border identifies who is local and who is foreign, and the treatment accorded to the foreign is often different (and distinguished) from the treatment of the local.

Measuring Nomadic Capital

A multitude of figures are bandied about for the amount of money located in tax havens and the offshore world. I am always hesitant to repeat any of these numbers because they are guesses based on assumptions, and those assumptions may not always be shared with the figure that is offered as a statement of fact. The more refined figures may involve some economic analysis, taking data its author believes to be known and verifiable, first calculating what should be the figure for total global assets and then extrapolating out of these two numbers a figure for the unmeasured, unknown, and unverifiable amount of 'missing billions/trillions hidden in tax havens' (BBC News 2012). In my former career field, such figures were what we called a WAG or a SWAG, that is a 'wild ass guess' and a 'scientific wild ass guess'. As demonstrated in the work collected in *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict* (Andreas and Greenhill 2010), not only are these claims difficult to replicate without knowledge of the framing assumptions for the data and subsequent calculations, simply stating the figure repeatedly appears to make the figure more believable (e.g., Andreas 2010). The result is to produce an appearance of 'truthiness' around the figure, represented, for example, by the repetition of a collection of estimates included in a report on 'Offshore Tax Evasion' released by the US Senate Permanent Subcommittee on Investigations in 2014 (Permanent Subcommittee on Investigations 2014, p. 9).[8] In that instance, the figures were attributed variously to a US State Department document from 2000, to a report produced by the OECD in 2007, and to the estimate released by the Tax Justice Network in a 2012 briefing paper.

This position is amply supported by the wide-ranging estimates offered by a multitude of analysts and commentators on the size of lost tax revenue because of tax havens, transfer pricing and 'secrecy jurisdictions'.[9] For example, Ronen Palan, Richard Murphy, and Christian Chavagneux offer a figure of US$255 billion in lost tax revenue globally, while Oxfam extrapolated a decade earlier that developing economies were losing at least US$50 billion annually (Palan et al. 2010; Oxfam 2000). There are also the figures contained in US Congressional documents asserting that the USA suffers a loss of US$100 billion in tax revenue annually because of the use of tax havens by US-based corporations (Doggett 2011). Absent from most analyses blaming 'globalisation' for the inability of the state to collect tax from its residents' nomadic capital is an explicit recognition for the choice that was made to minimise, avoid, or evade one's

tax obligation. At its most basic, that decision may be framed as an act of selfishness on the part of the individual, who does not wish to share the proceeds of their labour and financial success with the rest of the society in which they reside. While this may be viewed as a collective action problem, one in which the challenge is to get all members of a society to contribute to the public goods provided by its government, it may also be viewed as a matter of 'trust' in society and in that government. In other words, that the individual taxpayer must trust in other members of society to contribute their 'fair' share and also trust that the government will use the tax revenue for public goods and not waste it on prestige projects, welfare cheats, or outright corruption (Daunton 2001, pp. 10– 11).

A further factor embedded in the construction of these figures involves the nature of counting, or accounting for, them. One analysis of international capital flows identified the fact that a pool of capital is counted multiple times in multiple forms as it crosses national borders and is utilised by the investment practices of global financialisation (Coates and Rafferty 2007). What began, and is counted in a bank ledger as a liability, in the form of a bank deposit in one jurisdiction may be used as collateral for a loan. In turn that loan may be used to purchase company shares on a foreign stock exchange which may then be traded for dividend-paying bonds from yet another jurisdiction. This particular problem with international accounting practices was not among the list of issues indicated in the data used by Gabriel Zucman in his effort to develop an economics-based estimate for the untaxed wealth residing offshore to the jurisdiction of its owner (Zucman 2013, 2014, 2015). Zucman explains the rigour of his method and offers the data for replication studies with his academic journal articles and at his website.[10] But if the gap between global assets and global liabilities, as used in his calculations, includes multiple iterations for the same, original quantity of wealth, then the size and extent of that gap is as nebulous as all of the figures used to generate any of the other estimates made for the untaxed wealth present in the global economy.

In light of these figures for the amount of untaxed wealth believed hidden from tax assessors, one has to wonder why any citizen anywhere actually pays income tax. It is appropriate then at this point to introduce the concept of 'tax morale'. Tax morale is understood in the literature as the willingness of the individual to pay taxes, with a variety of motivations ranging from the fear of prosecution to the sense of moral obligation (Randlane forthcoming, pp. 3–4). For the case of Warren Buffett, his tax morale is apparently quite high since he has indicated publicly his willing-

ness to pay more income tax than is presently required of him. The concern behind the efforts to capture the tax nomad and collect taxes from them emerges from a belief that their tax morale is low to non-existent. Low tax morale may be a product of many factors, certainly among them is the free-rider problem arising from a lack of trust that fellow taxpayers are actually paying their fair share. It is a common perception that a number of MNCs are not paying their fair share, and several MNCs are considered in the chapter "Multinational Corporations and the Digital Economy" for their use of intellectual property to minimise their corporate income tax obligations. Tax morale then represents one factor that may prompt or explain the nomadic practices of individuals, if not also the tax minimisation practices followed by MNCs.

It is useful to understand some of the other terms frequently found in any study of international taxation. Very often, for example, the terms 'tax haven' and 'offshore' are conflated as representing the same thing, yet while they may exist in the same location they are operationally different. A tax haven may be understood as a jurisdiction offering special tax rates or tax concessions to attract foreign capital, though not necessarily for domestic investment purposes. Operationally, the 'offshore' may be any foreign jurisdiction which does not share taxpayer account information or withhold taxes on behalf of the taxpayer's home tax authority. Again, this is an area in which the USA is an exception, as one of the very few states which seeks to collect tax on the worldwide income of its citizens, irrespective of where they reside and earn that income. The other state taking this approach to taxation is Eritrea, which admittedly has a substantial diaspora as a percentage of its total population. Consequently, with its worldwide-based tax regime it is important for the US government to have access to information on foreign income in order for the tax authorities to discourage and prevent tax evasion. For the sub-national jurisdictions comprising the USA, their citizens' federal income tax data is used to determine the amount of state and local income tax owed. Federal regulations and legislation created a national income information reporting regime comprised of data submitted by employers and financial institutions to the IRS. The states and other localities that collect an income tax in turn rely on the data collected by the IRS for calculating the income tax owed by their residents. The individual taxpayer, however, remains responsible for voluntarily reporting any and all foreign source income which creates the space for some to evade their income tax obligations as a US citizen. The consequences for US citizens are discussed further in the chapter "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'".

Finally, the reader may have observed the regular use of the word 'jurisdiction' as opposed to state, country, or territory throughout the preceding discussion. For the academic discipline of International Relations, a state has a well understood (if also contested) definition, wrapped around sovereignty as discussed in the next chapter. It is a definition that excludes a number of territories that are not recognised as states, which nevertheless possess sufficient independence of action to craft their own tax legislation and to operate a financial centre. Some of these territories have been categorised as tax havens or OFCs and are therefore part of the wider domain of this study. The use of jurisdiction here is to be inclusive of both states and these non-independent territories, and where the word 'state' is used it should be understood as excluding these non-independent territories. A further qualification may apply when the discussion involves the USA with its 50 sub-national 'states', because they also are non-independent territories crafting their own local tax legislation and they may operate a financial centre under the umbrella of US federal legislation. The US states of Delaware and Nevada receive mention on this point later in the book. It is a situation that also means tax competition can exist and operate among these sub-national jurisdictions as their governments seek to enhance their local economies.

The Structure of the Book

As foreshadowed by the reference to a global governmentality regime in connection with the Libussa play above, there is implicit in this analysis of global taxation a perspective influenced by Michel Foucault and his analysis on governmental practices to regulate, control and discipline citizens. Where once taxes simply financed the sinews of the state, and then the provision of public goods, they now also function as a Pigouvian lever over the practices of citizens (e.g. alcohol and tobacco) and the promotion of the 'greater good' (e.g. carbon capture to counter climate change). As explained in the next chapter, it is governmentality rather than governance, because global governance implies consent. The argument developed here is that in the end transnational efforts have been much more about the deployment of power, directly and indirectly, in order to gather up nomadic tax revenue.

Irrespective of whatever level of analysis considered in these chapters—individual state, regional collection of states, or international organisation of states—each national government has its foremost regard on tax revenue

collection for the benefit of its domestic constituency. International negotiations towards cooperation for addressing issues of cross-border taxation remain contested in seeking the best possible outcome for one's own domestic constituency. Consequently, whatever measure and extent of cooperation may be achieved among the negotiating parties, it nonetheless occurs in the shadow of state power. This final point will become clear as each individual strategy for tackling the tax nomad is considered. Finally, I recognise that the means and mechanisms used to pursue the individual tax nomad are different from those used to pursue the corporate tax nomad. But the factor explored in this analysis is beyond simply the method used or the measures necessary to circumvent or prevent its use. Rather it is the nature of state sovereignty as a practice in global political economy for its role in shaping and limiting the ability of the state to collect tax on nomadic capital which is the factor under investigation.

The chapter "Sovereignty and the Tax Nomad" begins by setting the groundwork for that exercise of power in the performance of sovereignty for determining taxation, both domestic taxation and cross-border taxation. It is sovereignty that separates jurisdictions and sovereignty that shapes any move for cooperation among jurisdictions in conjunction with that exercise of power. Sovereignty also creates the tax nomad, and this concept is further developed in the chapter in order to identify the practices both of the individual and the corporation in relation to taxation. Finally, the concept of governmentality as applied in this book is presented and situated in the understanding for the role of sovereignty and the tax nomad that earlier were developed. The application of Foucault's concept of governmentality to explain the conduct of power behind the global efforts to pursue tax nomads reflects the author's preference for this theoretical literature as compared to other theorists of power in society. Other theorists could be equally appropriate for application to the study of international taxation and the construction of mechanisms to overcome the sovereign barrier that creates the space for arbitrage and the existence of the tax nomad. The work of Steven Lukes, for example, could have been applied or the theoretical tools refined by Michael Barnett and Raymond Duvall (Lukes 2005; Barnett and Duvall 2005). The concept of governmentality nevertheless provides a more explicit recognition of the presence for both discursive and material power in operation as states pursue the tax nomad.

The practices of the corporate tax nomad in the context of the digital economy are covered in the chapter "Multinational Corporations and the

Digital Economy". The focus is with intellectual property as a subset of the intangible assets owned by the firm and its use by the MNC to accomplish cross-border tax minimisation. Several case examples are presented, based on public documents and media reports covering the legislative investigations conducted on the tax minimisation practices of specific MNCs. In addition to the discussion of the legislative investigations of Apple, Inc., Google, Inc., and Starbucks Corporation, the chapter highlights the fact that individual ownership of intellectual property also may be used to minimise personal income tax. The concept of 'image rights' is demonstrated with the example of prominent English football player David Beckham. This case is supported by two further examples, the trademark rights covering US college football coach Urban Meyer and the image rights at the centre of a tax case in Spain involving Argentinean football player Lionel Messi. Intellectual property acquires nomadic properties through the use of a corporate vehicle, a corporate subsidiary registered potentially in another jurisdiction, which introduces the US state of Delaware to the chapter as an early provider of these services. The companies registry of Delaware and its court system structured specifically to deal with court cases involving corporation law comprise a model emulated by other offshore jurisdictions. The chapter then applies these concepts for understanding the tax minimisation conduct of the MNCs listed above and their European operations.

The background concepts developed in the chapters "Sovereignty and the Tax Nomad" and "Multinational Corporations and the Digital Economy" are applied throughout the subsequent three chapters, starting with the consideration in the chapter "A Collective Response to the Tax Nomad" of the strategies and practices used by the EU to deal with the tax nomad. As a regional organisation with institutions and structures created to establish and maintain a unified Single Market, the EU should be adequately prepared to address cross-border taxation. Yet those institutions and structures are constrained by the intervening influence exercised by sovereignty on all matters of taxation. Consequently, the chapter argues the EU revived the concept of the tax farmer, though admittedly that term does not appear in any EU documents or communications. The argument made here, after reviewing the history and methods of tax farming, is that the operation of the EU Savings Tax Directive (EUSTD) was functionally the same as tax farming. The Savings Tax Directive concerned the individual European tax nomad, and the chapter also explores the EU's strategy for dealing with the corporate tax nomad. For the corporate tax nomad, the proposed solution is to determine the EU tax base of an MNC and

then apportion it among the Member States in which the MNC operates. It remains a proposal at the present time and may be overcome by events depending on the success of the global-focused initiative of the OECD discussed in the chapter "Global Tax Governance and the Tax Nomad". Finally, this chapter considers the tactics used by the EC to deal with the tax minimisation practices of MNCs, to include those discussed in the chapter "Multinational Corporations and the Digital Economy". The tactic is to treat a tax ruling granted by the Member State to the MNC as a form of state aid and then to determine if that ruling constitutes illegal state aid. These tax investigations by the EC have transnational implications which are touched on in the chapter.

From the EU as a regional actor engaging with tax nomads, the chapter "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'" turns the attention to the USA as an individual hegemonic state actor in the world economy. First, it is important to recognise that the USA claims the right to tax its citizens' (individual and corporate) worldwide income. This claim alone presents cross-border taxation implications and serves to some extent to make the relations of the US government with its citizens involving taxation somewhat unique. The hegemonic position of the USA in the world economy presents it with the capacity to take actions that are not available to other state actors. Other states have in turn used that cooperation with the USA as justification to argue for similar cooperation with their tax authorities. The chapter explains the historical treatment by the US government to get information on the foreign accounts of individual taxpayers, leading to the 2010 legislation known by its acronym, FATCA (Foreign Account Tax Compliance Act). From one viewpoint, it is US legislation which has produced corporate tax nomads, and this viewpoint is explored along with the continuing efforts of the US government to address the resulting problems with corporate income tax collection. Those continuing efforts are constrained by existing US tax legislation, a problem acknowledged by the government but any new legislation is a victim of legislative politics in the USA. The chapter closes with a section demonstrating the influence of US tax policy on the tax practices of other jurisdictions, the case of the United Kingdom government using FATCA as a lever to achieve a similar information sharing agreement with its non-independent jurisdictions.

In the chapter "Global Tax Governance and the Tax Nomad", the analysis shifts to the proposals developed for dealing with tax nomads at the global level. The use of US tax policy to achieve the cross-border taxation

objectives of other jurisdictions remains an important factor for the production of global governance in cross-border taxation. It is discussed as part of the G20's involvement in taxation since the financial crisis with its guidance for the OECD on tax issues. After explaining the OECD's history with the topic of tax competition, the chapter situates its relationship with the G20. The G20 emerged as the 'steering committee' for the world economy following the financial crisis, and since 2009 has provided direction to the OECD on developing mechanisms to address tax nomads from the global level. Those mechanisms deal with both the individual tax nomad (and leverage the US legislation FATCA for global application) and the corporate tax nomad. The discussion on the OECD's recommendations for the cross-border taxation of MNCs is limited to the factors covered earlier in the text, the use of intangible assets (intellectual property) and subsidiary firms to arbitrage competing national tax legislation. Some thoughts are provided on the interaction of OECD recommendations with US corporate income tax legislation, acknowledging that the most interesting interactions likely are still to occur.

The final chapter pulls together the various lines of inquiry developed in the preceding chapters. In particular, it develops the case that international efforts to produce global governance for taxation create a global governmentality regime to achieve compliance in the global political economy. The politics of taxation, as a debate over the distribution of goods, raise a number of questions for further research. Several of these points are introduced by way of conclusion, including the legitimacy of any global governance mechanism emerging from the G20 and OECD, along with the role of the USA with its deployment of material power for its own interests to collect tax on the worldwide income of its citizens.

Notes

1. The distinction between these three terms is as much practice as it is legal. Tax evasion is to take fraudulent and illegal measures to evade one's legal obligations to pay tax. Tax avoidance is to take measures within the letter of the law to reduce one's taxes as much as possible, even if the measures may not be within the 'spirit' of the law. Tax minimisation represents the practices of a firm operating across jurisdictional borders to reduce as much as possible within the letter of the law and all applicable international agreements its tax obligations to each involved jurisdiction.
2. Portions of this section were previously presented in a blog entry for the University of St Andrews, School of International Relations blog, 'Plato's

Cave' in November 2011 (now available at http://www.platoscave.hcri.ac.uk/?p=178).

3. Subsequently, Thomas Piketty published his tome on income inequality to great acclaim (Piketty, 2014).
4. Visit the web page at http://www.treasurydirect.gov/govt/reports/pd/gift/gift.htm.
5. The European Parliament established the Special Committee on Tax Rulings (TAXE) to investigate the tax treatment of MNCs through tax rulings by EU Member States, its website is at http://www.europarl.europa.eu/committees/en/taxe/home.html.
6. Unfortunately my lack of German language skills limits my complete understanding of the full extent of Grillpazer studies and the analysis of *Libussa* in particular, that are available in the German literature.
7. Dictionary.com, "he_will_place_a_tax_on_the_air", in Columbia World of Quotations, New York: Columbia University Press, 1996. Available: http://quotes.dictionary.com/he_will_place_a_tax_on_the_air, accessed: 1 July 2011.
8. This particular report is discussed further in the chapter "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'". On 'truthiness', see Jacques Steinberg, '2005: In A Word; Truthiness', *New York Times*, 25 December 2005.
9. The term 'secrecy jurisdiction' was adopted by the Tax Justice Network in 2008 in order to avoid explicitly referencing taxation and instead to focus on the 'secrecy' aspect they argue is the underlying problem, see http://www.secrecyjurisdictions.com, accessed 26 July 2011. One problem with this approach is that my 'privacy' is your 'secrecy'; consequently the end of secrecy is at the same time, arguably, the end of privacy.
10. See http://gabriel-zucman.eu/hidden-wealth/.

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Sovereignty and the Tax Nomad

As indicated in the preceding chapter, the various concepts used in this book are presented in the following sections. First is a review of sovereignty as it is understood and used in International Relations and global political economy. This concept is pivotal to debates over globalisation and the problems faced by governments to identify income in order that they may collect the tax they claim is due from that income. Sovereignty is then applied to the production of the nomad, so that the concept of the tax nomad may be developed and used throughout the remainder of the book. Finally, the chapter situates global governance as a specific practice of global governmentality, at least as it operates or is intended to operate against the practices of the tax nomad. The global governmentality framework may be relevant to other domains of the world economy, but this argument only claims that it is appropriate for dealing with the challenges found in cross-border taxation and not necessarily for global governance broadly understood.

Globalisation, Sovereignty, and Taxation

Looking back to the late 1990s when globalisation was all the rage as the way to understand the world economy, the OECD asserted that while it had many positive effects in the world economy, at the same time globalisation also brought negative effects. In particular, it facilitated 'new ways by which companies and individuals can minimise and avoid taxes'

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(OECD 1998, p. 14). A number of authors argued that globalisation limited the ability of states to control their domestic economies and in particular their tax administrations because of these negative effects. The methods utilised by corporations to minimise their tax obligations in any (and every) specific jurisdiction, and increasingly the related methods used by individuals, were the focus for much of this literature (Drezner 2004; Garrett 1995; Garrett and Mitchell 2001; Genschel 2002, 2004, 2005, Genschel and Schwarz 2011; Paris 2003; Plümper et al. 2009; Palan et al. 2010). My initial intervention in this debate, as I said in the preceding chapter, came from a political perspective and the political economy of taxation and tax competition and looked specifically at the OECD project originally titled 'Harmful Tax Competition'. A central point in that paper was the presentation of the project as a rearguard campaign by states to counter the negative effects attributed to globalisation and to reclaim lost state capacity (Vlcek 2004; see also OECD 1998, 2000). Related to the position that globalisation limits the ability of the state to act is an argument that it is state sovereignty itself which limits the ability of a state to collect tax on its residents' foreign assets and income (Jeffery 1999). State sovereignty in this view exists as fiscal sovereignty, that is, a jurisdiction is free to choose its domestic tax structure and at the same time is not obligated to collect tax on behalf of another jurisdiction. The boundaries of the state container become a barrier, obstructing the flow of information desired by a foreign government concerning the investment activities of its residents with that particular state (or non-independent jurisdiction, e.g. Cayman Islands) container.

Such a perspective is predicated on traditional concepts for sovereignty crafted and refined in a European context over the past 400 years. For beginning International Relations students, it is frequently simplified to the treaties for the Peace of Westphalia (1648) that ended a collection of religious wars in seventeenth-century Europe and centred around two basic claims. The first claim is that the state possesses territorial integrity, and therefore, once the boundary and borders have been determined, pieces of that demarcated territory may not be sold, traded, or exchanged between states as is the case with private property. In other words, the territory of the state is not the private property of the sovereign to do with as she sees fit, nor may pieces be carved off by neighbouring states for incorporation into their territorial jurisdiction. In all likelihood, the reader can think of several historical and contemporary examples demonstrating the failure of this sovereignty claim in practice. Nonetheless, with the growth

of international organisations and international juridical mechanisms over the past 100 years, efforts to litigate territorial claims increasingly outnumber the instances where force was used to settle a territorial claim.[1] The second sovereignty claim attributed to the Peace of Westphalia is non-intervention in the domestic affairs of another state. This principle was initially intended to remove external interference from internal policies, such as when a new sovereign chose to change the official religion for a territory. Over time, this principle came to be understood as non-interference in any domestic policy different from other states' domestic policy beyond simply the designation of an official state religion. Again, the reader will be able to recall historical examples for where this principle has been violated.

It is on the basis for such violations of the theoretical conceptualisation of state sovereignty that led Stephen Krasner to declare that state sovereignty is a structure of *Organised Hypocrisy* (Krasner 1999). His typology for sovereignty involved distinguishing four types of sovereignty and demonstrating the ways in which each type had been violated. The four types of sovereignty were domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty. Arguably hypocrisy rests at the centre of the efforts to discipline the tax nomad as explored in the later chapters of this book. Domestic sovereignty means that a jurisdiction is free to craft its tax laws as it sees fit to satisfy its goals and objectives to finance government and public goods for society. Yet it is claimed by some observers that interdependence sovereignty obligates the jurisdiction at the same time to recognise that its choices interact with the domestic tax policy decisions made by other jurisdictions for the welfare of their governments and societies. In some cases those interactions may be incorporated in the domestic tax policy with the intention to benefit domestic society irrespective for the consequences emerging from its interaction in any other jurisdiction's policies. It was on this basis that the OECD initially pursued a campaign against harmful tax competition as representing an example where the competitive tax policy of one jurisdiction was intentionally or unintentionally harmful to the economies of other jurisdictions. Relatedly international legal sovereignty involves first the recognition of a territory as a sovereign actor in the international and second the collection of international ties that bind the sovereign actor—the international treaties and agreements to which the jurisdiction is a signatory. It is under this type of sovereignty that tax treaties reside and the pursuit of multilateral tax agreements in order to more effectively bind jurisdictions to non-harmful tax relations. Finally,

Westphalian sovereignty represents those two sovereignty claims of territorial integrity and non-interference. While the integrity of any territory is not directly threatened by another state's efforts to collect taxes, with regard to the banking, finance, and tax policies of another jurisdiction, the non-interference aspect to sovereignty has been compromised by the treaties behind international legal sovereignty. The global governance apparatus involved in questions of international taxation includes those international agreements in addition to international organisations such as the OECD.

As explained in the previous chapter, the term jurisdiction is used when the object of analysis may be a non-independent territory in addition to the sovereign state. Thus, while Krasner's analysis applies to the sovereignty practices of recognised sovereign territories (under the international legal sovereignty form of sovereignty), the jurisdictions considered in this analysis also include the less-than-fully-sovereign territories. For these territories the four categories of sovereignty described by Krasner apply in part, but not fully. The partial functioning of sovereignty is shaped by the relationship of the non-independent territory with a sovereign state (via dependency, free association, or similar constitutional agreement). For example, the relationship between the UK and the Cayman Islands is different from the relationship between the UK and Jersey, for historical reasons and embedded in the complex constitutional arrangements that evolved over the past millennium to produce the modern British state. The relationship between the USA and the Cayman Islands is mediated by and through the UK, while at the same time the representatives for the Cayman Islands seek to represent the interests of the territory directly in those international forums in which it is a participant (e.g. the OECD's Global Forum on Taxation/Global Forum on Transparency and Exchange of Information for Tax Purposes, which is discussed in the chapter "Global Tax Governance and the Tax Nomad"). Aspects of the latter sovereign state/non-independent jurisdiction relationship are relevant for the context of both the EU (chapter "A Collective Response to the Tax Nomad") and USA (chapter "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'") cross-border tax collection programmes.

Beyond the dimensions of sovereignty addressed by Krasner (1999) there is fiscal sovereignty, the competence of a government to determine its tax policy, which was at the heart of the claim made by the OECD that offshore financial centres (OFCs) were 'poaching' the tax base of other states (OECD 1998, p. 16). Consider by way of example the use of stolen

property (lists of bank account details from banks in Liechtenstein and Switzerland) by Germany and France as evidence against tax-evading residents with foreign bank accounts. Government officials may quibble over the 'stolen property' attribution, but that is only because they perceive the act of evading taxation as the greater crime (Crawford and Ball 2010; Mijuk and Crawford 2010). Such a perception is based on the concept of fiscal sovereignty, that in addition to possessing a right to craft its domestic tax legislation, the state has the 'right' to tax its citizens and residents, a right that may be exercised by any means necessary. In addition to a state's domestic police powers, it may undertake international action, such as participating in the work of the OECD to reshape interstate conventions in order to obligate foreign states to assist and facilitate in the collection of its tax revenue. Hence, the foreign state is enlisted or conscripted as the new tax farmer—explicitly in the case of the withholding tax option in the EUSTD and implicitly with the inclusion of taxpayer information exchange provisions in tax conventions originally intended to avoid the *double* taxation of a taxpayer with foreign income-generating assets (Rixen 2011, pp. 205–08). These approaches will be further explored in the chapters "Sovereignty and the Tax Nomad" and "Global Tax Governance and the Tax Nomad", respectively.

For Diane Ring, the concept of state sovereignty is essential to understanding the debate over international tax competition. It is, in sum, a conflict between one state's sovereign right to collect income tax from its residents (which may or may not be citizens, a further complication arising with some domestic tax regimes) for their collective benefit and another state's sovereign right also to craft tax legislation intended to benefit its residents and citizens. One question posed in her analysis—'What if one state justifies its tax policies as necessary to preserve its sovereign control over tax and fiscal powers, but another state argues that those very policies infringe on *its* sovereign right to design tax and fiscal rules beneficial to its citizens?' (Ring 2008, p. 179, emphasis in original). Which state is *more* correct in its claim, and should one state be privileged by international tax conventions over the desires and responsibilities of other states? 'Is there a priority of certain sovereignty claims over others?' (Ring 2008, p. 179). She goes on to explore these questions in the context of the OECD's harmful tax competition project, which set the sovereign claims of OECD member states (while emphasising the need for a global dialogue, see e.g. OECD 1998, p. 10) against the sovereign rights of other states (predominantly the small developing economies it characterised as 'tax havens'). In

her analysis, Ring noted the frequent reference made to notions of 'interstate equity', suggesting it carries 'implications that some redistribution might be appropriate among the winning and losing states in the global tax system' (Ring 2008, p. 179). At the same time, Ring gave prominence in her analysis to the US perspective in its domestic debate on the OECD project, heavily referencing the work of US commentators and critics (Ring 2008, p. 189). Unfortunately, the US focus at this point in her analysis reduces the agency of the other sovereign actors challenging the OECD and conflates the activities of a vocal US think-tank/lobby group with those challenges directed at the OECD by the Commonwealth and its Caribbean member states (see Vlcek 2008, pp. 90–103). It is this tension over fiscal sovereignty that animates the discourse and motivates the exercise of power in the international by leading state actors.

Consequently, there are competing interests between jurisdictions for which their claim to sovereignty both justifies the actions of the jurisdiction and at the same time hinders the same actions by the jurisdiction. It is the responsibility and obligation of the state to act in the best interest of its residents to collect the tax revenue required to fund public goods. But those interests involve only those residing within the territory and benefiting directly from the public goods, with little regard for any person residing beyond the territorial boundaries. At the same time, the jurisdictional borders represent a barrier to the collection of tax revenue in the situation where a resident has taxable income located in a different jurisdiction. The resident may then be legally obligated to report that income for tax purposes, but enforcement of that legal obligation requires knowledge for the existence of foreign income. Moreover, the definition of income may vary between jurisdictions, further complicating the determination of the resident's tax obligations. Sovereignty permits the existence of legal and regulatory differences between jurisdictions, and opens up the space in which a person may 'arbitrage' and benefit from the difference. In finance, 'arbitrage is trading that exploits price discrepancies' (MacKenzie 2005, p. 562). The concept of arbitrage is applied in a much more comprehensive and broader sense to identify the practice of exploiting these differences in pursuit of personal or corporate gain. In terms of transnational finance, arbitrage may involve differences in currency exchange rate, bank interest rate, income tax rate, and the legal treatment accorded to a person based on residency, citizenship, or national identity (see also MacKenzie 2007).

The means to arbitrage between jurisdictions is facilitated by the practices of state sovereignty. Whether or not it is hypocritical, the language

of sovereignty and the concept for sovereignty as non-intervention frames diplomatic exchange on issues of international taxation. As a result, the cases explored in this book exist within this framework of sovereignty as a practice. It is the recognition for this practice that guides the development and operation of global governance with respect to international taxation, as a desire to strengthen the cross-border ability of individual sovereign jurisdictions to collect tax revenue. Simultaneously, the practice of sovereignty shapes the individuals and firms that pursue regulatory arbitrage and most especially with respect to taxation. As the means for understanding and explaining the arbitrage methods used within this framework of sovereignty as a practice in the world economy, the concept of 'nomadic' is introduced in the next section.

Nomadic Identity

In the context of global finance and the function of the OFC for global capital flows, the use of the concept of 'nomadic' previously was applied more discretely to the forms of capital itself (Vlcek 2009b). Here our understanding of nomadic functions as an attribute of the taxpayer as much as it represents an attribute of the capital involved. The taxpayer uses state sovereignty and its creation of legally distinct spaces to reshape their financial assets and income as transient and existing somewhere else. It remains important to recognise that this capital is always someplace, though admittedly, for the grasp of the tax revenue collector that location 'legally' may be no place, a situation explored in the next chapter for the case of Apple International. The use of Gilles Deleuze and Felix Guattari's text, *A Thousand Plateaus: Capitalism and Schizophrenia* (1980), to understand the nature of the offshore was hinted at by Ronen Palan in his book *The Offshore World* (2003, Chap. 7). But as I noted in an early review of the book, I was disappointed that after piquing my curiosity at the potential theoretical deployment raised by Palan it was not followed through in the subsequent analysis (Vlcek 2003). Consequently, I endeavoured to develop my own understanding from *A Thousand Plateaus* in Vlcek (2009b) and it is further developed here.

The conception of 'nomadic' as a label for the taxpayer and their money captures the essence of the circumstances vis-à-vis the sovereign state. A traditional definition for a nomad is a pastoral person moving locations regularly in order to find pasturage for their animals and who does not maintain a permanent place of residence. Conceptually, nomadic also implies

mobility, a concept that Bill Maurer has suggested International Political Economy (IPE) scholars use without reflecting on its socially constructed aspects (Maurer 2003, pp. 71–97). As indicated, the use of nomad and nomadic here is developed from my reading, first of Palan and subsequently of Deleuze and Guattari, 'Treatise on Nomadology – The War Machine', and further informed by, among others Julian Reid's 'Deleuze's War Machine: Nomadism Against the State' (Palan 2003, pp. 162–80; Deleuze and Guattari 2003, pp. 351–423; Reid 2003). From his reading of Deleuze and Guattari, Palan sets state sovereignty into its territorial context, establishing the offshore world as a re-territorialisation, becoming smooth space in opposition to the striated space defined by the system of states produced by the practices of state sovereignty. The language of 'smooth space' and 'striated space' are directly from *A Thousand Plateaus* and summarised by Brian Massumi in the 'Translator's Foreword' to *A Thousand Plateaus*, as 'State space is "striated," or gridded. … Nomad space is "smooth," or open-ended' (Deleuze and Guattari 2003, p. xiii). The designation of nomadic was then applied to capital in order to describe a feature that Palan finds present in the operation and characterisation of specific segments of global finance, including the Euromarket (Eurodollars), foreign currency exchanges, and the Internet as 'paradigmatic cases of capitalist nomadism' (Palan 2003, p. 170). The specific case for the nomadic characteristics of the Internet and the digital economy in relation to international taxation is developed in more detail in the next chapter.

The Nomadic Individual

When using the description of the nomad from *A Thousand Plateaus*, it is important to recognise that the presentation of both the nomadic and the sedentary conditions as described by Deleuze and Guattari does not fit the traditional concepts applied in anthropology, for which they have been criticised (e.g. Miller 1993). In defence of their usage of the language without the anthropological denotation, a subsequent author reminded readers that *A Thousand Plateaus* was not an anthropological study. Instead, Deleuze and Guattari used the terms 'to articulate two tendencies—the nomadic and sedentary—that have each a certain coherence and that manifest themselves in various mixed forms' (Bogue 2004, p. 172). At the same time, anthropological analysis also offers an understanding for the nomad appropriate to their usage and its application here. In Jacques Attali's *L'Homme nomade* is a consideration of the nomad from archaeological

time to the present, and Attali provided a categorisation of the modern nomad, divided into three groups. First, were the involuntary nomads ('infranomades') further composed of two groups of people: 'the nomad by heritage (the last descendants of the first peoples)' and representing what we may recognise as the traditional nomad; and what he called the compelled nomad, a more modern phenomena including homeless people, migrant workers, and refugees. His second category was composed of sedentary people, which are those that never move and included farmers, pensioners, and public sector employees. Attali's final category contained the voluntary nomad which may be the 'recreational nomad', a category that included professional athletes but consisted mainly of tourists, and also included what he names the hypernomad ('hypernomade'). The latter subgroup included senior corporate executives, interpreters, musicians, and artists, and it captures the popular imagination for the modern nomad in a globalised world (Attali 2003, pp. 355, 447–48, my translation).

It is this hypernomad that is of interest here and in turn identified by Palan as the permanent tourists (PTs) that exist as 'a nomadic tribe of tax exiles floating between foreign lands' (Palan 2003, pp. 17, citing Maurer 1998). In the cited article by Bill Maurer, there is an analysis on the promotional literature available that encouraged the use of offshore locations by the individual. His analysis found in the literature an emphasis on the mutability of citizenship along with a rupture between the individual and the political jurisdiction of their citizenship/residence. Maurer provided a lengthy quotation from a website operated by one 'Adam Starchild, an offshore finance proselytizer' with the description of the PT as one who 'arranges his or her "paperwork" in such a way that all governments consider him a tourist' (Maurer 1998, pp. 504–06). At the same time, the acronym of PT can be understood to represent multiple possibilities, variously as the prior taxpayer, perpetual tourist, practically transparent, privacy trained, or permanent traveller. Collectively, these multiple identities represent one who is *perpetually in transit*, the hypernomad or capitalist nomad possessing no fixed abode or territorially based residency status, one who is simply a passport number in the state's border control database.[2] As such, it is an identity that, crucially, is negotiable with respect to citizenship (Palan 2003, p. 159). The essence in this nomadic existence is to separate and distinguish the individual *qua* taxpayer from any, and all, tax-collecting jurisdictions. To be nomadic in this form is to practice tax arbitrage at the individual level on an individual scale.

One example for a capitalist nomad explicitly renegotiating his citizenship is a co-founder of Facebook, Eduardo Saverin. His choice received media attention in 2012 because of his connection as an early investor in the social media firm and the wealth produced by his stake in the firm. The timing of his action also was instrumental in attracting criticism for the appearance that it would enable him to avoid paying tax on the value of his shares in Facebook following its initial public offering (IPO). A brief timeline suggests Saverin's personal tax situation was not quite so simple, particularly in light of US legislation preventing the complete avoidance of taxes on his wealth. He was born in Brazil and gained US citizenship in 1998, then moved to Singapore in 2009 (W.W. 2012). As the date of the Facebook IPO approached in May 2012, it emerged that Saverin had renounced his US citizenship in late 2011, according to some media reports in order to avoid paying taxes on the value of his shares in the firm. News reports disagree on the figure, but based on the share price for Facebook at the IPO (US$38/share) he would be worth more than US$1 billion (Mahtani 2012a, b; Hogue 2012). The claim that his renunciation of US citizenship reduced his US tax obligations on his wealth was contradicted in other media reports, because the US claims a right to tax all assets in the citizen's possession on the date at which citizenship is terminated. The result in this case is that Saverin owed taxes on the value of his Facebook investment prior to the IPO (when his US citizenship was terminated), but he will not owe taxes to the USA on the profits of any future investments Saverin makes outside of the USA (Worstall 2012). Nonetheless, the headline for the article at *The Nation* captured the emotive discourse surrounding personal income taxation in North America (and Europe), particularly for those taxpayers in the top 1 per cent of income earners, 'Lessons in Disloyalty: Eduardo Saverin and the Facebook IPO' (Hogue 2012). The measures employed by the USA to pursue its citizens for taxes on foreign income are explored in more detail in the chapter "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'" below.

The Nomadic Corporation

Just as with the natural person as a nomadic individual (*l'homme nomade*) there are legal persons, corporations, that we should approach as nomadic. In the case of the corporation, it is its 'national identity' for purposes of tax jurisdiction, separated from other features of its corporate identity which

produces the nomadic form. The evolution of the organisational structure of the MNC was the focus for Mihir Desai in a paper titled 'The Decentering of the Global Firm' (Desai 2009). The decentring aspect in his analysis involved the structure of a firm with a global production chain and possessing three corporate 'homes': one home for its managerial talent, in other words, the location of its corporate offices and senior management staff; a second home, that is its financial home, the location where the company is listed on a stock exchange; and its legal home, the location where the firm is registered as a corporation. For many multinational firms, these three homes will be the same jurisdiction just as in the case of a non-multinational, domestic, firm. There are, however, many firms in which these three corporate homes may include two or three different jurisdictions, and that structure in turn has a significant impact on the taxation experienced by the multinational firm. The case of Stanley Works, a US corporation which considered re-incorporating itself in Bermuda in 2002 in order to arbitrage its national identity and thus its national tax obligations, was reviewed elsewhere and appears once again as background for more recent US corporate practice in the chapter "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'" (Vlcek 2009b). And while Stanley Works did not go forward with its plans to perform a 'corporate inversion', a number of US firms have undertaken this business strategy in order to reduce their total income tax obligation, and specifically to limit their US corporate income tax obligation. The issue for the US-registered multinational firm is the fact that corporate income tax is based on the firm's worldwide income rather than on the territorial income basis used by most other jurisdictions (Desai and Hines 2002, p. 410).

At its most basic, a corporate inversion, as proposed by Stanley Works, involves relocating the corporation's legal home by terminating its corporate registration in one jurisdiction and re-registering the firm as a corporation in another jurisdiction. The process involves the conversion of shares from the initial corporation into shares for the new, foreign-registered corporation, an event which is treated as taxable for the firm's US shareholders by the IRS. All future non-US income generated by the now foreign firm would no longer be subject to US corporate income tax, which is the objective behind a corporate inversion (Desai and Hines 2002, pp. 415–22). Corporate inversions by US multinationals were a relatively rare event before the end of the century, and while Stanley Works did not go through with it a number of other firms did perform an inversion. In turn, that activity prompted the introduction of legislation in 2004 to

make the process more difficult, if not impossible, as a method for a US firm to reduce its US corporate income tax obligation. The legislation succeeded in suppressing the direct inversion method, but not the activity by US multinationals to change their tax jurisdiction (Marcum et al. 2015, p. 86). Rather than change the jurisdiction of corporate registration, without any change in the corporate home for its management, the preferred strategy was to merge with a foreign firm in order to acquire its corporate registration home while merging the management structure of the two firms. The merger process complied with US legislation while successfully making non-US income non-taxable in the USA for the formerly US multinational firm. In the decade following the 2004 legislation mergers between US firms and foreign firms where the foreign firm provided the new home of corporate registration increased, gaining substantial attention from the US government and media as a result (Marples and Gravelle 2014; Vanessa Houlder et al. 2014; Farrell and Paletta 2014; McKinnon and Thurm 2012).

These practices to transform the national identity of the firm, to become nomadic with regard to corporate income taxation, are peculiar to US corporate income tax policy and discussed in more detail for that context in the chapter "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'". Nevertheless, the decentred multinational corporate structure investigated by Desai is a product of sovereignty in the international system and the practices of sovereignty as performed by the jurisdictions comprising that system. Here it is useful to recall that one explanation for the origin of the offshore world is that it emerged out of court rulings made under English common law that discriminated between corporations deemed to be resident in the UK as compared to those corporations registered in the UK but whose substantial business activities were located elsewhere (Vlcek 2009b, p. 1468, citing Picciotto 1999). Consequently, in common law jurisdictions corporate citizenship has been detached from geographic location which produces the legal environment where Desai can find three distinct 'homes' for a MNC. Structuring the MNC with subsidiaries and branches registered in a different jurisdiction is central to the methods used by an MNC to reduce its corporate income tax obligations as explored in the next chapter. One short example to demonstrate this intersection of sovereignty and the nomadic MNC that is different from the US corporate inversion process will suffice at this point.

First, Quantum Minerals Ltd. is a Canadian MNC with mining and smelting operations in Australia, Democratic Republic of the Congo,

Finland, Mauritania, South Africa, Spain, Turkey, and Zambia (First Quantum Minerals Ltd. 2015a, pp. 6–7). The First Quantum mines in Zambia and the MNC's response to Zambian government proposals to increase the tax rate applied to the mining industry were presented as one case study in a NGO report on taxation and development in Africa (Open Society Institute of Southern Africa 2009, pp. 37–38). The complexities of developing economy government revenue collection from the extractive industries operating in their territory often involve contracts and agreements treated as state secrets by those governments (Sikka 2011). Beyond these tax issues, it is the corporate structure utilised by First Quantum for its Zambian operations that are of interest here and provided 47 per cent of the firm's revenue in 2014 (First Quantum Minerals Ltd. 2015b, p. 91). As a corporate entity, First Quantum does not directly manage the mining operations in Zambia, rather it owns a subsidiary in Ireland which in turn owns subsidiary corporations registered in the British Virgin Islands (BVI) and Zambia. The latter subsidiaries may in turn own further subsidiary corporations in Zambia. The overall corporate organisation involves similar subordinate corporate structures with subsidiaries registered in Barbados, British Virgin Islands, Ireland, Luxembourg, and Netherlands, none of which jurisdictions include a mine or smelter operated by First Quantum (First Quantum Minerals Ltd. 2015b, pp. 5–6). Each of these jurisdictions possesses its own independent corporate tax regime, which in aggregate shapes the corporate tax obligations of the MNC as a total entity. But this is not to say that these structures only exist to provide tax benefits, because organising the MNC in this fashion also serves to disaggregate risk and investment as well as influencing the location of any litigation or arbitration (Maurer and Martin 2012).

Collecting income tax from the MNC further involves a question over which jurisdiction may collect it when the MNC is operating in multiple jurisdictions. There is the notional home jurisdiction, which should be the jurisdiction in which the corporation is registered and the location where one would expect to find its corporate headquarters. When the USA is that home jurisdiction its legislation claims the right to tax all of the profits of the company, regardless of where those profits were earned. But as noted above, that is not the situation in many other jurisdictions where corporations are registered and corporate income tax is collected on a territorial basis. Opposite the home jurisdiction is the host jurisdiction, that is the location where the income-generating activity occurred, for example, at a clothing manufacturing facility in Vietnam or at a mine

in Zambia. In general, competing claims for corporate income tax are negotiated between the two jurisdictions and the rules laid out in a double taxation treaty with the goal not only to collect tax, but also to avoid suppressing business activity by making corporations pay tax on the same income to both jurisdictions. It is at this point in the international tax picture that the subsidiary in the transnational corporate organisational structure plays its role. The jurisdiction in which the subsidiary is registered is the 'home' jurisdiction for the subsidiary. Jurisdictions such as the British Virgin Islands and the Cayman Islands do not impose a corporate income tax on foreign-sourced income. Thus, First Quantum's subsidiaries will pay corporate income tax on their operations in Zambia to the Zambian government, but any income that flows through to the BVI-registered subsidiary will not be taxed before flowing onward (First Quantum Minerals Ltd. 2015b, pp. 19, 117–18). Nevertheless, it is the presence of corporate subsidiaries in what may become increasingly complex and sometimes opaque corporate structures that can serve to permit the MNC to avoid all corporate income tax obligations everywhere. Such was the situation for Apple's foreign (non-US) income that so annoyed the US Senate's Permanent Subcommittee on Investigations in 2013 (Permanent Subcommittee on Investigations 2013). The use of foreign subsidiaries by Apple and other MNCs are addressed in the next chapter because of the prominent involvement of IP in shaping the flow of capital (revenue and income) among the MNC's subsidiaries.

Governmentality as Global Governance

The pursuit of the tax nomad across a national border requires either the willing cooperation of the government of the other jurisdiction with identifying the nomad and enforcing the tax collection demand, or the material power to force cooperation and enforcement from the other jurisdiction. Willing cooperation may be seen as running counter to the desires of the government for any jurisdiction that is seeking to attract foreign capital, while at the same time the use of force to collect taxes in a foreign jurisdiction has fallen out of favour. In an environment where cooperation is not forthcoming and material power is now felt to be inappropriate, other forms of power must be used. Consequently it has been discursive power that has been used in recent decades to craft international taxation policy and to encourage cooperation with it by unwilling jurisdictions. The actors applying this discursive power desire to re-create

existing international policies and produce a global norm for international tax cooperation. The second report for the OECD's harmful tax competition project included a list of tax havens with respect to its efforts to end such competition in the world economy (OECD 2000, p. 17). At about the same time, the Financial Action Task Force (FATF) issued its first list of jurisdictions that, while not members of that organisation, nonetheless were not compliant with its Recommendations for countering money laundering (Financial Action Task Force 2000). This practice of blacklisting was criticised as 'unhelpful' towards achieving international cooperation. The EC provided a more recent example for this practice with a consolidated list in 2015 which it subsequently revised in response to the criticism received about the structure and contents of the list (see e.g. Houlder 2015b).[3]

Nevertheless, it is this process for determining what is acceptable practice and what is not acceptable practice in the relations between jurisdictions on issues of taxation and nomadic capital which represents a fundamental factor behind the argument here that global governmentality is present and operating in international taxation debates, decisions, and practices (Neumann and Sending 2007, pp. 694–98). Global governmentality is the tool used to develop an understanding for the practices of power in operation to address any policy that intentionally or unintentionally serves to assist the tax nomad. These discursive practices of power undermine Westphalian concepts of sovereignty as non-interference in the domestic politics and operation of a jurisdiction. Simultaneously they reproduce the hypocrisy of sovereignty, though blaming globalisation for that situation because the discursive power is deployed by states possessing sufficient material power to back up their position. Global governance in this issue domain is not representative, which challenges the claims that have been made for legitimacy in the process and its outcomes (Cooper and Pouliot 2015; Slaughter forthcoming).

For the purposes of this analysis, governmentality is understood as a technology of power operating through the practices of a government to regulate a population (Dean 2010, pp. 28–30; Neumann and Sending 2010, pp. 18–45). Governmentality does not replace biopower (Foucault's term for the disciplinary practices of a state to control its population) or sovereignty, but instead it operates with them in a triangular framework supporting a Foucauldian analysis of international power relations (Neumann and Sending 2010, pp. 24–27). At the global level, it may be found in the international organisation that exercises regulative practices

of power over states in the world economy. In other words, rather than seeing governmentality as 'the way in which one conducts the conduct of men' (Foucault's explicit application for his concept) global governmentality addresses the way in which an international organisation conducts the conduct of states (Foucault 2008, p. 186). Consequently, the relationship between that self-disciplined citizen and the state described by Foucault is replicated at the international between the state (or its related non-independent jurisdiction) and the international regulatory regime enforced through the statements of international organisations.

The above perspective for the tax nomad provides only one level for understanding the nature of the nomad to be derived from *A Thousand Plateaus*. A second level involves the engagement and contestation present in the relationship of the nomad with the state. Moving through the metaphorical jungle of smooth space and striated space, one finds the continual conflict between the efforts of the state to constrain and control the nomadic tendencies of a population. It is from this conflict that Foucault draws his concept of governmentality, the effort of the state to 'conduct the conduct of men' (Foucault 2008, p. 186). It is with an appreciation for the conflictual nature of the state's efforts against the nomad (understood in *A Thousand Plateaus* Chap. 12 as 'the War Machine') that serves to explain the pursuit of nomadic capital by states, agents of the state, and apologists for the state—it is not an issue of 'fairness' or 'tax justice', rather it is the unceasing drive for control by the state over the nomad. Any indication for a failure to control this nomad, demonstrated by any successful minimisation, avoidance, or evasion of tax payments, serves to undermine the tax morale of sedentary citizens as much as it provides further encouragement for nomadic citizens. Consequently, the cases explored in the later chapters represent measures taken by a state, by a collectivity of states, and by an international organisation of states to constrain and control their respective nomads, both the individual and the corporate. And while the initial justification for their action may be to collect tax on the nomadic income, at the same time it is intended, by design, to discourage the thinking of any prospective nomads from seeking to escape the constraints imposed by the state.

Sovereignty shapes the terrain of international society for good and ill. By demarcating the terrain of national societies, it identifies the space in which that society determines its operation and conduct through

legislation and practice. In so doing, the territory of one state is differentiated from its neighbours, and that state may choose to legislate conduct detrimental or abhorrent to its neighbours as much as it may choose to legislate in a way that produces a cordial, cooperative environment for trade and exchange with its neighbours. This perspective applies to all state conduct, though it is limited to a consideration of the legislation and practices surrounding taxation in the following chapters. The reader may agree with Stephen Krasner that sovereignty as practised by states today is a form of organised hypocrisy. Nonetheless, it remains a fundamental tenet of International Relations and the conduct of all states at some point in time (even if not at all times) is expected to be consistent with the perceptions of sovereign conduct by other states in international society. Governmentality simply represents one theoretical lens through which we may interrogate the practice of some states to shape and guide the practices of other states. A case may be made that this guidance is to achieve a collective good, but that is only after asserting that the good in question is both positive and welfare-maximising. States challenging the claim made for its welfare-maximising benefits will point out that the collective good serves to maximise the welfare of some other states far more than serving to maximise its welfare or the welfare of its citizens. In other words, with the utmost respect to Susan Strange, we must always ask *cui bono*? For the case of cross-border taxation, it will generally be the larger state that will benefit from this action to the detriment of the welfare of the smaller state and its citizens. Equally, the bias is towards the developed economy over the welfare of the developing economy and its citizens.

Notes

1. See the case docket of the International Court of Justice, available at http://www.icj-cij.org/docket/index.php?p1=3.
2. At the present time there are websites offering basic information on becoming a tax nomad (e.g., http://www.taxnomad.com/) or offering a course to learn how to be a tax nomad (e.g. https://zerotaxnomad.com/).
3. The European Commission retains an updated webpage with each Member State's list of jurisdictions identified 'for tax purposes' at http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/lists_of_countries/index_en.htm.

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Multinational Corporations and the Digital Economy

Introduction

There is yet another nomadic element at play in the international taxation environment that may not be immediately recognised as nomadic. Beyond the nomadic characteristics of the MNC, some of its more profitable assets may themselves possess nomadic features. Consequently, this chapter interrogates two practices that operate through the structures of the offshore world and are utilised by MNCs to perform what the OECD has named base erosion and profit shifting (BEPS). The OECD and its production of BEPS as the foundation for its latest international tax governance regime are presented in the chapter "Global Tax Governance and the Tax Nomad". The essential elements for the purposes of this chapter involve the basic definition for the concept: base erosion is the use of business practices which serve to reduce the taxable profits of a firm and that in turn reduces the tax base of the state. Profit shifting is one specific business practice that reduces the taxable income of the firm in one jurisdiction through the transfer of capital to another jurisdiction (OECD 2013a). At the same time, one should not forget that the definition itself for both 'income' and 'profit' is equally as malleable for the firm and its accounting practices (Sikka 2010). In this context, accounting practice for a business is not a simple matter of adding up sums, first one must determine what the sum represents. A figure that might represent a taxable income amount in one jurisdiction may be (re)categorised as a tax deductible credit in a different jurisdiction, hence a motivation for the MNC to move capital.

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Some of the complexities of BEPS are grounded in the economic and legal concepts for what are identified as 'intangible assets' by international accounting standards. Specifically, 'an intangible asset is an identifiable non-monetary asset without physical substance' (IFRS Foundation staff 2012, p. 1). Regardless for the lack of physical substance, an intangible asset is separable from the firm and may be sold, rented, traded, or otherwise marketable. Importantly, the intangible asset may only be recognised as such when it is independently capable of producing economic benefits for the firm, and the cost of the intangible asset is itself measurable. There are further technical aspects of interest to accountants and the managers of a firm seeking to extract value from the firm's intangible assets which are not relevant here. For the purposes of this study, there is one specific form of intangible asset of interest because of its use by MNCs to achieve tax minimisation. This form consists of the firm's IP, and the substance for what is determined to be 'intellectual property' (including brands, patents, firm-specific knowledge, and practices, which in the USA at least are patentable in themselves). The scare quotes have been employed for this specific instance to circumscribe the fact that ideas, images, practices, and creative products possess the same rights and responsibilities accorded to other forms of property, that is, physical goods like land, vehicles, and buildings. Similarly the ownership rights for IP are negotiable, and the lack of a physical anchor permits IP to be nomadic and thus 'owned' by a subsidiary firm which in turn is owned by the MNC.

Recent cases attracting international media attention involve multinational digital economy firms such as Amazon and Google, as well as multinational service economy firms such as McDonald's and Starbucks which positioned their IP (e.g. trademarks and logos) under the ownership of a foreign-registered subsidiary. This process serves to reduce the taxable domestic income (the tax base) of these firms through the royalty payments made to the corporation's foreign subsidiary. The second practice utilised by the MNC is similar in that it operates through a corporate structure involving foreign-registered subsidiaries where these international business companies provide intra-firm goods and services for other subsidiaries in the transnational corporate structure.[1] The challenge for assessing tax on the international transfer of the intermediate goods and services provided by a subsidiary involves determining the 'fair market' price, which the OECD attempts to situate via the 'arms-length transaction' (OECD 2013a, pp. 36–37). Consequently, the transaction price applied may serve to shift income from a high-tax jurisdiction to a low-tax jurisdiction which serves to erode the tax base of the firm in the high-tax jurisdiction.

The chapter proceeds by explaining what may be defined as IP accompanied by an unrelated example to demonstrate the portability aspect of IP. It then introduces the mechanism used by an MNC to own IP as part of the overall corporate structure, a corporate vehicle that collects the fees and charges paid for the use of the IP. The chapter then explores four examples of MNCs that have gained widespread public attention because of their practices with utilising their IP for tax minimisation purposes, Apple Inc., Amazon.com Inc., Google Inc., and Starbucks Corporation.

The Nature of Intellectual Property

The idea of IP in most instances is to treat knowledge *as* property, as a commodity to be bought, sold, or traded. Initially, the owner of this property is the knowledge producer, an individual person on their own or as part of a team, which created the knowledge for themselves or as a 'work for hire'.[2] The definition for IP, as provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) Agreement may be summarised as follows.[3]

TRIPS identifies seven types of IP that it covers[4]:

- Copyright and related rights—in addition to written works, music, and film, the Agreement also covers computer programs in the same manner as literary works, to include rental rights.
- Patents—the Agreement sets out a number of minimum standards for patents, including a 20-year period, the coverage of 'plant varieties' and processes as well as products.
- Trademarks, including service marks—the Agreement sets out a number of minimum standards for trademarks, and the WTO further asserts, 'Marks that have become well-known in a particular state enjoy additional protection.'
- Geographical indications—the position of the Agreement is that the geographical indication reflects the 'special characteristics' of the product as much as it reflects where it was made. Perhaps the most commonly recognised geographical indication is for the sparkling wine originating in the Champagne region of France.
- Industrial designs—after registration these receive a ten-year protection period under TRIPS against 'the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design.'

- Layout-designs (topographies) of integrated circuits—also receive a ten-year protection period under TRIPS against copying.
- Undisclosed information, including trade secrets—this area of the Agreement covers information that is not public knowledge but which might need to be provided to government agencies in order to get a licence or approval to produce and sell a drug, for example. The idea is to force states to protect information that is provided to them in confidence with patent applications.

For the purposes of this study, the forms of IP which are relevant are copyrights, patents and trademarks. While all of these forms have a physical presence, in the form of the documents specifying them, it is a small and easily transported/transferred physical form. Logos and other material identifiably representing a particular good or service thus may be copyrighted or trademarked transforming them into 'property' to be bought, sold, traded, or transferred to another owner. For example, the shape and design of the Coca-Cola logo as well as the hour-glass shape of the classic Coca-Cola bottle are both trademarks for the company and its products (see any Coca-Cola product for the trademark indicia).

There is yet another form of 'intellectual' property subject to categorisation as a trademark or a copyright, the image and name of a celebrity personality. Retired English football player David Beckham was the object of media reports on the revenue generated by his image, and of academic analysis as a recognisable example (Haynes 2007). As explained on the BBC Sport website in 2002, 'a household name' (that is a widely recognised person or celebrity) has a value similar to the brand name recognition of a Coca-Cola product or an Apple product. 'The idea of image rights is that the household name has control over how their name is used and exploited commercially' (Fordyce 2002). In the case of David Beckham, his image rights company, Footwork Productions, Ltd, is registered in the UK and it collects all royalties, licensing fees, and so on from the use of his image across a variety of products and services (Rayner 2013). The point of interest here is not with Beckham's success in commodifying his image, rather he simply is representative for those persons whose image possesses name recognition to the point that other parties are willing to compensate them for use of their image in a promotional manner, most commonly television and film actors. And having commodified the image of a person, the

compensation (royalties) flows to a firm that 'owns' the image rights instead of flowing to the bank account for the person themselves. The treatment of image rights varies from one jurisdiction to another; nonetheless, there is a fairly consistent view that a person's image represents property which can generate income as well as be legally protected from any 'mis-use' of the image (Blackshaw 2012, pp. 253–70).

This cult of personality extends beyond the image even to the name of the personality. In 2015 the Ohio State University in the USA received a trademark designation for the name of its head football (American-style) coach. Similar to protecting image rights for the purpose of generating income from the use of that image, the university took the action to trademark the name of its coach in order to protect its revenue from licensed merchandise related to its highly profitable college football programme (Diamond 2015). Any commercial product having the name of 'Urban Meyer' or with the phrase 'Urban Meyer Knows' now must be licensed by the university, or face litigation for the trademark violation (Husnick 2015).

As already indicated the concept of image rights is not limited to Anglo-Saxon jurisprudence. As a form of property that may be owned by a company, the company involved may be registered in a foreign jurisdiction different from the residence of the household name. As described in more detail in the next section, the latter aspect affords the household name and their financial advisors opportunities for careful tax planning and tax minimisation (Blackshaw 2012, pp. 253–66). In turn, these tax minimisation practices may be viewed as tax evasion in some jurisdictions if the income generated by the person's image is not declared. Staying with the domain of international football offers a prominent example at this time in Lionel Messi, recognised as one of the best footballers in the world and recipient of the 'Golden Ball' as the best player in the 2014 World Cup with the Argentine national team ('World Cup 2014' 2014). In 2013 the Spanish government accused the long-time FC Barcelona player (his professional team) with failing to pay the taxes owed on income generated by his image rights. Media reports stated that according to the prosecutor's lawsuit, income earned by his image from 2007 to 2009 was paid directly to companies registered in Belize and Uruguay but subsequently routed to him in Spain via 'British and Swiss channels' (Román 2013; Erb 2015). In this case both Belize and Uruguay have been treated as tax havens, and Belize was listed as such by the EU in 2015.[5]

The central point here is to recognise the easily portable nature of these particular forms of IP. IP in the form of a brand name, trademark, logo, business process, or image has economic value, and that value is accumulated by the legal person that owns it. The portable nature therefore makes it possible to locate the ownership of the IP elsewhere in order to facilitate regulatory (taxation) arbitrage. The next section explains the use of a foreign-registered corporate subsidiary to accomplish that arbitrage activity, specifically by the MNC, but as suggested by the case of image rights, it works equally well for the individual.

The Ownership Vehicle

To understand the nature of nomadic IP, that is the practice of transferring ownership of IP to a foreign-registered firm which will then collect the licensing fees, royalties, and other forms of income generated by the IP, it is first necessary to understand the operation of the corporate registry, also known as a companies registry. The act of registering a company, or corporation, foundation or trust, serves to produce a legal entity with specific rights and responsibilities identified under the law of the jurisdiction hosting the registry.[6] In other words, for juridical purposes the act of incorporation, or registration, creates a legal person which then may be treated as a subject of the law and charged with violating other laws (e.g. environmental laws). Historically, companies were established under a government charter outlining the specific activities which the company could undertake, such as establishing a colony as granted by Royal Charter to the Massachusetts Bay Company (Picciotto 2011, pp. 111–13). The development of the limited liability corporation (indicated by an 'Ltd' in the UK and an 'LLC' in the USA) on the other hand was to protect shareholders from any financial liability extending beyond their initial investment when purchasing company shares in the event that the firm failed (Picciotto 2011, p. 111). Consequently, in the case of a bankruptcy the corporation's creditors could not pursue the corporation's shareholders to settle the corporation's outstanding debts. The financial liability of the shareholders was limited to that initial investment and nothing further. This simple concept is fundamental to the growth of capitalism, and it has been extended to include legal entities that 'own' property without themselves possessing a substantial physical existence. Thus, there are frequent references in the media and academic literature to the term

'shell company' to identify a legal entity that may own property and financial assets while at the same time its actual physical existence is little more than the necessary incorporation paperwork and a mailbox address. With this minimal structure the legal entity may be listed as the owner for physical property (homes, paintings, yachts) as well as financial property (bank accounts, company shares, securitised debt instruments), and even other legal entities (corporations, trusts, foundations). Naturally this situation provides opportunities for criminality as much as it does for privacy and regulatory arbitrage, but that is beyond the scope of the present discussion.[7]

Delaware may not have been the first jurisdiction to use a corporate registry as a significant source of government revenue and economic development. Nonetheless, this small member state of the USA has achieved a prominent role in corporate registrations, and it enhanced the basic practice for hosting a registry with its emphasis on corporate governance adjudicated through a dedicated court system. The website for the Division of Corporations with the Delaware state government asserted in 2015 that Delaware was 'a leading domicile for U.S. and international corporations.'[8] The claim was based on the fact that more than one million corporations were registered in Delaware, among which were 'more than 50 % of all publicly-traded' US firms, to include more than half of those firms listed in the Fortune 500. Cost and efficiency of corporate registration is not the only reason for the large number of firms registered in Delaware. The operation of the Delaware registry of corporations is supported by a judicial system with its Court of Chancery and a collection of Delaware-based law firms specialising in US and Delaware corporate law.[9] From a legal perspective, this dedicated court is an important benefit from incorporating in Delaware, while from an economic perspective a Delaware incorporation, particularly of subsidiaries, may offer tax benefits along with privacy (Dyreng et al. 2013; General Accounting Office 2000, p. 2). The annual report documenting the operation of the Division of Corporations during 2014 provided a number of statistics, including details on the financial contribution made to the state with its collection of fees. For fiscal year 2014 the total was US$ 927.8 million, which meant that it provided 26 per cent of the total revenue collected by the state of Delaware, and the sum represented a 5 per cent increase over the contribution made by registration fees in 2013 (Delaware Division of Corporations 2015, p. 2). In turn the Court of Chancery dealt with a total of 4537 cases

and 5183 dispositions, including equity-related issues (e.g. real estate transactions) beyond those involving the large number of registered corporations (Delaware Judiciary 2015). Moreover, the Division of Corporations' annual report emphasised the 'global' dimension of Delaware's corporation registry, pointing out that two separate websites with information in ten languages now promoted Delaware's registry and its corporate governance expertise.[10]

Following the example of Delaware, a number of small island jurisdictions established corporate registries as an economic development strategy. The emergence and growth of these 'offshore' company registries, along with the co-location of branches for a number of international banks, provide one explanation for the origins of offshore finance (Vlcek 2008, pp. 18–25). And while many of the prominent jurisdictions with an OFC today have a connection to the British empire and the flexibility offered by a common law legal system, related practices did develop in civil law jurisdictions (including Liechtenstein, Luxembourg, and Switzerland), such as in French the *Société à responsabilité limitée* (SARL) and in German the *Stiftung* (foundation) and *Anstalt* (establishment) (Palan 2010). The Cayman Islands, for example, established its company registry in the 1960s, following the example already set by the Bahamas and Bermuda (United Kingdom. Public Record Office 1973).[11] Collectively, these jurisdictions have arrived at an 'offshore business model' with similarities to Delaware. It provides a legal regime permitting non-resident persons to perform regulatory arbitrage for which they pay fees and use local supporting business services. With its companies registry, the BVI collects an initial registration fee and annual renewal fees for every international business company (IBC) registered in the BVI. Corporate registrations are performed via business company services firms which provide employment for lawyers, accountants and support staff. The BVI has a population of roughly 33,000 and the BVI Financial Services Commission reported 478,865 active IBC registrations for the end of March 2015 (BVI Financial Services Commission 2015). The annual renewal fee is US$350, generating US$ 160,289,850 from renewal fees alone for the government of the BVI (*The BVI Business Companies Act* 2004 (*amended by 26/2005*), 2006, pp. 154, 57). In the Cayman Islands many of the registered entities are hedge funds, permitting the Cayman Islands to claim that it is a 'premier' location as the registered home for mutual funds (Cayman Islands Monetary Authority 2014, p. 27). Bermuda, on the other hand,

is recognised as the leading domicile for insurance and re-insurance firms with 1217 registered insurers in 2014 (holding US$607.6 billion in total assets), while the Cayman Islands had 764 insurers (with US$54.9 billion total assets) (Bermuda Monetary Authority 2015, pp. 36–37; Cayman Islands Monetary Authority 2014, p. 20). As a final point of comparison with the Cayman Islands, Bermuda had 647 registered investment funds of all types (Bermuda Monetary Authority 2015, p. 35).

Corporate Subsidiaries in Practice

There are several ways in which the subsidiary company facilitates regulatory arbitrage for the MNC. As described in the previous section, one way is to own the IP and collect all licence fees, royalties, and other forms of income generated by it. When the subsidiary is registered in a jurisdiction with a low corporate income tax rate then the tax owed by the MNC as a whole is reduced, subject to the corporate income tax policy of the home jurisdiction for the parent MNC. This situation is demonstrated in the first subsection below with the case of Apple Inc. And while an argument may be made that this tax minimisation strategy, as with the corporate inversion introduced in the chapter "Sovereignty and the Tax Nomad", is specific to the US and its corporate income tax policy, it also is representative for the MNC tax minimisation practices at the centre of the OECD's BEPS project explored in more detail in the chapter "Global Tax Governance and the Tax Nomad". Moreover, there is no reason to believe that a US-registered MNC engaged in tax minimisation practices would limit itself solely to minimising its US corporate income tax obligation. The second subsection here considers the cases of Amazon, Google, and Starbucks and their corporate income tax minimisation practices in the EU. The circumstances surrounding this set of examples are further considered in the chapter "A Collective Response to the Tax Nomad" as part of the initiatives made by the EU in its pursuit of the tax nomad (individual and corporate).

Apple Inc.

Apple Inc., the MNC responsible for a variety of consumer electronics with immediate name recognition (i.e. Mac, iPad, iPod, iPhone) is recognised also for its corporate structure minimising corporate income tax payable to the US federal government. Apple is a California-registered corporation

with principal offices in Cupertino, California (Apple Inc. 2014). Its corporate organisational structure is representative here for some of the tax minimisation structures used by a number of US MNCs with respect to US corporate income tax. As explained with the discussion of US corporate inversion practices in the chapter "Sovereignty and the Tax Nomad", the US federal government claims corporate income tax on the worldwide income of the US-registered firm, with the tax owed on foreign-sourced income payable when it is repatriated to US territory (see also Permanent Subcommittee on Investigations 2013, p. 158). The corporate structure of Apple to minimise its US corporate income tax obligation was described in the report of the US Senate Permanent Subcommittee on Investigations released as an exhibit for the Subcommittee Hearing, 'Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.)', held on 21 May 2013. In that report, the use of a foreign subsidiary, defined in US tax legislation as a controlled foreign corporation (CFC), owned economic rights for some of Apple's IP. The Subcommittee report asserts that this organisational structure permitted Apple to shift profits to the Ireland-registered subsidiary (Apple Sales International). A second Ireland-registered subsidiary was a holding company collecting income from other non-US subsidiaries (Permanent Subcommittee on Investigations 2013, p. 155). The SEC Form 10-K for Apple Inc. identifies only four subsidiaries (three registered in Ireland and one registered in Nevada, see Fig. 1 below) along with the notation that the name for any other subsidiary was not identified because they did not meet the reporting requirements of the SEC (Apple Inc 2014, Exhibit 21.1). The Subcommittee report provides more information on Apple Inc. subsidiaries based on information the corporation submitted to the Subcommittee. The important point to appreciate with this US Senate Subcommittee report is the fact that the Subcommittee is concerned with the existence of untaxed corporate income considered in the context of the US federal government's debt. For that reason, the report included recommendations for changing US tax policy in order to eliminate the tax minimisation practices employed by US MNCs (Permanent Subcommittee on Investigations 2013, pp. 154, 57).

Information provided to the Subcommittee by Apple indicated that the corporation had a regional structure, with Apple Inc. in the USA responsible for all sales and IP revenue from North and South America, while Apple Sales International (registered in Ireland) is responsible for sales in the rest of the world and together with Apple Operations Europe (registered in Ireland) is responsible for IP rights. This organisational

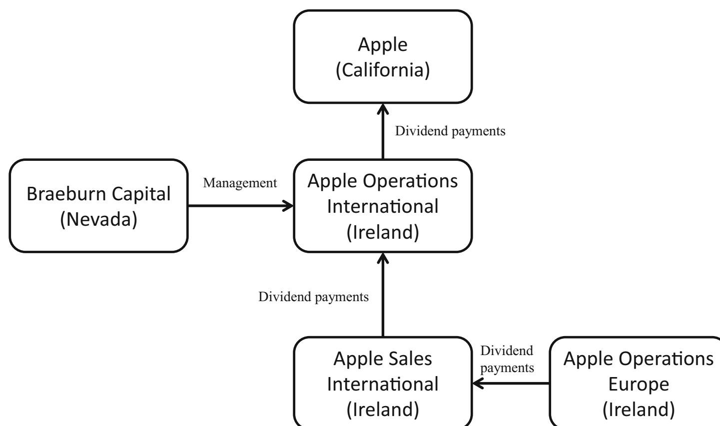

Fig. 1 Simplified organisation chart—Apple Inc.

structure was represented with a straightforward diagram depicting 'Apple's Offshore Organizational Structure', prepared by the Subcommittee and based on information provided by Apple Inc., but again not replicated in the firm's SEC Form 10-K submission for 2014 (Permanent Subcommittee on Investigations 2013, p. 171).[12] By situating partial claim to the revenue generated by the firm's IP in the Ireland subsidiary, all of the revenue for the use of the IP in the region flowed to Ireland, rather than back to Apple Inc. in the USA, effectively shifting income away from the USA. The Subcommittee report suggests the cost-sharing agreement between Apple Inc. and the Ireland-registered subsidiaries merely served to relocate the tax obligation for this income as most of the work behind the IP was conducted in the USA and not Ireland (Permanent Subcommittee on Investigations 2013, pp. 179–82). Collectively, this structure results in a situation where most of Apple's foreign income is channelled to the subsidiaries registered in Ireland (retail and IP), but due to the nature of Ireland's tax legislation neither subsidiary was 'tax resident' in Ireland and therefore did not pay corporate income tax in Ireland (Permanent Subcommittee on Investigations 2013, pp. 171–76).

The Subcommittee hearing attracted a lot of media attention, for both the figures offered on 'untaxed' foreign income and the tax residence status of the two primary Ireland subsidiaries (including Waters 2013; Rushe 2013; Schwartz and Duhigg 2013; Yadron et al. 2013). But in

fact, Apple's tax minimisation structure had appeared in the media over a year prior to the Senate Subcommittee hearing. An article published in *The Sunday Times* (London) under the headline 'Apple's $100bn headache' suggested that Apple faced a US$20 billion tax bill (Duke 2012). It explained that this issue had arisen after the announcement that Apple Inc. intended to transfer some of the accumulated income from its success to its shareholders. It would become the first dividend paid to Apple shareholders since 1995, but much of its profits remained outside US jurisdiction and would be subjected to corporate income taxes when repatriated in order to pay the dividend. Further, the *Sunday Times* report underscored the role played by a Nevada-registered Apple subsidiary (Braeburn Capital) as situated 'at the centre of a complex structure of off-shoot companies that the technology giant has created to shield its soaring profits from the American taxman' (Duke 2012). Yet interestingly the exhibits presented at the 2013 Subcommittee hearing contained a single reference to this subsidiary, noting that the assets of Apple Operations International (Ireland-registered) were managed by Braeburn Capital (Permanent Subcommittee on Investigations 2013, p. 173). The story of Braeburn Capital also was the focus for a *New York Times* article published in April 2012, pointing out at the very start that Nevada provided US domestic tax minimisation features for Apple Inc., when the corporate income tax rate for California was 8.84 per cent and the neighbouring state of Nevada had a corporate income tax rate of zero (Duhigg and Kocieniewski 2012). This article further situated the case of Apple within US federal corporate income tax policy along with the nature of corporate income tax minimisation among the 50 sub-national constituent jurisdictions of the USA, each with its own state-level corporate income tax policy. The absence of this aspect in Apple Inc.'s complete organisational structure from the Subcommittee report may be due to the fact that it facilitated domestic corporate income tax minimisation where the Senate Subcommittee was concerned over international tax minimisation practices that reduce federal corporate income tax revenue.

Nonetheless, Apple Inc.'s organisational structure includes a variation of a tax minimisation strategy known as the 'double Irish'. As described in the *Financial Times*, it involves the arbitrage of differences in the definition of corporate residency for tax purposes between Ireland and the USA. Ireland's tax law determines corporate residency for tax purposes as the jurisdiction where the corporation is controlled and managed. The USA determines tax residency based on the jurisdiction of corporate

registration. Consequently, by placing ownership of IP in a firm registered in Ireland but controlled from another jurisdiction, Ireland assesses tax residency to be held by that other jurisdiction while the USA assesses tax residency to be held by Ireland (Barker et al. 2014). For the case of Apple Sales International and Apple Operations Europe, both subsidiaries are registered in Ireland but they were controlled and managed by Apple employees located in Nevada with the subsidiary company Braeburn Capital (Permanent Subcommittee on Investigations 2013, pp. 172–76). Combined, this treatment of tax residency by Ireland and the USA leads to the situation where the subsidiaries are effectively tax resident *no-where*, and consequently, they are not paying corporate income tax *anywhere*. The media exposure of this situation led to public outrage in some corners, as well as a blunt response to the Subcommittee by the Apple Inc. CEO.

> We pay all the taxes we owe, every single dollar. We not only comply with the laws, but we comply with the spirit of the laws. We do not depend on tax gimmicks. We do not move intellectual property offshore and use it to sell our products back to the United States to avoid taxes. We do not stash money on some Caribbean island. We do not move our money from our foreign subsidiaries to fund our U.S. business in order to skirt the repatriation tax. (Permanent Subcommittee on Investigations 2013, p. 37)

If one takes the view that actions speak louder than words, then the actions of Apple Inc. speak far louder than the words of its CEO. In order to make the promised dividend on shares of Apple stock, the firm did not repatriate foreign-sourced income and pay the outstanding US federal and state corporate income tax on that income. Instead, in 2013 Apple Inc. issued US$17 billion in corporate bonds, followed in 2014 with a further US$12 billion in corporate bonds for 'general corporate purposes, including dividends' (Apple Inc. 2014, p. 36). Media reports in November 2014 indicated that Apple Inc. had diversified away from dollar-denominated corporate bonds with the issuance of €2.8 billion in low interest rate Euro-denominated bonds (Natarajan et al. 2014; Bolger and Rodrigues 2014; Edwards 2014). As a result, money from the corporate bonds could pay the dividend while foreign income would be used to pay the interest and principal on the bonds. In turn those interest payments represent a business expense and a tax deduction for purposes of corporate income tax. The use of interest payments in this fashion to minimise income tax obligations is one measure to be considered in the OECD's BEPS project (OECD 2013a).

Amazon, Google, and Starbucks in Europe

The revelations in the USA on Apple Inc.'s global corporate organisation structure led the EC to initiate action against the 'double Irish' use of subsidiaries by pressuring the Irish government to change its tax legislation, a move against the tax nomad explored in the next chapter. This subsection turns to the attention placed on the actions of US-registered MNCs and their operations in Europe, specifically in the UK. In November 2012 the Public Accounts Committee (PAC) of the British House of Commons held hearings on the actions of HMRC with regard to the assessment and collection of corporate income tax (Committee on Public Accounts 2012). The element of greatest public interest was the hearing with representatives of Amazon, Google, and Starbucks to explain their business operations in the UK and the associated payment of UK corporate income tax (including Bergin 2012b; Houlder 2012b; Syal 2012).

Amazon.com Inc.

Amazon.com Inc. is a Delaware-registered corporation with its corporate headquarters located in Seattle, Washington. The firm aspires to be the 'Earth's most customer-centric company', and in pursuit of that goal it has evolved from selling books over the Internet in 1995 to selling practically everything over the Internet today. Similar to Apple, Amazon has structured its business operations on a regional basis, North America and International (Amazon.com Inc. 2015, p. 3). Amazon's SEC Form 10-K for 2014 identified 11 significant subsidiaries, of which seven are registered in Delaware, two in Luxembourg, and two in Nevada (Amazon.com Inc. 2015, Exhibit 21.1). The role of these subsidiaries within the organisational structure of Amazon may be expected to be quite similar to the role outlined for Apple above in its organisational structure. The work of the PAC did not include the production of corporate organisation charts with the location of subsidiaries; however, for the case of Amazon there was an investigative report published by Reuters in December 2012 (and see Fig. 2 below). In it the author related the evolution of Amazon's corporate organisation outside of North America following its acquisition of online retailers in Germany and the UK in 1998. From 1999 to 2003, the revenues of its European operations were attributed to a Delaware-registered subsidiary. The income generated by its foreign business was set against the losses experienced in its US business, resulting in no net income tax on the foreign income.

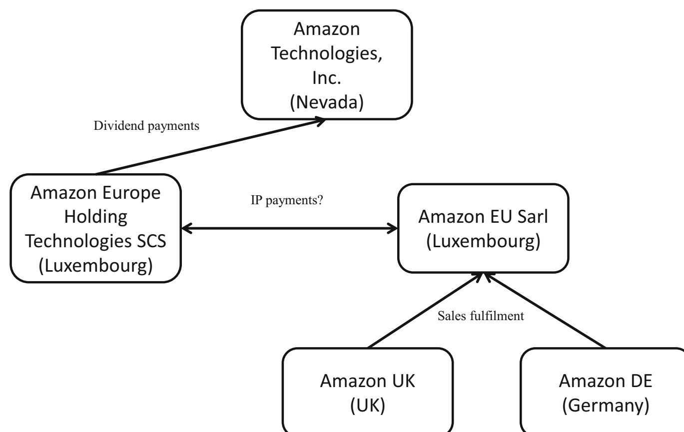

Fig. 2 Simple figure for Amazon operations in Europe

In 2003 Amazon established its first Luxembourg-registered subsidiary, to be followed by two further Luxembourg-registered subsidiaries a year later (two of these subsidiaries are sufficiently 'significant' to be listed in the SEC Form 10-K for 2014—Amazon EU S.à.r.l. and Amazon Europe Holding Technologies SCS). IP rights for the operation and maintenance of Amazon's business model were made available to one Luxembourg subsidiary (details remain company confidential), which then licenses the IP to the second Luxembourg subsidiary. In turn Amazon Europe Holding Technologies SCS remits some, but not all, of the income generated by the licensing of IP between these subsidiaries back to Amazon Technologies, Inc., a Nevada-registered subsidiary (Bergin 2012a; see also Committee on Public Accounts 2012, Ev 56 & Ev 57). One result from this process is that at the end of 2014, Amazon could report to the SEC, and the wider public, that it had US$2.5 billion in 'undistributed earnings of foreign subsidiaries that are indefinitely invested outside of the US' (Amazon.com Inc. 2015, p. 66). While this situation was not an issue raised in the hearing with the PAC the firm's structure in Europe created the situation that was central to the Committee's concerns.

Representing Amazon before the PAC was Andrew Cecil, Director, EU Public Policy. The essential dynamic in the back-and-forth conversation between Cecil and the members of the Committee concerned the location of economic activity which could be measured, counted, and taxed.

Cecil was at pains to explain that notwithstanding the operations of the UK-registered firm, Amazon.co.uk Ltd, any purchase by a member of the Committee was a transaction with Amazon EU S.à.r.l., which operates as a pan-European firm. The UK firm provides services on behalf of the Luxembourg-registered firm, to include receiving and maintaining inventory and then picking, packing, and shipping orders. As a fulfilment firm for Amazon EU S.à.r.l. and any of its third-party affiliates, the UK firm may ship the order anywhere in the world, although as noted in the hearing many destinations will be in the UK because at the international level the firm is seeking speed of order completion (Committee on Public Accounts 2012, Q328–Q386). Consequently, the revenue and sales figures that are publicly available are consolidated at the Amazon EU S.à.r.l.-level, and data on the UK-specific operations requested to support the Committee's agenda to demonstrate Amazon in the UK was not paying sufficient corporate income tax in the UK was not available (e.g. Committee on Public Accounts 2012, Q388). Following the hearing, Amazon EU S.à.r.l. did provide some of the requested sales data to the Committee which was released as exhibits to the report published by the PAC (Committee on Public Accounts 2012, Ev 56 & 57). But the point that was absent from the discussion is the fact that Amazon's business model has emphasised growth over income, hence profits in the form of taxable corporate income is sparse (Mourdoukoutas 2014). As noted in the written response provided to the Committee, worldwide consolidated income for 2012 was US$48,077 million for net sales with income from operations of US$862 million, producing an operating margin of 1.8 per cent (Committee on Public Accounts 2012, Ev 57). Data from the SEC Form10-K declared that Amazon had net sales of US$88,988 million for 2014 with income from operations of US$178 million. Calculating an operating margin on these figures yields a figure of 0.2 per cent (Amazon.com Inc. 2015, p. 17). These figures help to explain why Amazon.com Inc. has never paid a cash dividend on its company shares (Amazon.com Inc. 2015, p. 16).

At the time this book was written, Amazon was reorganising its European operations, partly in response to these inquires (Houlder 2015a). It would receive further attention on its tax practices from the EC, which is discussed in the next chapter.

Google Inc.

The second Internet-based firm interrogated by the PAC for its international corporate income tax arrangements was Google Inc., which was also

a Delaware-registered corporation and its principal offices are in Mountain View, California (Google Inc. 2015b). Initially incorporated in California in 1998, Google reincorporated in Delaware in 2003 and provides goods and services 'in more than 100 languages and in more than 50 countries, regions, and territories' (Google Inc 2015b, p. 3). The international corporate organisation structure supporting the delivery of those goods and services is not apparent from the SEC Form 10-K, which in 2014 only identified three subsidiaries, one registered in Delaware and two registered in Ireland (Google Inc. 2015a). Looking back through previous years' SEC submissions reveals that Google removed 114 subsidiaries from the list of subsidiaries that were last present in its 2009 SEC submission (Google Inc. 2010). The headline for a *Wall Street Journal* article in 2013 called it 'The Incredible Vanishing Subsidiary' in its analysis of five US-based MNCs that included Google (Holzer 2013). Among those vanished subsidiaries were seven corporations registered in the UK, including Google UK Ltd, which was the focus of questions examined by the PAC in their effort to understand how Google Inc. was organised internationally and paid less UK corporate income tax than the Committee felt was appropriate (Committee on Public Accounts 2012, Q446–Q578). The basic process was that while a customer may contact a representative of Google UK Ltd concerning advertising with Google, the transaction for the advertising services is completed with Google Ireland Ltd, because the UK-registered subsidiary is the local agent for the Ireland-registered subsidiary (Committee on Public Accounts 2012, Q453) (Fig. 3).

The substantial economic activity for Google Inc. and its collection of subsidiary corporations occurs in the virtual space of the Internet, as Matt Brittin, Google Vice President for Sales and Operations, Northern and Central Europe, endeavoured to make clear for the Committee. The research and development activity for the technology driving the business activity occurred in the USA, while international licences for the use of that IP outside of the US resides in a Bermuda-registered subsidiary (Committee on Public Accounts 2012, Q456, Q476). As expressed in the questions from the members of the PAC, this structure served to reduce Google Inc.'s US corporate income tax obligation while producing a 'cash pile' in Bermuda (Committee on Public Accounts 2012, Q486, Q490, Q494, Q575, Q522). In response to a concluding general question for the hearing, Brittin reiterated the point that that Google pays tax in those jurisdictions 'where profits are generated' which is the economic activity involving research and development (Committee on Public Accounts

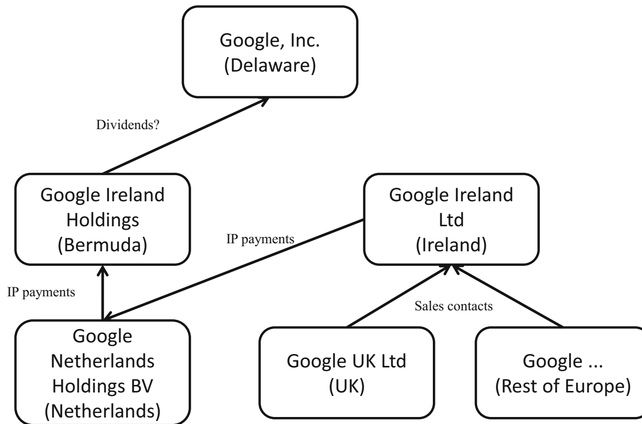

Fig. 3 Simplified view of Google in Europe

2012, Q613). It is a point that was reinforced in the written submission provided afterwards, 'Google follows the principles of international taxation in that taxes are paid based on where products are created rather than where they are consumed' (Committee on Public Accounts 2012, Ev 58). Nonetheless, the frustration visible in the statements made by members of the PAC in the hearing may be a reflection of the fact that Google Inc. provided a 'Revenues by Geography' breakdown in its SEC Form 10-K listing revenue for 'United States', 'United Kingdom', and 'Rest of the world' (Google Inc. 2015b, p. 26). Subsequent statements from 'whistleblowers' and an investigative report published by Reuters led the PAC to hold a follow-up hearing in May 2013 with representatives of Google UK, Ernst & Young, and HMRC (Committee on Public Accounts 2013; Bergin 2013). This hearing involved an attempt to decompose the business practices of Google employees, between what was claimed by 'whistleblowers' to the PAC and the way those practices were described at both the November 2012 hearing and the current hearing. It was an effort to distinguish the sale of advertising on an Internet platform in a manner similar to the sale of advertising in a print medium (e.g. Committee on Public Accounts 2013, Q38). To increase the confusion in the hearing room, the representative for Ernst & Young highlighted the point that Internet-based transactions are taxable dependent on where the non-UK selling firm is resident, and whether it is considered to have a permanent establishment in the UK (Committee on Public Accounts 2013, Q52, Q53). While not clearly

achieved in the oral evidence at the hearing, the claims of 'whistleblowers' were refuted in subsequent written evidence submitted to the Committee (Committee on Public Accounts 2013, Ev 39).

Shortly after the November 2012 PAC hearing in London, Google's business operations in Australia were examined in an article on MNC tax practices published in the *Sydney Morning Herald*. The structure for Asia is similar to the structure in Europe, with a regional subsidiary providing advertising services for the region. In this case, it is a Singapore-registered subsidiary, though the name identified (Google Asia Pacific) was not one of the subsidiaries listed in Google Inc.'s 2009 SEC Form 10-K. The article quoted from Google Australia's annual report that the Australia-registered corporation provided '"research and development services" to its US parent and "sales and marketing services" to Google companies in Ireland and Singapore' (Butler and Wilkins 2012). Consequently, for the case of Google, IP is at the centre of its operations and the source for its income because it serves to facilitate the advertising revenue generated through its websites.

As with Amazon, Google's European operations and tax practices attracted additional attention from the EC, which is addressed in the next chapter. And while this book was in development Google reorganised itself on a grand scale, becoming a subsidiary to a new corporate entity, Alphabet, a holding company registered in Delaware (Barr and Winkler 2015; Waters and Platt 2015). This restructuring may or may not have a material impact on the payment of corporate income tax by the MNC and its subsidiaries in any or all of the jurisdictions in which it operates.

Starbucks Corporation

The case of Starbucks Corporation is different yet again from Amazon and Google, in that it provides a good directly to a customer in a retail setting while utilising its IP in a way that succeeds in reducing its corporate income tax obligation. Starbucks is registered in the state of Washington with its principal corporate offices in Seattle, Washington and provides specialty coffee in 65 countries under six brand names in addition to the eponymous Starbucks Coffee (Starbucks Corporation 2014, p. 2). The SEC Form 10-K identifies 90 subsidiaries with the proviso that the list 'excludes certain subsidiaries which, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary under SEC rules as of September 28, 2014' (Starbucks Corporation 2014, Exhibit 21). Two subsidiaries were of particular interest to the members

of the PAC during the November 2012 hearing, the subsidiary in the Netherlands which serves as the regional headquarters for Starbucks and roasts its coffee beans and the global coffee bean purchasing subsidiary in Switzerland. By maintaining a regional headquarters function, a regional coffee bean roasting operation, and a global coffee bean trading firm, Starbucks Corporation, as a multinational business, achieves classic economies of scale for both the 2140 company-operated stores and its licensed (affiliate) stores in the Europe, Middle East, and Africa (EMEA) region (Starbucks Corporation 2014, p. 3). At the same time, however, outside observers (including the PAC and its advisors) see in these structures the mechanisms facilitating tax base erosion, accomplished by shifting income to subsidiaries resident in jurisdictions offering a lower corporate income tax rate (Netherlands, Switzerland) than in other jurisdictions in which the firm operates (including the UK).[13] Moreover, Starbucks UK was accused of shifting income from the UK to its Netherlands subsidiary through the royalty payments made on its IP (Committee on Public Accounts 2012, Q211–229, Q263–272) (Fig. 4).

The royalty payments issue was emphasised in the hearing for two reasons, first because of a perception that Starbucks had no economic rationale for the 6 per cent royalty fee on its IP, and then second because that figure was reduced to 4.7 per cent after discussions with HMRC. In response to questions that Starbucks' IP royalty fee rate was higher than other firms in

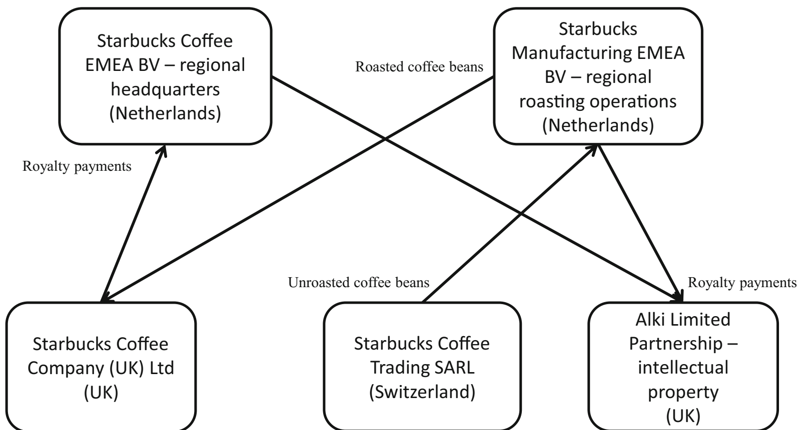

Fig. 4 Simple figure for Starbucks in Europe

the food industry, Troy Alstead, Starbucks Global Chief Financial Officer, asserted that the royalty rates for other global brands ranged from 4 to 8 per cent (Committee on Public Accounts 2012, Q219). Further, he emphasised the point that the licensees operating 50 per cent of Starbucks' global retail presence (10,653 out of 21,366 stores in 2014) 'willingly pay us the 6 % royalty, because they clearly recognise the value of the goods and services, the store design, the trademark protection and the value of the global brand' (Committee on Public Accounts 2012, Q223, see also Q224–228; Starbucks Corporation 2014, p. 3). The explanation offered for the rate reduction was that is represented the settlement reached with HMRC in response to HMRC's challenge to Starbucks' continued loss-making status in the UK (Committee on Public Accounts 2012, Q267). The overall concern present throughout the PAC's questions was the fact that after 15 years of operation, Starbucks UK had been profitable, in terms of actual corporate income tax paid to HMRC, in only one year (Committee on Public Accounts 2012, Q189–206). At the global level, however, Starbucks Corporation was apparently reporting to investors and analysts that its UK subsidiary was achieving a 15 per cent 'operating profit margin' (Committee on Public Accounts 2012, Q190). The subsequent Q&A did not clarify the situation to the satisfaction of the PAC, but in part the difference was attributed by Alstead as arising from differences in accounting rules between the USA and UK (Committee on Public Accounts 2012, Q190–200).

A point which was not explicitly stated in the hearing, but which should be understood is the fact that it is a matter of perspective. In considering the profits and losses of an MNC comprised of a collection of subsidiaries which may also be reporting profits and losses individually, the question is at what level or point in the corporate structure one is attempting to determine the corporation's profitability. For Starbucks UK, the royalty payment it makes to the regional headquarters in the Netherlands is a cost element that reduces its income, hence its profits. The same royalty payment, however, when passed through to Starbucks Corporation in the USA represents income, at the global level, and in turn it positions the Starbucks outlets in the UK as a source of profit for the operations of the MNC as a larger entity. The base concern for the PAC was that the income, as global income, was taxed in the USA, and it did not represent taxable income in the UK. Due to sustained media attention, Starbucks announced several weeks after the PAC hearing that it would voluntarily pay £10 million in taxes to the UK government in 2013 and 2014 while

not claiming tax deductions for its royalty payments and payments to affiliated Starbucks' subsidiaries. One member of the PAC was quoted in the *Guardian* article that this payment represented the MNC's desire to protect its brand (and thus the value of its IP) rather than a change in the MNC's corporate tax policy (Neville and Treanor 2012; Houlder et al. 2012b). A further concern emerging from media reports was the perception created by this announcement, suggesting that in essence the tax payments of MNCs are voluntary. Yet to a certain extent, this may in fact be true when the nature of international taxation is confronted by the MNC tax nomad (Barford and Holt 2013). It chooses how much tax to pay in each jurisdiction in which it operates through the cross-border structure of corporate subsidiaries it has created.

The EC became interested in Starbucks' tax arrangements with the Netherlands at this time, and its investigation is discussed in the next chapter.

Notes

1. Examples and diagrams for generic multinational firms are presented at Annex C in OECD (2013a).
2. 'Work for hire' is a concept from copyright law covering IP produced by an individual under contract and ownership rights to the IP rests with the employer and not the producer, see, for example, http://www.copyright.gov/.
3. See https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.
4. See https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.
5. Initially, this list was an aggregation of Member State tax havens lists where the listed jurisdiction had been included in the list of at least ten Member States (Houlder 2015b). In response to criticism of that initial presentation form, the EC revised its presentation strategy, and the website is now an interactive map where the user highlights a Member State in order to have its list of jurisdictions 'for tax purposes' displayed. The map is available at http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/lists_of_countries/index_en.htm, last accessed 15 February 2016.
6. Shipping registries perform a similar function, both for the ship and for the jurisdiction hosting the registry, including regulatory arbitrage, government revenue, and ownership privacy. On shipping registries in general see van Fossen (2012, Chap. 4), and for an example where these 'flags of convenience' have been used to evade economic sanctions see Becker (2010).

7. There are a number of studies on the criminal misuse of limited liability corporations, including Findley et al. (2014), van der Does de Willebois et al. (2011), Sharman (2010), Financial Crimes Enforcement Network (2006), Schwarcz (2002).
8. http://corp.delaware.gov/aboutagency.shtml.
9. The success of the Court combined with a companies registry has been emulated in the Caribbean with the Eastern Caribbean Commercial Court, the commercial division of the Eastern Caribbean Supreme Court (Maurer and Martin 2012).
10. http://global.delaware.gov and http://www.corplaw.delaware.gov.
11. The specific experience of the Cayman Islands as an OFC is explored further in Vlcek (2013a, b).
12. The SEC requires that a firm only report those subsidiaries that are 'significant', which would be when the subsidiary is responsible for more than 10 per cent of the firm's assets, income, or investments (Holzer 2013).
13. A similar argument for a corporation using economies of scale to achieve income shifting was made against SABMiller in Africa by the NGO Action Aid in 2010, see Hearson and Brooks (2010).

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A Collective Response to the Tax Nomad

The EU is confronted by a significant challenge when it comes to taxation, both of the natural person and of the legal person. As a cooperative political–economic organisation composed of sovereign jurisdictions, the EU is guided and constrained by the sovereign choices delegated to the collective and the sovereign choices retained by the Member States. Taxation is one of the areas in which the Member States retain independent sovereign decision-making authority, and that can result in Member States competing over corporate income tax rates, special tax regimes, and the individual tax treatment of large MNCs.[1] Efforts by the EC and those Member States aggrieved by 'losing' the tax competition have been hampered by the Treaty on the Functioning of the European Union, Articles 113–115, which require unanimity in the European Council to adopt a tax policy applicable to the entire EU. Consequently, most tax policies remain fully the responsibility of each individual Member State. Regardless of the rather high hurdle for agreeing a common tax policy, the EC in time was able to advance an initiative to eliminate some forms of individual income tax avoidance by EU citizens within the EU. A mechanism to reduce corporate income tax minimisation practices within the borders of the Single Market exists, but at the time of writing it remains voluntary.

Both of these EU programmes, one addressing the natural person and the second the legal person, are reviewed in this chapter. In addition to these programmes, the EC initiated action against some of the preferential corporate income tax arrangements granted to MNCs by select Member

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States. Tax practices involving the location of IP highlighted in the last chapter are under investigation by the EC, not as a matter of tax policy (a sovereign power retained by the Member State), but as a matter of 'illegal state aid' which is not compatible with the Single Market and falls under the oversight of the Commission within the context of Article 107 of the Treaty (European Commission 2015a). The chapter considers each of these topics in turn. First, the programme to prevent tax avoidance by individual EU citizens is presented in the next section. The compromise solution employed by the EC is characterised here as a revival of tax farming, and this approach to government revenue collection is explored prior to looking at the specific case of the EU. It is followed by the cooperative solution proposed for apportioning the corporate income tax base in the Single Market. At present it is a voluntary process with a proposal to transform it into a mandatory arrangement. Finally, the chapter turns to the innovative strategy for treating the 'comfort letter' addressed to an MNC by the Member State's tax authority as a form of illegal state aid. The argument essentially made by the EC is that any preferential arrangement for one MNC that is not equally available to other MNCs represents state aid to that particular firm and as a result constitutes illegal state aid.

The EU Revives the Tax Farmer

The contentious gestation of the EUSTD provides the context for this argument that it represents a modern revival of tax farming. The agreement on the text of the Savings Tax Directive that was finally achieved in 2003 and went into effect from 1 July 2005 culminated 16 years of negotiation among the Member States (European Council 2003).[2] The EUSTD covers the 'taxation of savings income in the form of interest payments' made on any interest-bearing account held in a jurisdiction where the EU citizen was not resident. The EUSTD provided two implementation options for the participating jurisdictions: to automatically exchange taxpayer account details with the other Member States or to collect a withholding tax which would then be transferred to the Member State where the EU taxpayer was resident. Implementing the Directive with two options represented a compromise in order to overcome the differences between those Member States with a financial centre and those without one. And because this capital remains nomadic, those Member States with a financial centre insisted on the inclusion of their competitor jurisdictions outside of the EU, Andorra, Liechtenstein, Monaco, San

Marino, Switzerland, and USA. The EUSTD also requires that Member States 'apply these provisions … [in] all relevant or associated territories (the Channel Islands, Isle of Man, and all dependent or associated territories in the Caribbean)' (European Council 2003, p. 45). Yet the Directive is not water-tight, it holds a geographic loophole, because it does not cover Bermuda (a UK Overseas Territory [OT]) and it does not include a number of other recognised financial centres, such as Hong Kong SAR and Singapore. The latter two jurisdictions were identified in media reports as the destination for capital flight from Europe at the time the Directive entered into force (Parker et al. 2006; E. Taylor and Prystay 2006). It also should be noted that only five of the specified non-Member State jurisdictions cooperate with the implementation of the EUSTD. The USA has not collected and shared data on the financial accounts of non-resident, non-citizen natural persons for the purposes of cooperation with the EU Directive. This situation is a point of interest with respect to the implementation of a US measure, the Foreign Account Tax Compliance Act (FATCA), and discussed further in the next chapter.

The Directive also contains a structural loophole, in that it applies to the interest-generating accounts registered to a natural person. Consequently any natural person may avoid the tax collection mechanism of the EUSTD by simply transferring their non-resident financial assets to a legal person, in the form of a corporate vehicle, trust, or foundation. Interestingly, that legal person may be registered in an EU Member State or associated territory and remain resident in that jurisdiction (Jiménez 2006). The loopholes in the EUSTD were recognised from the start, and a proposal to amend the Directive was tabled in 2008 (European Commission 2008). In addition to addressing the two loopholes noted here, the proposed amendment also would revise the definition of 'interest' used in the EUSTD in order to include new financial products that function as interest-generating savings accounts even if they do not look or sound like an interest-generating account. Passage of this proposal looked to be well on the way to be as lengthy as the passage of the original Directive, for example, a 2012 Action Plan for the EU to 'strengthen the fight against tax fraud and tax evasion' included passage of this amendment to the EUSTD among its 34 measures for action (European Commission 2012b).

Yet in 2014, and only six years after it was first proposed, Council Directive 2014/48/EU to amend the EUSTD and address some of the identified loopholes was approved (European Council 2014b). The amendments for the EUSTD now expect the interest-paying agent to

'look through' the intermediary corporate vehicle to determine beneficial ownership and if that owner is an EU citizen to apply the requirements of the Directive (amended Article 3). Further, the definition for an interest payment was replaced in order to capture tax on payments that are effectively interest even when the payment may have been packaged in such a way as not to look like interest (amended Article 6). The latter Directive amending the original Directive to collect a tax on savings interest was to be adopted in Member States' legislations by 1 January 2016. But this amending Directive did not address the limitations (and loophole) with geographic scope. While it may identify, for example, a Singapore trust as a corporate entity 'not subject to effective taxation' for the purposes of the EUSTD that categorisation affects the payment of interest from a paying agent located in the EU but does little to prevent tax avoidance by EU citizens maintaining accounts or corporate vehicles registered beyond the territory covered by the EUSTD.

As a mechanism to deal with the undeclared income from interest on the nomadic savings possessed by citizens and residents of the EU, the EUSTD is in part the revival and reestablishment of the tax farmer in modern Europe. Viewed in this manner, the collective response of the Member States is to mandate that each Member State cooperate with all others in order to achieve equity of tax payments on the earned savings interest accumulated by their residents. In order to understand the EUSTD as tax farming, it is necessary to explain the historical origins for this policy approach and its present-day applicability.

Tax farming, when viewed through a lens shaped by the modern liberal state, represents the privatisation of a government function. This perspective resonates today among those observers critical of a neo-liberal prescription (commonly labelled as the Washington Consensus) for the increased privatisation of government in order to reduce government bureaucracy (bloat) and expenditures (that have created excessive levels of government taxation and debt). It is predicated on the idea that tax collection for government services is an essential component of a state and an argument that state formation was a product of increased tax collection for bureaucratic development and rationalised (centralised) state militaries (Teschke 2010). Moreover, the practice of tax farming bears the negative image of armed men breaking into the peasant's home in order to forcibly extract the tax owed while a rotund (well-fed and aristocratic) representation for the tax farmer oversees the operation—all of which is

recognised as the prerequisite situation leading to the French Revolution (E. N. White 2004). Facile caricatures fail to reflect the diversity of strategies employed by the early modern state's use of tax farming to gather revenues for national government operations, foremost among which was the conduct of war.

Tax Farming in the Ancien Régime

In a survey of the tax collection methods historically used by political jurisdictions, Metin Coşgel and Thomas Miceli (2009) identified three basic categories, which they term 'share contracts', 'rent contracts', and 'wage contracts'. A share contract was an arrangement where the tax collector and the government agreed in advance to share the collected tax revenue. They found this to be an 'anomalous' practice and contract enforcement required that the government 'measure the actual tax collected and then divide that amount with the collector at the prespecified rate' (Coşgel and Miceli 2009, p. 402). Their second category, rent contracts, was straightforward; the tax collector (farmer) provided the government with a fixed amount in advance for the contract to collect taxes and the right to keep any sum collected over and above the advance payment. The third category encompasses the approach much more familiar today, with tax collectors employed under a fixed wage contract and all revenues collected going to the public purse, in other words the staff employed by the state tax revenue authority (Coşgel and Miceli 2009, pp. 402–03).

Coşgel and Miceli note that a number of permutations exist within these three categories, varying contractual requirements on factors such as the compensation paid to the collector(s), the length of the contract, and so forth; nonetheless, the variance among tax administrations across time and space motivated the authors to produce a model 'sufficiently abstract to identify the basic factors affecting general tendencies', while at the same time it remains open to the variations present with individual examples (Coşgel and Miceli 2009, p. 404). The model leads them to conclude that the variation seen across and within these three categories is a product of the level of government effort required to measure the tax base as compared to measuring (and controlling) the activity of the tax collectors. Thus, where it was difficult to consistently calculate the tax base, due to volatility in agricultural production or cross-border trade in goods, it was more efficient (from the government's perspective) to use rent contracts for tax revenue collection. Developments in technology and government

bureaucracies from the seventeenth century onwards 'increased the cost of measuring the tax base and revenues and lowered the cost of measuring the collectors' effort' (Coşgel and Miceli 2009, p. 415). Consequently, wage contracts (that is the direct employment of tax collectors by a government) increasingly became the efficient solution for governments and with it the decline of the tax farmer.

Alternatively, Edgar Kiser applied principal-agent theories to this question of tax farming versus government-employed tax collection agents, arguing that the determining influence guiding a government's chosen approach for tax collection was structural. The decision by a government whether or not to use tax farming was determined by the government's capacity to 'adequately monitor and sanction the actions of their agents' (Kiser 1994, p. 240). If supervising the actions of government-employed tax collectors was felt to be too difficult or costly, then tax farming was used as the means to motivate tax collectors to be more efficient (Kiser 1994, p. 240). Furthermore, the incentives for corruption by agents are less with tax farming. As Kiser points out, the 'agent on a fixed salary' (in other words the government employee) may enhance their income at no loss to themselves when accepting a bribe. The 'agent on a proportional salary', that is the tax farmer that is paid a proportion of the tax revenue they collect, would suffer a loss because accepting a bribe to lower the tax assessment will also lower the collector's income, which is a proportion of the reduced tax revenue collected. It would be necessary for the bribe to be significantly more than the expected income reduction in order to make accepting a bribe worthwhile for the tax farmer, an amount likely exceeding the amount of tax owed in the first place. Consequently, from the perspective of the taxpayer, to bribe the tax farmer makes little sense if the bribe would be greater than the amount of tax owed. Kiser suggests that tax farming is therefore the efficient strategy in circumstances where the assets to be taxed 'are variable, mobile, and difficult to measure' (Kiser 1994, p. 293). It is a description that echoes the challenge presented by the tax nomad.

Beyond the question of operational efficiency, Richard Bonney highlighted the fact that tax farming in pre-Revolutionary France did not involve direct (income or poll) taxes, rather *la Ferme générale* was strictly to collect the indirect taxes. In other words, the tax farmer collected the tax imposed on salt, drink, and the trade in goods (Bonney 1992, p. 151). But the important conclusion to draw from his analysis was that it was not tax farming, per se, that fuelled the discontent over taxation before

the Revolution, rather it was the inequities between provinces (a product of the privileges accorded to a province when it was first integrated into France during the fifteenth century) and between social groups (e.g. tax exceptions accorded to the clergy) that were the greater source of public discontent (Bonney 1992, pp. 152, 62). Consequently, it was not the tax farmer that incited the Revolution but the inequity built into institutional structures of taxation in pre-Revolutionary France.

What these analyses point to (particularly the study by Coşgel and Miceli) when combined with an argument that globalisation has reduced the capability and capacity of the state (as a bureaucratic organisation) is that the cost to measure accurately the tax base and the extent of revenue expected from it has been increasing over the past few decades. As reviewed in the first chapter, there is a wide range of estimates for the quantity of untaxed nomadic capital. And whatever the accuracy for these estimates no one doubts that there exists untaxed income to be found. In light of this situation, the model created by Coşgel and Miceli may indicate the practicality for a return to tax farming, at least for pursuing tax nomads in order to overcome the sovereignty barrier preventing the accurate measurement of citizens' non-resident assets and therefore a correct assessment for the tax revenue that is owed the government. The increased reliance of governments on direct taxes in the twentieth and twenty-first centuries as compared to the historical reliance on indirect taxes is also a factor, though it is a variable that is not considered by Coşgel and Miceli in their model (see Picciotto 2011, pp. 208–09, citing Dauton 2001). Further, it should be noted that this shift from indirect to direct taxation is consistent with the efforts undertaken by developed states since World War II to reduce tariffs (a leading source for indirect taxes), though developing economies have resisted this shift as tariffs remain an important source for government revenue (Keen and Mansour 2010a, p. 561; Sindzingre 2007, p. 619).

Tax Farming as Privatisation

The problem with corruption among government officials has been cited as a justification for tax farming, a point underscored by Edgar Kiser with a quotation from the Prussian Great Elector, 'the more civil servants, the more thieves' (Kiser 1994, p. 292). Again, accepting a bribe to reduce a tax assessment would enrich the civil servant and the bribing taxpayer, while diminishing the government's revenue collection. This problem

remains a concern today, especially in developing or emerging economies, see, for example, Transparency International's annual *Global Corruption Report*.[3] Yet the weakness among tax administrations in developing economies has been attributed to political elite interference (to help colleagues and punish opponents) as much as it has been attributed to the willingness of underpaid government tax assessors to accept bribes (Fjeldstad and Moore 2009, pp. 4–5). While academic work on tax administrations in developing economies has emphasised the 'paying taxes promotes democracy' argument (e.g. Everest-Phillips 2010), tax farming as a form of government privatisation was proposed for implementation by developing economies in the 1990s.

A staff economist with the International Monetary Fund (IMF) asked if tax farming might offer 'A Radical Solution for Developing Country Tax Problems' (Stella 1993)? The study began by reviewing the points raised by studies on historical cases of tax farming: tax farming as a cost-efficient government strategy, the benefit to the government from the upfront payment by the tax farmer for the contract, and the problem of excessive revenue collection by the tax farmer. It continued with an argument that tax farming represented a 'second-best solution' for tax collection in the developing economy. From his review Peter Stella concluded that the flaws outweighed any benefit. Among the flaws identified were concerns over the relative efficiency gain between a private tax administration versus a government tax administration and the likelihood for excessive tax collection by private actors. The critique, however, is ahistorical in that Stella attributes a value for market efficiency and faults tax farming as failing to 'appropriately value citizens' preferences', concerns that are not generally present in the pre-modern societies cited in the text as practicing tax farming (Stella 1993, p. 220). In contrast to Stella's conclusion, Kiser (with a co-author) applied principal-agent theory to this question on tax farming as the privatisation of a government function in a developing economy. In the context of developing economies Edgar Kiser and Kathryn Baker identify a further problem with government tax administrations that reduce their effectiveness, a limited budget to support the tax administration such that employee wages in the tax administration are insufficient to the task of reducing the temptations of corruption (Kiser and Baker 1994, pp. 492–93). After reviewing several potential shortcomings with privatising the tax administration of a developing state, Kiser and Baker conclude that the path of privatisation 'would be the most advantageous for indirect taxes', similar to the historical experience of *la Ferme générale* in France

(Kiser and Baker 1994, p. 497). Nonetheless, they were cautious with their recommendation and qualified their analysis with a declaration that it was strictly about administrative efficiency and did not include other considerations on the use of tax farming in a developing economy today, such as its political acceptance by the public at large (Kiser and Baker 1994, p. 497).

While the drive to privatise government services in developing economies did attract large foreign firms to operate, for example, water and electricity services, the same situation has not occurred for developing state tax administrations. Proposals to disentangle a state tax administration from the elite politics of a government bureaucracy in turn represent a position somewhere between the bureaucratic government tax administration familiar to a European (HMRC) or North American (IRS) resident and the historical caricature of the French tax farmer mentioned above. The establishment of a (semi-) autonomous revenue agency (ARA) in a number of African states was reviewed by Odd-Helge Fjeldstad and Mick Moore. One initial explanation for the emergence of this strategy to conduct tax administration in a developing economy was the trend towards government privatisation, and in Africa the introduction of concepts from New Public Management for enhancing government administration and with it economic development (Fjeldstad and Moore 2009, pp. 2–3). This strategy is consistent with the suggestion that a move to a privatised tax administration would reduce political interference and corruption in the government's tax administration, which Fjeldstad and Moore acknowledge would seem to follow a 'process of putting state agencies on a commercial footing as a prelude to privatisation' (Fjeldstad and Moore 2009, p. 3). Yet, rather than confirm this analysis, they found instead that the promulgation of the ARA, at least in Africa, served other purposes, in particular as a means to increase revenue collection. The establishment of an ARA further served to signal to foreign aid donor agencies the government's intentions for bureaucratic reform and to create a tax administration more conducive for the tax policies promoted by the international financial institutions—individual and corporate income taxes and consumption taxes (VAT). The overall objective for an ARA, as Fjeldstad and Moore emphasise, however, was increased tax revenue collection, which they further noted was frequently the lead objective listed by donor agencies for any tax administration reform project (Fjeldstad and Moore 2009, pp. 11–12). In turn, this objective is crucial for enhancing the government's ability to repay its sovereign debt as well as demonstrating a capacity to repay any new sovereign debt obligations. Since

2010 the capacity to pay sovereign debts increasingly became a critical economic issue among the Member States of the EU. Naturally, the challenge for repaying these debts placed increased demands on the public purse, leading in turn to increased concern for the collection of tax to fill that purse, in all EU Member States and not simply those at the centre of the 2010–2011 Euro-zone financial crisis (e.g. Greece, 'Financial crimes squad snares island tax dodgers' 2011).

Tax Farming by the European Union

At first glance, this may appear to be a rather bold assertion that the EU, as a postmodern political entity, would be engaged in a practice more commonly perceived as an early modern phenomenon with all the negative connotations remembered from the pre-Revolutionary French experience. Yet one option available to the Member States for implementing the EUSTD after 2005 was fundamentally a form of tax farming. In exchange for collecting a withholding tax on the assets of foreign account holders banking with domestic institutions, a Member State (and Switzerland) retained 25 per cent of the tax collected (European Council 2014b, pp. Article 12, 'Revenue Sharing'). Naturally, a case challenging this characterisation of the EU Directive as encouraging tax farming would emphasise that the requirement to reach a consensus in order to finalise the Directive forced this situation in the implemented version, and not that it represented an intended tax revenue-generating mechanism by design, ex ante. Nevertheless, 14 jurisdictions declined to exchange account holder information that would permit the Member State to collect income tax on interest payments directly from its residents with foreign accounts (Hemmelgarn and Nicodème 2009, p. 25). Instead, they chose to have financial institutions withhold tax from those interest payments, and these jurisdictions remitted the collected taxes to the Member State.

In 2009 a report was commissioned to assess the effectiveness of the EUSTD in terms of the revenue collected through its mechanisms. The authors of the report found the Directive had 'no measurable effects on the development of different investments' which would be anticipated by any effort to avoid the collection of tax on interest established through the EUSTD (Hemmelgarn and Nicodème 2009, p. 5). The initial observation on this apparently counter-intuitive situation was the existence of the loopholes permitting easy avoidance of the Directive. The second explanation offered was the fact that the tax withheld from interest payments

by states not exchanging account holder data was 15 per cent in the first three years after the EUSTD came into force. The rate of withholding increased to 20 per cent for the next three years and then to 35 per cent after the EUSTD had been in force for six years (European Council 2003, p. Article 11). For all the analysis of the data conducted for this report and its acknowledgement for the limitations present in the date analysed, the significant point to recognise is that the Directive, as implemented, failed to collect the tax revenue anticipated. For example, in 2006 the individual Member State that received the most withholding tax from the Directive was Germany with €154,620,000 (Hemmelgarn and Nicodème 2009, p. 27). It is a figure substantially less than the '$12 billion annually for Germany alone' anticipated by some observers when the Directive was in development (Sharman 2008, p. 1065, citing 'Taxing Matters', *Economist*, 3 April 1997).

While it is true that the loopholes in the Directive permitted easy avoidance, it also may be that actually existing foreign assets in some of the covered jurisdictions do not in fact generate as much taxable income as expected by some observers. Certainly for the case of the Cayman Islands, media exemplar for a tax haven, there were far fewer individual bank accounts in the name of EU Member State residents than were otherwise anticipated by those living outside the Cayman Islands. Because income taxes, and thus data on individual potential income taxpayers, were not collected in the Cayman Islands, it first was necessary to create a Tax Information Authority (TIA) for the collection, management, and reporting of data in order to fully implement the EUSTD. In the report for the first six months of the Directive (1 July–31 December 2005), the Cayman TIA listed 8886 accounts containing total assets of US$10.96 million while in the report covering calendar year 2009, there were 7397 accounts containing total assets of US$12.2 million (Tax Information Authority 2008, 2010). To put this into the larger context, the Bank for International Settlements reports in their *Quarterly Review* (Table 6A: External positions of reporting banks vis-à-vis all sectors) that total foreign assets on deposit with the Cayman Islands in December 2009 was US$1,733,082 million (Bank for International Settlements 2011). The report for 2012 showed little change, with 9098 accounts containing assets totalling US$12.1 million (Tax Information Authority 2013). For the case of the Cayman Islands, this situation reflects the fact that its financial centre works predominantly with corporate accounts (mutual funds, hedge funds, and other financial firms) rather than individual natural persons.[4]

It is expected that this geographic loophole in the EUSTD will be closed by ongoing global initiatives at the OECD under the direction of the G20 (as discussed in the chapter "Global Tax Governance and the Tax Nomad"). And as explained at the beginning of the chapter, the EUSTD was amended by Council Directive 2014/48/EU to address the corporate vehicle loophole by 'looking through' the legal entity to identify the natural person with beneficial ownership and thus the tax obligation. In parallel with addressing deficiencies in the Savings Tax Directive, the EC also was seeking to broaden the scope of a Directive on the automatic exchange of data among the Member States of the EU. The Administrative Cooperation Directive would be amended to include the exchange of information on EU citizens that would facilitate the collection of income tax on their foreign source income. The latter Directive would now mandate the collection and exchange of individual account owner information that was mandated by the EUSTD. With Council Directive 2014/107/EU, automatic reporting of this income-related information was agreed with an implementation date of 1 January 2016 (European Council 2014a). A press release announcing these two amending Directives in June 2013 as part of the EU's fight against tax evasion also situated them in the context of the US initiative discussed in the next chapter.

> Today's proposal [to amend the Administrative Cooperation Directive] … will mean that Member States share as much information amongst themselves as they have committed to doing with the USA under the Foreign Account Tax Compliance Act (FATCA). (European Commission 2013)

Nine months later the rapid passage of this amending Directive led to an EC proposal to repeal the EUSTD completely. Automatic exchange of information within the EU successfully superseded the requirements imposed by the EUSTD and achieved the goal desired when that Directive was first mooted. But the goal is achieved only with respect to the Member States of the EU and leaves open the associated jurisdictions also included in the EUSTD. Consequently, the EU engaged in negotiations with them to maintain an information exchange regime, only now framed within the scope of the global initiative of the OECD's Common Reporting Standard (CRS), covered in the chapter "Global Tax Governance and the Tax Nomad" below.

Sharing Corporate Income Tax Revenue in the EU

Moving from the individual tax nomad to the corporate tax nomad, the EC first proposed a Directive to quantify a Common Consolidated Corporate Tax Base (CCCTB) in 2011. The objective was to establish a mechanism to determine the precise income tax base for an MNC operating within the EU and then to equitably distribute that tax base among the Member States in which the MNC operated (European Commission 2011). The document endeavoured to clearly convey that the proposed European Directive was intended to determine the tax *base* and with it the formula for apportioning the tax base among the Member States in which the MNC operates. In other words, the intention was to measure the total taxable income generated by the MNC throughout the EU within a particular tax year. In keeping with the apportionment of duties and responsibilities between a Member State and the EU, the proposed Directive would not determine the corporate income tax *rate*. The rate of corporate income tax to be applied to the tax base determined under the CCCTB remains the sovereign choice of each individual Member State. The intention is that after calculating the tax base on any MNC for a given tax year, for example €10 million, that sum would then be divided among the Member States in which the MNC operated for the Member States to assess corporate income tax. If in this example the MNC operated in three Member States, the apportionment of the tax base might be as follows: one jurisdiction with 50 per cent of its activities, one with 15 per cent, and the third with 35 per cent of its operations. Each Member State then would apply its rate of corporate income tax on its portion of the MNC's tax base of €10 million to determine the amount of corporate income tax to be paid by the MNC to that Member State (European Commission 2011, p. 5).

The proposed Directive recognised that an MNC could structure its operations with a subsidiary in a non-EU low-tax jurisdiction for the purposes of reducing its corporate tax base within the EU. To address this potential problem, it contained a section of 'anti-abuse rules', measures to circumvent and prevent any efforts by a corporation to use interest deductions and payments to foreign subsidiaries (such as IP royalty payments) to reduce its tax base (European Commission 2011, pp. 46–48). Implementation of the CCCTB, however, was to be a voluntary decision made by the MNC, and it would have to opt-in to use the CCCTB as the operating method for determining and apportioning the corporate income

tax to be paid within the EU (European Commission 2011, pp. 21–22). Consequently, it may be assumed that any MNC that had organised the structure for its European operations to make use of corporate subsidiaries as a mechanism to minimise its tax base, for example, Amazon, Google, and Starbucks as discussed in the chapter “Multinational Corporations and the Digital Economy”, also would be unlikely to opt-in to the CCCTB.

Initially, there was little progress on the CCCTB proposal, competing domestic agendas among the Member States on domestic tax policy meant that support for the Directive was mixed. Yet following the events surrounding the revelations on corporate taxation practices in the EU discussed in the previous chapter, the proposal for a CCCTB was reenergised. It became part of an agenda for ‘Fair and Efficient Corporate Taxation’ in the EU (European Commission 2015b). This Action Plan provided more specific substance to an EC Communication issued in March 2015 calling for increased transparency of national tax decisions made by the Member States. Increased transparency would include enhanced automatic information exchange in the EU and limiting the advanced tax rulings (comfort letters) that were provided to an MNC by a Member State’s tax authority. The logic behind this move for increased transparency on tax rulings was that while the ruling may address the MNC’s tax affairs in that one jurisdiction, it likely also possessed an impact on the MNC’s business practices in all other Member States in which it operated. In turn, that impact could distort the tax base of the MNC in the other Member States and potentially reduce their corporate income tax receipts from that MNC (European Commission 2015c, pp. 4–5). The CCCTB was briefly mentioned in this Communication with the statement that it would be ‘re-launched’ with the expectation that it ‘could serve as an effective tool against corporate tax avoidance in the EU’ (European Commission 2015c, p. 2).

The expectation expressed in the EC’s March 2015 Communication was grounded on the proposition that the Member States would accept this proposal to make the CCCTB mandatory. And while the EC policy agenda on the matter of corporate income taxation may not be consistent with the desires (and agendas) of some Member States, nonetheless it felt that it had the support of the wider European public (EurActiv.com 2013). The perception for widespread public support, demonstrated, for example, by public protests at the retail outlets of targeted MNCs, was a background element for the EC Action Plan on corporate income taxation (e.g. Neville and Treanor 2012; Houlder 2013b; Skapinker 2010; McVeigh 2010). The

Action Plan points to a concern that these reports about the low corporate income tax payments of prominent MNCs create a perception that the tax system is not fair which 'threatens the social contract between governments and their citizens'. In turn, it is a perception that 'may even impact overall tax compliance', a clear statement that tax morale matters in the EU and justifies the proposed measures to increase transparency (European Commission 2015b, p. 2). And similar to developments to assure the collection of tax from EU citizens' foreign sourced income based on the efforts of the OECD, action on corporate income taxation is expected to benefit from the global strategy to reduce tax base erosion and profit shifting by MNCs.

Independent of this collective solution, the EC initiated a parallel investigation into the specific tax practices of specific individual corporate taxpayers in the aftermath of the Luxleaks revelations mentioned in the first chapter. This targeted strategy to investigate individual MNCs has reframed the right of the Member State to determine national tax policy, such that the established policy must be consistent and applicable to all affected taxpayers. In the case where the tax authority provides a tax policy ruling exclusively for a single corporate taxpayer, the argument made by the EC is that the ruling constitutes illegal state aid. By making the case on the grounds of state aid, the Member State's tax policy, at least with regard to the one individual corporate taxpayer, is now subject to EC oversight and review. This approach for dealing with the status of corporate income tax revenue and tax competition in the EU is presented in the next section.

Tax Agreements as Illegal State Aid

The European Commissioner for Competition, Margrethe Vestager, remarked with respect to the illegal state aid cases that 'The purpose of double taxation treaties between countries is to avoid double taxation – not to justify double nontaxation' (Kanter 2015). The statement, in this case concerning the opening of a formal investigation of the tax policy applied by Luxembourg to the European operations of McDonald's Corporation, reflects not only the architecture of bilateral double taxation treaties and the empty spaces in this architecture. It also reflects the presence of state sovereignty and the sovereign right of the jurisdiction to craft its tax legislation in whatever shape it desires it to be for the purposes of raising revenue. Just as state sovereignty produces the spaces for the existence of the tax nomad, it also constructs the interlocking network of laws and legal entities that maintain the nomadic status of the assets that

may or may not be subject to taxation. Pursuit of transparency among EU Member States on their tax rulings for MNCs represents one means for suppressing and constraining nomadic capital, at least in the EU. Until those proposed Directives become EU law, the Commission is investigating existing cases of possible illegal state aid.

The EC announced in June 2014 the formal investigation of state aid provided by Ireland (Apple), Luxembourg (Fiat) and the Netherlands (Starbucks). As reported in the *Financial Times*, the EC planned to review the tax rulings provided to these three MNCs and how those rulings handled the intra-firm transactions between related corporate subsidiaries (Houlder et al. 2014). The corporate structures supporting the tax minimisation practices of Apple and Starbucks were outlined in the previous chapter. At the present time, the EC has delayed its decision regarding Ireland's tax ruling for Apple until 2016 in order for the Irish government to respond to a request for additional information (Oliver et al. 2015).

The Case of Apple and Ireland

The initial request for information concerning Ireland's tax rulings for Apple was made by the Commission in June 2013, subsequent to the hearing held by the US Senate Permanent Subcommittee on Investigations discussed in the chapter "Multinational Corporations and the Digital Economy". Following a series of information requests from the EC and the submission of data by the Irish government, the EC determined that an investigation of these tax rulings as a case of illegal state aid was appropriate. Interestingly, the EC decision letter notifying Ireland of this action incorporated data provided by Apple Inc. to the US Senate Permanent Subcommittee for its investigation into 'Offshore Profit Shifting and the US Tax Code' (European Commission 2014a, pp. 6–12). From the text of the Decision letter, this publicly available information from the US Senate hearing was compared to the data provided by the Irish government to the Commission. Specifically, the letter observed that the Irish government did not provide 'either a transfer pricing report or any cost sharing agreement' when the documents released by the Permanent Subcommittee on Investigations referred to a cost sharing agreement between the Irish subsidiaries and the US parent company (European Commission 2014a, p. 12). After its review of the information on this case, the assessment of the EC was to advance the case and determine whether or not the Irish

tax rulings and their treatment of intra-firm transactions constituted 'a selective advantage' to Apple that was not available to other firms. Should the EC conclude that Apple was the recipient of special treatment through these tax rulings it would constitute a case of illegal state aid within the terms of the Treaty on the Functioning of the European Union, Article 107 (European Commission 2014a, p. 14).

The tax regime of Ireland has been prominent in cases involving US MNCs, in part because Ireland offered them a low-cost, English-speaking entry point into the EU. But it is the Irish tax treatment of foreign MNCs that has received more attention, in the media as well as at the EC in Brussels. The specific method for tax minimisation employed by the MNC has acquired name recognition outside of the international tax advisory community due to the media exposure for the case of Google in Europe. The 'double Irish', as it is called, involves the use of an Ireland-registered subsidiary in Ireland and a second Ireland-registered subsidiary managed from a low-tax jurisdiction, often Bermuda. The first subsidiary collects the income for the MNC's business operations in Europe, and also possibly from operations covering the Middle East. The second subsidiary, managed from Bermuda, holds the legal ownership rights to the MNC's IP. The first entity may collect the income generated by the business activity, but it must also pay for the mechanism used to execute that business, and that mechanism resides in the IP owned by the second entity. The USA, home to the parent corporation, and Ireland use different methods for determining a firm's tax residency. In the case of the USA, it treats the subsidiaries as tax resident in Ireland and will collect corporate income tax after the income has been repatriated to the USA. Conversely, Ireland treats the second entity as tax resident in Bermuda and does not collect corporate income tax on the income arising from its ownership of the MNC's IP (Houlder 2014; Barker et al. 2014). The result of the 'double Irish', as seen in the chapter "Multinational Corporations and the Digital Economy" for the case of Apple Inc., is that this income is not taxed anywhere, at least until such a time as the US MNC repatriates the income to the USA. The government of Ireland was under increasing pressure to revise its legislation on tax residency in order to eliminate this cross-border tax legislation arbitrage mechanism. In October 2014, the Irish government announced its intention to phase out this loophole, but it also will be revising other aspects of its corporate income tax legislation in order to remain an attractive investment destination for foreign MNCs (Boland 2014; Schechner 2014).

The Case of Starbucks and the Netherlands

The Commission announced its decision on the case of the Netherlands and its tax ruling for the Starbucks' subsidiaries registered in the Netherlands as illegal state aid in October 2015. This case does not include the 'double Irish' structure to minimise international tax obligations, rather it involves the treatment of royalty payments for IP and transfer pricing in the form of 'inflated price[s] for green coffee beans' in the judgement of the Commission (European Commission 2015a). As explained in the chapter "Multinational Corporations and the Digital Economy" for Starbucks' business operations in the UK the retail outlet purchases roasted coffee beans and related products from Starbucks Manufacturing EMEA BV (registered in the Netherlands). European retail outlets, through the locally registered subsidiary (e.g. Starbucks Coffee Company (UK) Ltd and Starbucks Switzerland Austria Holdings BV), pay royalty and licensing fees to Starbucks Coffee EMEA BV, the headquarters unit registered in the Netherlands (European Commission 2014b). The British Parliament's PAC viewed this structure as a mechanism to strip taxable income out of the MNC's UK operations to other locations in Europe (and elsewhere) with lower rates of corporate income taxation (refer back to the chapter "Multinational Corporations and the Digital Economy" for additional details). The EC took a wider view of Starbucks' European operations and the Dutch tax ruling for its regional headquarters unit. The summary for the Commission's finding that the tax ruling constituted illegal state aid rested on two significant points. First, that the royalty paid by the Netherlands-based regional headquarters to a UK-registered unit holding ownership of 'coffee-roasting know-how' (IP) was larger than justified because it did not 'adequately reflect market value.' The second point was that the Netherlands coffee-roasting unit paid a 'highly inflated price' for the unroasted coffee beans it purchased from Switzerland-registered Starbucks Coffee Trading SARL (European Commission 2015a). The latter subsidiary serves as the global commodity trading platform for Starbucks and in that fashion it secures an economy of scale advantage for the MNC in acquiring unroasted coffee beans and then transhipping those beans to the MNC's roasting operations in Europe and elsewhere (Committee on Public Accounts 2012, Ev 53). The case made by the EC is that the Swiss-based commodity trading subsidiary provides a transfer pricing mechanism that serves to shift taxable income from the Netherlands to Switzerland as a result of the 'inflated' prices it charges the related subsidiary for unroasted coffee beans.

The ownership relationship among the European subsidiaries and related US-registered corporate entities leading back to the parent Starbucks Corporation, from the perspective of the Netherlands tax authority, were sketched out in the EC Decision letter to the government of the Netherlands (European Commission 2014b, pp. 8–10). Beyond the two points listed in the Commission's press release on its decision that the tax ruling given to Starbucks represented illegal state aid, the sketch of the corporate relationships (with some information redacted to protect proprietary knowledge) reveals the intricacies of the relationship between intra-firm transactions and corporate income taxation. The subsidiary Alki Limited Partnership is registered in the UK but effectively owned by the Dutch corporate entities which are ultimately owned by the Starbucks Corporation (USA). It 'owns' Starbucks' IP for the EMEA for which it makes royalty payments to a US Starbucks subsidiary (further information on this relationship was redacted). In other words, Starbucks' UK retail operations pay IP royalties to Starbucks Coffee EMEA BV (Netherlands) which makes an IP royalty payment to Alki Limited Partnership (UK) and Alki pays royalties to an unnamed Starbucks subsidiary (USA). Because of the nature of Dutch law several of the corporate entities, including Alki, are 'tax transparent' in the Netherlands and therefore they are not subject to its corporate income tax regime. The EC is focused on privileged tax treatment afforded Starbucks in the Netherlands and identifies the IP royalty payment by the Dutch subsidiary to Alki as an example of transfer pricing.

At a global level, however, what may be characterised as transfer pricing within Europe also represents profit shifting from Europe to the USA. More detailed information is necessary in order to determine if the transfers from Alki to the US subsidiary are subject to US corporate income taxation or if there is a further corporate structure to minimise the US corporate income tax obligations of Starbucks in the USA. One analysis of this case (published before the EC initiated its inquiries of the Dutch tax rulings) attempted to determine the status of the latter point, after working through the testimony of Starbucks to the PAC in the UK alongside copies of the Dutch subsidiaries' annual financial statements. Unfortunately, the organisation of information reported in a US corporation's annual financial statement does not include the level of detail or separation by jurisdiction/subsidiary to facilitate making clear connections between income and the tax paid on it (Kleinbard 2013). But another aspect to the efforts of the EC to force specific Member States to claw back uncollected corporate income taxes after determining that their MNC tax

rulings represented illegal state aid transforms the regional solution for untaxed corporate income in Europe into an international issue. In recognising the EC's apparent focus on American MNCs (Amazon, Google, Starbucks), some observers have pointed out that a foreign tax payment becomes a domestic tax credit under US corporate tax legislation (Rubin 2016b; Gapper 2016). This produces another point of tax arbitrage in effect, because the overall aggregate tax payment of the MNC may not increase rather it simply may be redistributed among the involved jurisdictions. This situation arises out of the terms of any tax treaty between two jurisdictions for preventing double taxation. Paying more corporate income tax in the Netherlands provides Starbucks Corporation with a US tax credit, a tax credit which could, for example, offset its corporate income tax obligation on repatriated foreign profits. Any such offset would permit a US MNC the leverage necessary to repatriate foreign income for use to increase shareholder dividends or stock buy-back programmes in the USA. Moreover, it represents a redistribution of tax revenue from the USA to Europe which arguably represents a raid on US taxpayers (US Senate Committee on Finance 2016).

Conclusions

One point arising from the evolution of the EUSTD was its failure to adequately restrain nomadic capital at the regional level for the EU. The loopholes were certainly a factor, but the global dimension of the financial system would not necessarily be overcome by closing those loopholes. This situation is implicit in the decision of the EC to suspend implementation of the 2014 Directive in order to focus Member State legislative revisions on implementing the global initiatives for transparency in beneficial ownership and the automatic exchange of account holder information. These global initiatives, coordinated by the OECD, are covered in the chapter "Global Tax Governance and the Tax Nomad". In the same manner, the evolution of EU-specific efforts to tackle MNC corporate income tax minimisation practices are being synchronised with the OECD's BEPS project, also addressed in the chapter "Global Tax Governance and the Tax Nomad".[5] In sum, the boundaries of the EU and the nature of the Single Market are insufficient to deal with the nomadic abilities of income as capital, reinforcing the need for a global process to govern financial markets and the movement of capital.

Notes

1. The Commission's web page for all communications and reports on taxation is http://ec.europa.eu/taxation_customs/common/publications/com_reports/taxation/index_en.htm, and the webpage dedicated to the 'Fight against tax fraud and tax evasion' is http://ec.europa.eu/taxation_customs/taxation/tax_fraud_evasion/index_en.htm. A webpage containing a set of questions and answers for the Commission's work on tax evasion and avoidance is http://europa.eu/rapid/press-release_MEMO-12-949_en.htm.
2. A short history for the creation of the EUSTD is provided in (Holzinger 2005, pp. 481–87).
3. These reports are available at http://www.transparency.org/whatwedo/publications/doc/gcr/.
4. A more detailed discussion for the experience of the Cayman Islands with the introduction of the EUSTD is found in Vlcek (2013a).
5. A European tax nomad is at the same time a global tax nomad, and without a global remedy the European tax nomad could simply find more sympathetic pastures for its capital outside of Europe.

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Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'

This chapter introduces the methods taken by the USA to pursue tax owed by its citizens with foreign accounts and business activities. Students of American history and American foreign policy will immediately recognise, present in the chapter title, a reference to the foreign policy of the 26th President of the USA, Theodore R. Roosevelt. The full phrase is 'speak softly and carry a big stick', emphasising a perception that policy should be backed by power (with the implied use of force represented by a big stick). And with regard to cross-border tax collection, the USA is in a position where it is able to take independent action due to the role performed by the US financial system as a central component in the global financial system. This role operates together with the status of the US dollar as the world's reserve currency to encourage financial firms to maintain a presence in US financial markets, and in this manner it provides the USA with the leverage necessary to force the compliance of foreign firms with its domestic laws. One application of US hegemonic power has been to apply direct pressure on Swiss banks to disregard Swiss national law on banking secrecy and release to the US government account details for US citizens holding an account with the bank (Emmenegger 2015). A second application of US power is through the FATCA which was promulgated in 2010.

The latter law carries extraterritorial reach in that it requires foreign financial institutions to provide the US IRS with the account details for any account held with the firm by a US citizen. Failure by the financial institution to provide the information to the US tax authorities will be

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penalised by a 30 per cent withholding tax on the proceeds (interest, dividends, or sale) for any and all US assets owned by that firm. Any financial firm without assets in the USA could safely ignore this law, except in those cases where the national government signs a bilateral agreement with the USA. In that situation, the national government has responded to requests from its domestic financial firms with US-based assets to reach an intergovernmental agreement (IGA) with the US government. The agreement would centralise the national collection of requested account data from domestic financial firms, and the national government would in turn provide the data to the US government. It should be noted that US citizens already had an obligation to report possession of a foreign bank account to the IRS as part of their annual income tax reporting procedure, and this law was intended to identify those citizens wilfully not admitting to possession of a foreign financial account. This US law has been replicated by other states and potentially could advance global governance efforts to promote automatic exchange of taxpayer account data (Eccleston and Gray 2014). The global governance effort to overcome the sovereignty barrier and capture tax nomads is discussed in the next chapter.

Before getting into the specifics of FATCA as an application of US hegemonic financial power to collect tax from its citizens, it should be made clear that this law is not some capricious response to the global financial crisis (GFC) on the part of the USA. Rather it is simply the latest in a series of efforts by the Department of the Treasury to collect tax on income that citizens seek to conceal from the IRS by placing it outside US jurisdiction. Further, recall the fact noted in the first chapter, the USA is one of the very few states which seeks to collect income tax from its citizens on their worldwide income, irrespective of where they reside and earn that income. For the case of MNCs, corporate income tax on foreign income is collected at the time that income is repatriated to the USA (on option not available to taxpaying natural persons) and that legislation serves to create a variety of other challenges for the US government. Those challenges include US-registered MNCs retaining their foreign income in foreign jurisdictions (as outlined for the cases presented in the chapter "Multinational Corporations and the Digital Economy") as well as legally re-domiciling their corporate registration and identity outside of the USA in order to reduce their cumulative corporate tax obligation on the global scale. The efforts to address the tax minimisation practices of US-registered MNCs by the US government are discussed later in this chapter. The case of tax nomads and US hegemonic strategies is developed

by first situating present actions in historical context. The second section introduces FATCA, and it is followed by a section on the US approach for dealing with the corporate tax nomad. The chapter concludes with a brief consideration for the UK's application of FATCA as a lever to force its non-independent territories to provide comparable taxpayer account information on its tax nomads to HMRC.

A Short History of US Pursuit of Its Tax Nomads

Public recognition for the practice of wealthy Americans to place their money in Caribbean and Swiss banks (and elsewhere) has irked other Americans since the personal income tax was introduced in the USA. It is memorialised in American popular culture with the remark attributed to Leona Helmsley, 'only the little people pay taxes' (Associated Press 1989). The situation for American MNCs is similar in that it has been a concern of the US government and Congress for a number of decades that these MNCs are using US corporate income tax legislation in a fashion that serves to minimise the total amount of tax owed the USA on their global operations. The prominent position of the US domestic economy in the world economy following the end of World War II was reflected in the relative status of US MNCs in global production, trade, and finance. In conjunction with the function of the US dollar within the Bretton Woods foreign exchange regime, the US MNC found opportunities to arbitrage the domestic constraints imposed by a number of New Deal financial regulations. In particular, there was Regulation Q, which limited the interest rate permitted on bank deposits and consequently encouraged the American MNC to take advantage of the higher interest rates available for its overseas cash at a non-US bank (Gilbert 1986; Schenk 1998; Burn 1999). Thus, was born the Euro-dollar market and by one account the origins for offshore finance in the world economy (Burn 1999).[1]

The historical narrative offered by the US Senate's Permanent Subcommittee on Investigations declared that it first held hearings on offshore finance in 1983 (Permanent Subcommittee on Investigations 2014, p. 9). This particular subcommittee has remained 'seized of the matter', to use the terminology found in UN Security Council Resolutions to demonstrate the ongoing interest of the Security Council to achieve a final solution to the matter of concern (Safire 2002). On the matter of the tax nomad, the Subcommittee has held hearings regularly and released staff reports on offshore finance, tax evasion, tax havens, and what it depicts

as the failure of the Executive Branch to fully exercise its power to 'hold accountable tax haven banks that aided and abetted U.S. tax evasion, and take legal action against U.S. tax payers to collect unpaid taxes on billions of dollars in offshore assets' (Permanent Subcommittee on Investigations 2014, p. 7). Central to the recommendations of this specific report are criticisms that Executive Branch Departments failed to force Switzerland and the Swiss bank Credit Suisse to provide account details on US citizens holding accounts with the bank, irregardless for Swiss laws and Swiss judicial procedures, along with a criticism of Congressional colleagues for failing to ratify treaties in a timely manner as well as leaving loopholes in the FATCA legislation. In other words, the Subcommittee's report fully supports the extraterritorial enforcement of US domestic laws in order to pursue American tax nomads; in this instance, specifically with regard to Swiss banking legislation and Swiss-registered multinational banks.

Extraterritorial Subpoenas

In its criticism of Executive Branch (in)action against tax evasion, the report reflected on what it portrayed as recent 'lax enforcement' activity as compared to earlier action taken against offshore tax evasion (Permanent Subcommittee on Investigations 2014, p. 140ff). In 1982, the US government issued subpoenas against the Bank of Nova Scotia, served specifically against its office located in Miami, Florida. The US Departments of Justice and Treasury were pursuing a case involving illegal drug trafficking and tax fraud where the suspect was believed to have accounts in the Bank of Nova Scotia's branches in the Bahamas and the Cayman Islands. The purpose in serving the subpoena on the Miami office was to force the bank to provide records for any accounts held by the person in question at the non-US branches. The Bank of Nova Scotia initially resisted, because release of any bank records constituted a violation of the banking privacy laws then in force in the two foreign jurisdictions. Failure to comply with the subpoena led to a contempt of court fine which totalled US$1.8 million when the bank finally complied with the subpoena and provided account information after 18 months and two unsuccessful court appeal cases (Hudson 1998, pp. 550–53). As summarised in the Senate report, the court case against the Bank of Nova Scotia served to produce US case law establishing that grand jury authority could legitimately override the domestic laws of a foreign jurisdiction in pursuit of evidence desired by the grand jury. The mere presence of a bank office, even if it did not take

deposits, in US territory gave the US law enforcement authorities the necessary nexus to claim the global application of US laws on all related parts of the MNC (Permanent Subcommittee on Investigations 2014, pp. 141–43).

The court cases involving the bank of Nova Scotia and the information held on accounts belonging to a US citizen accused of illegal drug trafficking occurred in 1982 and 1984.[2] Fast forward three decades and there is a comparable case underway in the US court system, now involving the foreign repository of an alleged drug trafficker's email account (Rushe 2014). Microsoft complied with a Stored Communications Act 1986 warrant requesting information and data related to the email account maintained by an unnamed person, up to the point where Microsoft determined that the email content files resided on servers in Dublin, Ireland. It was at that point the corporation turned to the courts itself, requesting that the court 'quash the warrant to the extent that it direct[ed] the production of information stored abroad' (In re Warrant, 15 F. Supp. 3d at 470, as cited in 'In re Warrant' 2015, p. 1020, fn 15). The legal issue raised by Microsoft is that the US warrant does not apply to data stored beyond the territory and jurisdiction of the US government. As noted in the summary and review of the case in the *Harvard Law Review*, the extraterritorial application of the warrant would 'raise privacy and practical concerns, particularly for foreign subscribers' ('In re Warrant' 2015, p. 1025). In the aftermath of the Snowden revelations for widespread electronic surveillance by US security agencies, these privacy concerns are widespread outside of the USA. Microsoft's initial petition to quash elements of the warrant was denied by the Federal Magistrate in April 2014, after which Microsoft appealed to the Federal District Court where its appeal was rejected in July 2014. Microsoft has since appealed to the Second Circuit Court of Appeals and along the way has collected support for its case from a diverse group of firms and organisations who submitted amicus briefs in support of Microsoft's position.[3]

Consequently, state sovereignty is challenged by state power asserting extenuating circumstances that preclude an obligation to follow international conventions. The use of an existing mutual legal assistance treaty (MLAT) is considered too onerous and time-consuming when electronic communications are both quick and easily erased.[4] Alternatively, the contemporary case may be seen to demonstrate the permeability of state sovereignty that is created by transnational communication networks and the increased use of data storage facilities in locations providing economic and

environmental advantages to the service provider. While the location of Microsoft's data storage facility in Ireland may be for economic and political benefits rather than environmental benefits, the decision by Facebook to establish a data centre in Sweden was promoted in the media as significant for its reduced environmental impact (Gersmann 2011). Whatever the rationale, the transnational nature of telecommunication networks and increasingly for data storage (the ubiquitous 'cloud') has exceeded the capacity of existing international legal conventions.[5] A similar argument is made with regard to the application of existing double taxation conventions and the transnational operation of MNCs, particularly with respect to IP as outlined in the chapter "Multinational Corporations and the Digital Economy". The problem encountered when dealing with intangible assets and transfer pricing as one strand of the debate over the impact of globalisation on cross-border taxation is addressed in the next chapter. Beyond the transnational dimensions, this non-tax example serves to demonstrate that US practices of exceptionalism with regard to the extraterritorial application of domestic laws, while ignoring the international legal practices codified in its MLATs, extends beyond the pursuit of US tax nomads. It further serves to demonstrate once again the hypocritical treatment of sovereignty in international politics where material power supersedes the norms expected by a democratic liberal peace (Krasner 1999).

The 'John Doe' Summons

The second instrument the Senate's Permanent Subcommittee on Investigations felt the Executive Branch could be more energetic in using is the so-called 'John Doe' summons (Permanent Subcommittee on Investigations 2014, pp. 144–45).The initial application of these summonses occurred when the IRS initiated a fishing expedition in search of tax evasion by US citizens in 2000. In the case of this fishing trip, rather than pursuing a specific fish (suspect) with a spear gun, the IRS engaged a trawler with a drift net, sifting through all possible fish with offshore credit card accounts managed by a bank in one of several Caribbean jurisdictions in search of the tax-evading US citizen. The initial claim was that one to two million US citizens possessed an offshore credit card account, while only 117,000 US taxpayers had reported an offshore account in 1999 (Associated Press 2002; Crenshaw 2002). The IRS first began to pursue offshore credit card accounts in 2000 by presenting US-based firms with court orders to release the account information to the government.

A federal judge in Miami supported the effort with a court order authorising the use of 'John Doe' summonses to demand transaction records and account holder information from American Express and MasterCard. The focus was on the credit cards issued by banks in Antigua and Barbuda, the Bahamas and Cayman Islands to a US citizen (Internal Revenue Service 2003b).

The IRS expanded the scope for its campaign against offshore credit cards in 2002, when a federal judge in San Francisco authorised 'John Doe' summonses to get information from Visa covering credit card account transactions for 1999–2001. This set of summonses covered 'cards issued by banks in over 30 tax haven countries', and the court petition placed by the IRS was supported by an affidavit detailing MasterCard International's acquiescence to its earlier demands (Internal Revenue Service 2003b). But the organisational structure of its credit card business meant that the information provided to the IRS by MasterCard did not provide much help in the pursuit of tax nomads. MasterCard International processes credit card transactions, but the transaction data contained no identifying information on the individual beyond the account number, details on the account holder remained with the issuing bank (Internal Revenue Service 2003b). Consequently, it is the bank itself which must provide the account holder identification data for any specific credit card. For the case of one bank in the Bahamas that refused to cooperate and release the identification information, MasterCard International was pressured by the IRS to withdraw the bank's licence to issue MasterCard-branded credit cards. The action led to the sudden, abrupt closure of *all* MasterCard accounts managed by the Bahamian Leadenhall Bank and Trust, affecting its non-American customers as well as any potential targets of the IRS tax evasion investigation (Matthews 2003). The outcome from this action serves to demonstrate that US extraterritorial action carries unintended consequences while also revealing its limitations. In its summary of the 'John Doe' summons, the Senate Subcommittee report presented it as a tool for US authorities to requisition data on an unknown group of US citizens where that group 'is likely to have committed a tax-related offense' (Permanent Subcommittee on Investigations 2014, p. 144). The report cites the Internal Revenue Service (2011), and the broad language reflects the fact that the information sought is in support of a civil law case, with lower evidentiary standards than required for a criminal law case.[6] All the same, the summons requires the approval of a US Federal Court, though the historical experience suggests that minimal effort is required to convince the court to issue a 'John Doe' summons.

In a press release in July 2003 the IRS claimed that 'about 2800 tax returns' were undergoing audit with the expectation 'that number will continue to grow', and it had referred 'dozens of cases' for possible criminal prosecution (Internal Revenue Service 2003a). In the context of the public statement a year earlier these figures are encouraging, for they suggest that the vast majority of the targeted account holders were in fact honest, reporting and taxpaying citizens. To identify the number of possible prosecutions as only in the range of 'dozens' when the previous estimate was for over a million possible undeclared offshore accounts suggests there were only a small number of actual tax evasion cases involving offshore credit cards. If there were six dozen possible cases, for example, that represents a mere 0.0072 per cent of their estimated one million accounts. The data collected through the 'John Doe' summonses generated $3 million through this programme for the government (Internal Revenue Service 2003a). It also led to the operation of an amnesty programme running from 14 January to 15 April 2003, the 2003 Offshore Voluntary Compliance Initiative. The voluntary compliance programme achieved more success in terms of revenue claimed by the government. A General Accountability Office (GAO) report comparing the 2003 programme with subsequent programmes in 2009, 2011, 2012 indicated that it collected US$200 million with 1321 disclosures to the IRS (GAO 2013, p. 10). Yet compared to the two subsequent programmes (data on the 2012 programme was not available), these results were minor.

Where the 2003 programme encouraged 'voluntary' compliance because it had data collected in response to its 'John Doe' summonses, the 2009 programme encouraged compliance in response to 'John Doe' summonses served on UBS for information on accounts held by US citizens with the Swiss bank. The 2011 programme further encouraged voluntarism with government cases pending against a number of other foreign banks. The encouragement to cooperate was facilitated by an offer of limited penalties and limited scope on the number of tax years covered for any untaxed income revealed to the IRS. Nonetheless, back taxes and penalties were assessed on the disclosed accounts with the reported details audited by the IRS. In exchange for citizens coming forward rather than waiting to be discovered by IRS analysis of the data collected, the overhead costs to the IRS to enforce compliance was reduced, though this aspect to the process was not part of the GAO's report (GAO 2013, pp. 5–11). Alternatively, for those citizens that did not voluntarily report themselves and were instead exposed by the data released to the IRS they were subject

to the full range of enforcement action to include criminal charges. The IRS widely publicises any convictions *pour encourager les autres* (Saunders 2014).[7] With the wider scope of information available to the IRS, the 2009 voluntary programme collected US$4.1 billion in unpaid taxes and penalties from 15,000 voluntary disclosures. Though less successful in terms of revenue, at US$1.4 billion, the 2011 programme was slightly more successful in promoting voluntarism among US taxpayers with the IRS reporting 18,000 disclosures (GAO 2013, p. 10). These figures should be placed into context for the total amount of personal income tax collected by the IRS in those years to demonstrate the rather small scale of revenue collected, especially given that it included penalties and fines imposed for tax evasion. In fiscal year 2009 (1 October 2008 to 30 September 2009), the total amount of individual income tax collected was US$1175.4 billion and in fiscal year 2011 (1 October 2010 to 30 September 2011) the figure was US$1331.2 billion (US Treasury 2014a).

The Foreign Account Tax Compliance Act (2010)

The GFC during the period 2007–2009 was an American financial crisis with global consequences, and it served to demonstrate not simply the global interconnectedness of finance across and beyond the OECD member states but also the pivotal location of American financial MNCs and American financial markets in the global economy. The demonstration for its pivotal role served to indicate the potential leverage available for US policy if it was accompanied by the threat of withholding access to US financial markets. It is through such action that US domestic economic sanctions, against Cuba and Iran, for example, are able to influence the decisions of foreign firms with the potential loss of access to US markets and their ability to use the US dollar in their business transactions. The Dodd-Frank bill was an 848-page compendium of legislation produced by the US Congress in reaction to the financial crisis with intentions to prevent the future recurrence of financial practices believed responsible for causing the crisis (PL 111-203, 2010). This collection of statutes covers a wide variety of finance sector operations to include redesigning regulatory agencies. Additionally, at Title XV—Miscellaneous Provisions, there are a number of non-financial sector initiatives that were included at the end of the bill, such as Section 1502, Conflict Minerals, which is a provision to address the problem of conflict minerals in the eastern Democratic Republic of the Congo (GAO 2015).

The Legislation

The Foreign Accounts Tax Compliance Act, however, was not part of the Dodd-Frank legislative package, rather it was incorporated in the Hiring Incentives to Restore Employment (HIRE) Act of 2010 (PL 111-147, 2010). It is contained as Subtitle A, Foreign Account Tax Compliance (Sections 501–541) of Title V—Offset Provisions. The HIRE Act itself was the result of the combination of several pieces of legislation with the headline purpose to provide financial incentives encouraging employment in response to the rise in unemployment produced by the financial crisis. The justification for including FATCA in this particular legislative package was to provide a revenue source to offset the Federal budget obligation created by the hiring incentives in the legislation. Consequently, the FATCA provisions were included in order to keep the total legislative package 'revenue neutral'. FATCA was first introduced in Congress as a separate piece of legislation in October 2009 (HR 3933 and S 1934) where it was referred in the House of Representatives to the Ways and Means Committee and in the Senate to the Senate Finance Committee.[8] Subsequently in November 2009, the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means held a hearing on the bill (FATCA Hearing 2009). The background and context for this piece of legislation were outlined in the announcement for the hearing and with the opening remarks of the Subcommittee Chairman. It was the case of UBS that was foremost in the minds of these members of Congress, with the Swiss bank agreeing to a US$780 million fine for its facilitation of tax evasion by US citizens, while it continued to resist requests to provide individual account holder's details to the US government. In this context, the purpose for the bill was to legislate an obligation forcing foreign financial firms to report information on their US citizen account holders to the IRS. Further, the Subcommittee Chairman acknowledged 'the thoughtful commentary from both Treasury and IRS' in crafting the legislation under discussion, indicating their role in specifying the measures included in the legislation (FATCA Hearing 2009, p. 5).

At the hearing, the Chief Counsel of the IRS summarised the current state of the agency's difficulties with collecting tax on foreign income both intentionally and unintentionally concealed from the IRS. Obviously, those taxpayers that intentionally did not comply with US tax laws and regulations requiring them to report the foreign income were avoiding US income taxes. Individuals who unintentionally concealed income from the

IRS may be due to the fact that they were not aware of the requirement to report their foreign accounts and earned income. In some cases these individuals were not aware that the US government even considered them to be US citizens and expected them to pay income tax to the IRS (discussed further below). The IRS Chief Counsel then highlighted the ways in which the proposed legislation would increase the ability of the agency to get the data necessary for it to assess income tax, along with penalties, interest, and fines on all previously unreported income from foreign assets held by the taxpayer. In particular there was the legislation's obligation imposed on foreign financial firms and intermediaries to report directly to the IRS data on the accounts and investments held by US citizens. It is in this context that FATCA was crafted, with the provision in §1471 that failure to comply with the reporting requirements would be punished with a 30 per cent withholding tax on any 'withholdable payment' from US assets held by the non-compliant financial firm (PL 111-147, 2010, p. 124 STAT. 97). The cooperation of foreign firms with the reporting requirement of the legislation was expected because of a desire to avoid the withholding penalty imposed if they failed to cooperate (FATCA Hearing 2009, pp. 12–15). The Chief Counsel restated several times during the hearing that the IRS was not interested in collecting the withholding tax on the assets of non-compliant foreign financial firms. It was more important to receive the information about the firms' US account holders in order to assess taxes on their foreign sources of income (FATCA Hearing 2009, pp. 18, 19 and 23). Finally, it needs to be noted that the written statement submitted for the hearing highlighted the Administration's support for the legislation as 'a far-reaching and comprehensive bill' that included many of the measures contained in the President's Budget Proposal for FY2010 (FATCA Hearing 2009, p. 15).

Several potential problems with the legislation's approach for dealing with the tax nomad also were identified in the hearing. Oral testimony accompanied by a written statement from Dirk J.J. Suringa, a former Attorney-Advisor in the Treasury Department's Office of International Tax Counsel, identified three potential unintended consequences from the legislation as proposed. Suringa was a partner with a prominent Washington, DC, law firm involved in representing parties to an international tax issue at the time he presented his testimony, and consequently he underscored the point that he was speaking in his personal capacity and not on behalf of any client. The first unintended consequence was the fact that a financial firm could simply avoid dealing with FATCA by divesting itself of all US

assets, leaving the US government with no leverage over the firm because there would be no investment income to garnish. While Suringa observed that this reaction would serve to deny access to any information held by the firm about its US account holders to the IRS, FATCA holds a greater potential economic impact that he did not raise (FATCA Hearing 2009, p. 59). The decision made by a firm to divest itself of US assets at the same time represents the withdrawal of foreign investment capital from the USA, which holds a greater potential impact on the overall economy than the absence of any uncollected tax revenue. The second potential consequence he raised was that foreign jurisdictions could implement reciprocal policies withholding tax from US financial firms if they failed to report the account details held on their foreign account holders to the account holders' state of residence. The issue of reciprocity is addressed further in the next section because reciprocal data exchange emerged as a remedy to accusations that the US legislation was yet another example of American unilateralism. The final potential unintended consequence identified was the interaction of FATCA with the existing network of US bilateral tax treaties, such that FATCA could interfere with their ongoing use and application (FATCA Hearing 2009, p. 62).

With regard to any consideration for the potential consequences from the extraterritorial reach of the FATCA legislation, nothing was mentioned in the hearing. Of the three potential issues raised in the hearing only one has subsequently appeared, but the issue of reciprocity is not due to any other state enacting counter-legislation to FATCA. Rather reciprocity emerged as an issue because of the unanticipated problem (on the part of the US Congress) which was mentioned in only 2 of the 21 written comments on the legislation submitted for the hearing. As discussed in the next section, the obligation for a foreign financial firm to provide information about its customers to an agency of the US government would be in direct contravention of data privacy or data protection laws in many other jurisdictions. It is not simply a banking secrecy law as seen in the historical cases of the pursuit by US courts for information from the Bahamas and Cayman Islands as outlined above. It is instead the case that modern data protection laws place strict obligations on all institutions, organisations, and firms under all circumstances covering the release of any data held about individual persons. This reflects the high regard given to personal privacy and thus any data held on them by any entity, particularly in Europe. The European concern with personal privacy resulted in a European Court of Justice case in 2014 upholding the policy of the EC

that in order to accomplish 'Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century' there is a 'right to be forgotten' (European Commission 2012a; European Court of Justice 2014). Therefore, any demand for data about an individual's bank account would amount to a violation of data privacy/protection legislation within the EU.

The Implementation

The FATCA legislation's guidance has been implemented by the Treasury Department and IRS through a process of rule-making. In this 'rubber meets the road' phase, the practical details to make the law operational requires the resolution of a variety of implementation details, including, for example, the necessary prerequisite for handling exceptions to any data privacy laws that may otherwise prevent the release of a financial institution's customer data to a foreign government agency. Such was the case in Europe, where the banking sector provided a robust response over customer privacy rights (Braithwaite et al. 2011). The compromise solution crafted to deal with these conflicting legal obligations was an IGA. Rather than have each individual financial institution in a European state provide its account data to the IRS, the firm would provide the data on its US account holders to its own national government. With this approach, the financial institution remained compliant with applicable domestic data privacy laws. An agency of the European government would transfer the data to an agency of the US government under the terms agreed in the IGA. An early IGA between the USA and a group of five EU Member States (France, Germany, Italy, Spain, and the UK) was announced in July 2012 (US Treasury 2012a).[9] Subsequently in January 2013, the US Treasury announced the release of the final regulations for the implementation of FATCA, along with announcing that it had crafted a second model IGA. This second agreement between the US government and a foreign government contained that second government's commitment to have its financial institutions provide the required account data directly to the IRS (US Treasury 2013).

The introduction of the IGA by the Treasury Department moved the implementation of FATCA beyond the literal text of the bill enacted into law. First, the legislation did not foresee the requirement for an IGA in order to achieve implementation. There was no consideration given to local data privacy laws, which is consistent with the historical

practice of the USA in its pursuit of its own tax nomads, as related above. Second, the IGA introduced a reciprocity requirement on the part of the USA. Included in the joint announcement made in July 2012 marking the agreement between the USA and France, Germany, Italy, Spain, and the UK was this clause 2.

> In consideration of the foregoing, the United States would agree to: e. Commit to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the U.S. accounts of residents of the FATCA partner. (US Treasury 2012a)

The change indicated by this announcement that the USA would begin exchanging taxpayer account information is important, because the USA effectively has been a tax haven for the non-resident non-citizen account holder. The USA does not withhold tax from such accounts, nor has it shared any data about those accounts with foreign tax authorities in the past.[10] There has been strong resistance in the past whenever there was a suggestion to change banking regulation and force US financial institutions to report account details on any accounts held by non-resident non-citizens. There is the concern, for example, with the significant amount of undeclared capital from Latin America on deposit with financial institutions in Florida and Texas. Specifically the issue is that should financial institutions be required to collect and report account details those accounts would be closed and the assets relocated to a jurisdiction that will not exchange information with the account holder's home country (see, e.g. Houlder and Nasiripour 2012).

It is further important to observe that this document is an *agreement* between two governments, and it is not a *treaty* between them. For the case of the US government and the conduct of the IRS and Treasury Department, this is an essential point of distinction. A treaty would require the Administration to satisfy the Constitutional requirement for Senate ratification of the agreement, a notoriously difficult endeavour that has become even more difficult in the second decade of the twenty-first century. As a result, the Executive Branch, through the actions of the IRS and Treasury Department, is pushing at the limits of its constitutionally defined scope in the conduct of foreign relations. In response members of the US Congress have submitted legislation to repeal FATCA, including S.887 (2013) 'A bill to repeal the violation of sovereign nations' laws and privacy', resubmitted as S.663 (2015) 'A bill to repeal the violation

of sovereign nations' laws and privacy'; Senate Amendment 621 to the Concurrent Budget Resolution (S.Con.Res 11) to Repeal FATCA (2015); and HR2299 (2013) 'To prevent the Secretary of the Treasury from expanding the United States bank reporting requirements with respect to interest on deposits made to nonresident aliens.' Further, a letter from Congressman Bill Posey (then a member of the House Financial Services Committee) to the Secretary of the Treasury Jack Lew in July 2013 solicited clarification on the creation of IGAs as they were not mentioned in the FATCA legislation.[11] The problematic status of reciprocal reporting by the IRS providing data to foreign governments led to its inclusion in the President Budget Proposal for 2014, a point raised by Congressman Posey (Office of Management and Budget 2013, p. 202). Congress passed its own budget legislation without the reciprocity provisions, while the IRS responded to the Congressman's letter a year later outlining the current provisions in law which it had interpreted as providing it with the authority to develop the IGAs 'in order to achieve FATCA's information reporting objectives' (Fitzpayne 2014). Among the sections of US law which the Assistant Secretary for Legislative Affairs listed as providing the Treasury Department with authority to execute the IGAs is Internal Revenue Section §1474(f). This section was amended by the FATCA legislation, where it reads,

> (f) REGULATIONS. – The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of, and prevent the avoidance of, this chapter. (PL 111-147, 2010, 124 STAT. 105)

Arguably the IRS has undertaken a very broad reading of this text in order to justify the creation of an IGA which is not a treaty in order to impose a reporting requirement on US financial firms.

In October 2015, the IRS announced that it was prepared to transfer account data to other jurisdictions under the obligations of existing IGAs (Internal Revenue Service 2015). The announcement brought an immediate response questioning the information security capacity of the recipient states with regard to personal privacy. The IRS response to this criticism was that it would only share data with jurisdictions meeting 'stringent safeguard, privacy, and technical standards' (as cited in Saunders 2015a). The IRS implemented increased transparency on the financial accounts held by non-resident non-citizens with its final regulations for 'Guidance

on Reporting Interest Paid to Nonresident Aliens' (Internal Revenue Service 2012). This action represents a significant change in policy and counters the accusation that FATCA was simply a unilateral solution to the issue of foreign financial accounts used by individuals to avoid income taxes (Saunders 2015b).

As suggested at the beginning of the chapter, FATCA possesses extraterritorial reach and represents yet another instance for the extraterritorial enforcement of US domestic law. Dissimulation by a Treasury Department official speaking to members of the European Parliament in 2013 asserted otherwise. In those remarks, he argued that FATCA compliance by a foreign financial firm does not represent extraterritorial action on the part of the US government. Rather, non-US financial firms are complying with FATCA requirements as part of the cost of doing business in the USA and with US clients (FATCAEU 2013, 1:00:15). In and of itself it is a factual statement. At the same time it is disingenuous because it is the attractiveness of US markets that encourages foreign firms to conduct business in the USA. It is, in other words, a capability possessed by few (if any) other jurisdictions with the relative size and depth of their financial markets. The privileged status of the USA gives it the leverage to impose FATCA on foreign financial firms regardless of the cost while asserting it is solely for domestic tax collection reasons. As addressed elsewhere in this and other chapters, the compliance of other jurisdictions with FATCA has been utilised by yet other jurisdictions for their own foreign tax collection efforts.

The Implications for the Tax Nomad

Observe that the above section heading addresses the 'tax nomad' rather than the 'American tax nomad'. The explanation for the generic content is the fact that the action of the USA has been a catalyst for similar policies by other states and the OECD. At the OECD FATCA has been situated as a point of reference for the development of a CRS for the exchange of account holder information between state tax authorities. The CRS is explored in more detail in the next chapter. In the UK, government officials used the desire of the OTs with an OFC to execute an IGA with the USA in order to gain the agreement of these territories to provide comparable data on the accounts held by UK citizens in their jurisdiction to HMRC in the UK. This case is discussed further below as a 'Neo-colonial reflection of the "big stick"'. Moreover, the case has been made that by agreeing to comply with FATCA's reporting requirements the decision

undermined the foundations for Austria's and Luxembourg's resistance to automatic information exchange within the EU (Hakelberg 2015). The situation culminated in the amendment to the EUSTD, subsequently overcome by events at the OECD as discussed in the previous chapter.

Of more immediate impact was the experience of account holders at the targeted non-US financial institutions. The requirement to identify a bank's US citizen accounts in some cases led to banks summarily terminating those accounts in order to avoid the requirement to comply with the legislation and its attendant reporting costs. Forced compliance with FATCA has also brought to light the fact that *all* US citizens (including those that possess citizenship by birth from one US citizen parent but who may have never lived in the USA themselves) are nonetheless subject to the worldwide income tax regime of the USA (Tepper 2014; Houlder 2012; Houlder 2011).

Creating Corporate Tax Nomads

Cross-border arbitrage is an integral element in the story of US MNCs in the late twentieth century. As observed above, US interest rate regulations encouraged US MNCs to place their cash accounts with foreign banks in order to collect a higher rate of interest on their funds than was permitted under Regulation Q. The pursuit of a better interest rate with a foreign bank account grew to include the arbitrage of double taxation treaties and the practices of the corporate tax nomad. At the beginning of the twenty-first century, two practices of US corporate income tax minimisation attracted extensive media attention. The starting point for this attention is the fact that US MNCs have accumulated substantial pots of money untaxed by the US government because it remains outside of the USA. As indicated in the chapter "Sovereignty and the Tax Nomad" and explored in the chapter "Multinational Corporations and the Digital Economy", the USA imposes corporate income tax on the worldwide earnings of US-registered corporations. The tax on foreign earnings is collected only after that income has been repatriated to US jurisdiction (territory) leading to the growth of US corporate earnings retained outside of the USA. For example, in 2013 an organisation of public interest groups in the USA released a report stating that the 100 largest public firms in the USA had declared in their SEC 10-K filings for 2012 nearly US$1.2 trillion 'permanently reinvested' foreign earnings (U.S. PIRG 2013, p. 8). For the US MNCs discussed elsewhere in this book, Apple was reported to

have US$82.6 billion outside of US jurisdiction, Amazon US$1.5 billion, Google US33.3 billion, and Microsoft US$60.8 billion (U.S. PIRG 2013, pp. 15–27). In addition to delaying the repatriation of foreign earnings until the time when it would be most beneficial to corporate profits (e.g. a special tax concession or to offset corporate losses), the US government has been confronted by MNCs relocating their corporate registration, and thus tax domicile, via processes identified as a corporate inversion.

Collectively these practices seek to minimise the amount of corporate income tax paid to the US government by US-registered and -domiciled corporations. The USA has one of the highest headline corporate income tax rates among the OECD member states, accompanied by a complex collection of exemptions, deductions, and credits leading to a much lower effective rate for the corporate income tax actually paid. In addition, the US MNC seeks arbitrage opportunities through the collection of double taxation treaties maintained by many of the jurisdictions in which they operate or through the establishment of a local subsidiary (corporate vehicle), where the MNC may appear to operate. This situation was the case between the Netherlands Antilles and the USA from 1955 to 1987 with a tax treaty resulting in the emergence of the Netherlands Antilles as the home for US corporate subsidiaries. These corporate vehicles provided the means to arbitrage a US withholding tax imposed on the interest payments or dividends that were made by a US MNC to its foreign lenders and investors. The tax treaty was bidirectional in that it also applied to the interest payments and dividends paid by US lenders and investors to foreign MNCs with US investments. Under the tax treaty, the presence of the Antillean corporate vehicle in the middle of the financial transaction (from the US MNC to Antillean corporate vehicle to foreign corporation) meant that the USA withholding tax was not extracted from the transaction with the Netherlands Antilles' corporate vehicle. Avoiding the withholding tax meant that these financial transactions were more profitable, and during the period when the tax treaty was in effect the offshore financial sector in the Netherlands Antilles became an important part of its economy. But that same success drew the attention of the IRS which was not amenable towards this unintended consequence from a tax treaty with a small Caribbean jurisdiction. In order to obstruct this path for corporate tax revenue leakage, the USA unilaterally terminated the treaty in 1987 (Boise and Morriss 2009). The termination of tax treaties with small jurisdictions such as the Netherlands Antilles had little effect on the operation of other tax treaties with similar arbitrage opportunities, which was shown for the

case of Apple as discussed in the chapter "Multinational Corporations and the Digital Economy".

An alternative to the arbitrage of tax treaties by the US MNC for tax minimisation purposes is for it to terminate its status as a US-registered/US-domiciled MNC. In other words, the US MNC transforms itself into a foreign MNC, potentially with little movement or reorganisation of its US-based operations. This issue was introduced with respect to a proposed corporate inversion by Stanley Works, a tool manufacturing firm based in Connecticut, in the chapter "Sovereignty and the Tax Nomad". The objective is to place non-US sourced income out of the reach of the IRS, while continuing to pay US corporate income tax solely on the MNC's income generated within the territorial jurisdiction of the USA. The policy issue for successive Administrations and Congressional sessions in the twenty-first century has grown, attracting greater media attention since 2012 (McKinnon and Thurm 2012; Gelles 2013; Sakoui and Politi 2013; Houlder et al. 2014a).

The transformation proposed for Stanley Works in 2002 was simple, register a new corporation in Bermuda that would own the US-registered firm. The Bermuda firm would be managed from Barbados and thereby benefit from the US–Barbados double taxation treaty with its reduced withholding tax (Desai and Hines 2002, pp. 422–23). While Stanley Works did not go forward with its proposal, other US MNCs had already done so, including Ingersoll Rand (Bermuda) and Transocean (Cayman Islands). Measures were taken by the US government in 2004 to prevent that particular strategy of establishing a new foreign firm that simply would own the US MNC. The American Jobs Creation Act of 2004 (PL 108-357) included at Title VIII, Subtitle A, 'Provisions to Reduce Tax Avoidance Through Individual and Corporate Expatriation' (PL 108-357 2004, §801–§805). In response to the introduction of the new legislation, mergers and acquisitions specialists developed new strategies compliant with the obligations of the legislation. These alternative reorganisation strategies facilitated a subsequent wave of corporate inversion deals that served in particular to transform the global pharmaceutical industry as US MNCs merged with foreign MNCs to become a non-US-domiciled MNC (Marcum et al. 2015; Cimilluca et al. 2014; Ward 2014). In an opinion piece published in the *Wall Street Journal*, the chairman and chief executive officer for one of these pharmaceutical MNCs asserted that 'taxes are a business cost.' Further, he reminded readers that US corporate income taxes would still be paid by the firm on US-generated profits, and

it was only future foreign profits that were freed from future US corporate income tax collection (M.D. White 2014).

Further efforts were undertaken by the US Treasury and the IRS in 2014 to revise the existing regulations in reaction to the media attention given to the increased number of US corporate inversions announced (US Treasury 2014b; Internal Revenue Service 2014). The business response appeared to be an increased flurry of merger activity in 2015, again dominated by the pharmaceutical industry (Raice and Mattioli 2015). One interesting observation made about a number of these inversion deals was the fact that the UK would become home to the new firm. While it may be a fact that the UK has been quite active in calling for increased pressure on international tax avoidance since the Lough Erne Group of 8 (G8) meeting in 2013, the UK also has made reforms to its corporate income tax regime to make it increasingly attractive to MNCs (Houlder et al. 2014a, b). But these mergers are not necessarily driven by the US MNC, because the situation arguably made it more attractive for foreign MNCs to pursue a merger or acquisition of the US firm (Crow et al. 2015). Nonetheless, a number of deals were announced in 2015 for additional corporate inversions by US MNCs which resulted in yet further efforts at rule-making to block the strategy used. This announcement was accompanied by a statement from the Secretary of the Treasury that the only sure way to prevent corporate inversions would be with new legislation (US Treasury 2015; Jopson 2015). While members of Congress agree that corporate income tax law in the USA should be revised, there are competing agendas between the two political parties in Congress over the what and how of any new legislation (Hoffman et al. 2015; Politi 2011a). A report from the Congressional Research Service offered several policy proposals for consideration, to include moving the USA to a territorial tax base for corporate income taxation (where US MNCs would pay corporate income tax only on the income generated in the USA) and lowering the corporate income tax rate (with the expectation that it would reduce the incentive for an MNC to undertake an inversion). Neither of these proposals would be feasible without wider tax reform in the USA in order to offset the lost tax revenue from any change to corporate income tax policy (Marples and Gravelle 2014).

The conditions with national political processes in the USA may be improved and become more cooperative between the Executive and Legislative branches of the Federal government following the 2016 election cycle. Any such improvement is not assured, while firms continue

seeking ways to minimise taxes paid as one route towards improving their income and profits. The debate over the responsibility of the corporation to pay corporate income taxes is not addressed here as it is independent of the structures in the international system that produce and maintain the tax nomad.[12] Beyond the 'Occupy Wall Street' protests in the USA, the debate over corporate social responsibility on taxation is promoted by public action NGOs, such as the U.S. Public Interest Research Group (PIRG) and Citizens for Tax Justice, authors of the report on the use of OFCs by US MNCs to reduce their US corporate income tax obligations (see U.S. PIRG 2013; U.S. PIRG and Citizens for Tax Justice 2014). Public pressure for US MNCs to adjust their tax minimisation practices appears to have just as much influence as public pressure on Congress to reform the US tax structure. Limited progress, if any, has been accomplished in recent years regarding the corporate tax nomad. This situation stands in marked contrast to US measures against the individual tax nomad achieved through FATCA. The next section introduces the influence of US success with FATCA compliance, with the UK using the desire of its non-independent territories to be compliant with FATCA as leverage to increase their reporting to HMRC on any offshore accounts held by UK-resident citizens in the Crown Dependencies and OTs.

Neo-colonial Reflection of the 'Big Stick'

Among the multitude of efforts taken by states to address the issue of tax nomads and their use of cross-border arbitrage, it also is appropriate to consider the experience of the British Crown Dependencies (including Guernsey, Jersey, and the Isle of Man) and OTs (including Anguilla, Bermuda, the British Virgin Islands, Cayman Islands, Gibraltar, Montserrat, and Turks and Caicos). These jurisdictions are effectively semi-sovereign, in that they have constitutional responsibility for most governmental functions, while foreign affairs, security, and 'good governance' remain the responsibility of the government in Westminster (Foreign and Commonwealth Office 2012, p. 13; Ministry of Justice n.d.). Consequently, these jurisdictions have authority to set their own independent tax policy and establish and maintain an international financial centre, but they are not in a position to independently sign and ratify international agreements. As with other jurisdictions hosting a financial centre with accounts held by US citizens, they found themselves subject to FATCA but unable to finalise an IGA with the USA covering their OFC. Rather, due to the nature of their

constitutional relationship with the UK government in Westminster their agreements are mediated through the Foreign and Commonwealth Office in London. The cooperation of the Crown Dependencies and OTs with the relevant international bodies for global finance, such as the Global Forum discussed in the next chapter, and their accession to relevant international agreements requires the agreement and approval of the UK government. In order to achieve that agreement they found themselves also agreeing to a UK-specific variation to FATCA, an Automatic Exchange of Information Agreement with the UK government, in order for the FCO to authorise the completion of a FATCA IGA agreement with the US government.

An article in the *Wall Street Journal* announced in 2013 that the USA had signed its first IGA for FATCA with a Caribbean jurisdiction, the Cayman Islands, and it was one of twelve agreements signed at the time (McKinnon 2013). This action may be put into context with a 2011 report from the Cayman News Services on the contents of a lecture given in the Cayman Islands by 'an expert with RBC Wealth Management' stating that 'Cayman and other offshore banking jurisdictions face tough questions on handling of US accounts and wire transfers' (Cayman News Service 2011). A tax specialist also quoted in this news report indicated that if the USA succeeded in gaining a significant increase in tax revenue from the implementation of FATCA, then it should be expected that other jurisdictions would follow its lead and implement a similar automatic information exchange obligation. It did not require a demonstration of success, however, for the UK government to copy the US approach, by using FATCA compliance as the leverage it required to force automatic information exchange between Cayman and the other OTs and Crown Dependencies with HMRC. The intentions of the UK Treasury to use this leverage were revealed in November 2012, when a draft of its UK-specific IGA was leaked. The need for UK government approval on any international agreement completed by an OT or Crown Dependency, including a US IGA for FATCA 'opened up an opportunity for Britain to demand the same level of transparency as the US' (Houlder et al. 2012a, b).

The desire to retain any US-connected customer base and in order to avoid the penalties imposed on their financial sectors in the absence of a FATCA IGA meant that by the end of 2013 the UK government had signed its own IGAs with the Crown Dependencies and the relevant OTs. The timing of these events had intersected with a UK government initiative to place taxation as a lead agenda item for the G8 meeting hosted

by the UK in 2013 (Wintour 2013; Quinn 2013). The drama behind the scenes for the relatively rapid movement towards the completion of this series of IGAs was hinted at in media reports.[13] Nevertheless, between the meetings held prior to the June 2013 G8 meeting in Lough Erne and the end of the year an understanding had been reached and agreements signed. In parallel with those government-to-government conversations, there also was a public consultation on the implementation of these agreements with the Crown Dependencies and Gibraltar and their impact for UK businesses, attracting a selection of comments, observations, and criticisms (HM Revenue and Customs 2013a; HM Revenue and Customs 2013b). The consultation document situated the UK IGAs as an obvious evolution from processes to comply with FATCA and a move towards a more inclusive global standard for automatic reporting of taxpayer account data. Agreeing the automatic exchange of taxpayer data with the Crown Dependencies and OTs represented a first step on the path towards that anticipated global standard (HM Revenue and Customs 2013a, p. 4). One substantive issue raised in the responses collected by HMRC involved the matter of definitions, particularly where there may be a difference with the usage present in the FATCA IGA. Additionally, 'tax resident' is a concept not present in any FATCA IGA because it is irrelevant for US citizens with their worldwide tax obligation to the US government. Consequently, for the purposes of the UK IGA the determination of tax residency is a matter of local law and HMRC promised to prepare further guidance to help UK reporting institutions determine an account holder's jurisdiction of tax residency (HM Revenue and Customs 2013b, p. 8). The determination of the account holder's tax residency is a critical data field for implementing automatic data exchange at the global level, an OECD initiative discussed in the next chapter.

The clear relationship between the IGAs completed with the UK government and the IGAs completed for FATCA is reflected in HMRC's implementation guidance notes for financial institutions. Titled 'Implementation of International Tax Compliance (Crown Dependencies and Gibraltar) Regulation 2014: Guidance Notes', the document clearly states in its Background section that the reporting obligations under this regulation were 'specifically designed to be similar in nature' to the reporting obligations of financial institutions for the 'Implementation of International Tax Compliance (United States of America) Regulation 2013' (HM Revenue and Customs 2015, p. 4). Moreover, the document contains a highlighted box on page 4 declaring 'These notes should always be read in conjunc-

tion with the "Implementation of International Tax Compliance (United States of America) Regulation 2013 Guidance Notes"'. The reader will notice the absence from the document's title of the other OTs that signed an IGA with the UK government. This absence was not because it would have produced a rather long, unwieldy document title. Rather it is because of a substantial difference in the reporting obligations imposed on financial institutions by these IGAs. While the UK IGAs are based on the IGA used by the USA for FATCA, the point of difference among them is whether or not they are reciprocal. For the Crown Dependencies and Gibraltar, the IGA is reciprocal and UK financial institutions must report account details for persons (natural and legal) that are tax resident in one of these jurisdictions to be shared with the jurisdiction's tax authority. The other UK IGAs are not reciprocal and impose no additional reporting obligation on UK financial institutions. The FATCA IGAs negotiated by the USA have similarly been distinguished by this point of difference on US reciprocity for data exchange. The US FATCA agreement with Switzerland, for example, is not reciprocal, and no data for US-based accounts held by Swiss citizens will flow back to Switzerland from the USA (US Treasury 2012b). Where the Caribbean OTs may not collect income tax from their residents, that is not the case for Switzerland and its residents. This situation represents a further display of power behind the individual IGAs agreed by the US Treasury with foreign states seeking to make their financial sector FATCA-compliant.

This story for how the UK government leveraged US financial power in the form of FATCA in order to accomplish a similar (if not as fully comprehensive) agreement with its associated jurisdictions echoes the strategy of the OECD as outlined in the next chapter. The more universalist solution of the G20 through the institutional capacity of the OECD also seeks to leverage compliance with FATCA into agreement and compliance for automatic information exchange with everyone. As long as the OECD project retains the support of the US government, it retains some prospect for success at suppressing transnational tax avoidance and tax evasion. If, however, the political orientation of the government in Washington, DC, changes before the OECD policies have been effectively implemented in US legislation, then the consequences may be similar to the OECD's experience with its previous agenda against harmful tax competition, that is, limited and declining cooperation in the absence of US support for global tax governance (see further, Vlcek 2008, Chap. 4).

Notes

1. It also should be noted in the context for this originary tale, offshore finance is understood as distinct from the tax haven. Tax havens, and specifically Switzerland for French nobility, have existed since at least the eighteenth century (Faith 1982). Offshore finance as a form of regulatory arbitrage between national financial systems may arguably date only to the 1950s (Palan 2003).
2. The specifics of these court case decisions as identified in the Senate report are: In Re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); In Re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982) cert. denied, 462 U.S. 1119 (1983). There was a subsequent, unsuccessful appeal to the US Supreme Court, BANK OF NOVA SCOTIA v. UNITED STATES (1988), No. 87–578, available at http://caselaw.findlaw.com/us-supreme-court/487/250.html (accessed 28 November 2015).
3. A timeline for the case and links to the amicus briefs in support of Microsoft are available at the website of the Electronic Frontier Foundation, https://www.eff.org/cases/re-warrant-microsoft-email-stored-dublin-ireland (accessed 5 December 2015).
4. See on this point the 'Government's Brief In Support Of The Magistrate Judge's Decision To Uphold A Warrant Ordering Microsoft To Disclose Records Within Its Custody And Control', filed with the US District Court, Southern District of New York on 9 July 2014 at pages 25–26; and the 'Brief for the United States of America' submitted to the US Court of Appeals for the Second Circuit on 9 March 2015 at pages 51–53.
5. In 2015, Microsoft announced that it was establishing a data centre in Germany that would be 'legally ringfenced' in order to put any information stored in the facility beyond the corporation's access in the event of any US subpoena, summons, or warrant (Ahmed and Waters 2015; Geiger 2015).
6. The Internal Revenue Manual of the USA is available online, and this section on the 'John Doe' summons is at https://www.irs.gov/irm/part25/irm_25-005-007.html (accessed 4 December 2015).
7. The updated list of individuals charged using data from the UBS client data is available at https://www.irs.gov/uac/Offshore-Tax-Avoidance-and-IRS-Compliance-Efforts (accessed 4 December 2015).
8. See https://www.congress.gov/bill/111th-congress/house-bill/3933 and https://www.congress.gov/bill/111th-congress/senate-bill/1934 (accessed 7 December 2015).
9. For the current list of bilateral agreements, see the Internal Revenue Service webpage for FATCA at http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

10. With the exception of Canada, as noted in the *Guidance on Reporting Interest Paid to Nonresident Aliens*, it was the only jurisdiction with automatic exchange of information related to the payment of deposit interest on accounts held in the USA as of 2012 (Internal Revenue Service 2012).
11. Through the wonders of the Internet, this letter is publicly available at several websites, including http://freedomandprosperity.org/2013/news/press-releases/congressman-posey-rebukes-secretary-lew-on-fatca/.
12. For one academic analysis juxtaposing corporate tax practices against other corporate social responsibility activities, see Davis et al. (2016).
13. For example, 'Some jurisdictions have expressed anger about what they felt was arrogance on the part of Downing Street over the issue, which they felt smacked of "old colonialism"' (Houlder et al. 2013).

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Global Tax Governance and the Tax Nomad

This chapter turns from the efforts of one state to address the challenges of both individual and corporate tax nomads to the global effort for dealing with them. While claiming global responsibility and authority to set the agenda and to craft the mechanisms for reducing, if not eliminating, the use of sovereignty to arbitrage taxation, the organisations involved are not fully representative. At present, the OECD consists of 34, predominantly developed, state economies, though the framing for the list of 'members and partners' on the OECD's website reads,

> Today, our 34 Member countries span the globe, from North and South America to Europe and Asia-Pacific. They include many of the world's most advanced countries but also emerging countries like Mexico, Chile and Turkey. We also work closely with emerging economies like the People's Republic of China, India and Brazil and developing economies in Africa, Asia, Latin America and the Caribbean. Together, our goal continues to be to build a stronger, cleaner and fairer world. (http://www.oecd.org/about/membersandpartners/)

In the past, the concern for the unrepresentative nature of the OECD's membership and thus the sources for its economic and development agenda served to limit the effectiveness of its projects. Moreover, the level and extent of cooperation and participation from the OECD member state with the greatest measure of economic power (the USA) also

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was a factor behind past ineffectiveness (Vlcek 2008, Chap. 4). As suggested further below, continued US cooperation with the OECD agenda to reshape international taxation will be instrumental to its future success.

The evolution of the global governance approach to the issue of tax nomads is developed across the following five sections, starting with a short summary of the OECD's project against Harmful Tax Competition at the turn of the twenty-first century. The next section explains that when that approach stalled, the OECD continued its work through a group established to enhance its claim for representative support when developing its policies on taxation (Owens 2001). The onset of the GFC in 2007–2008 sets the opening for the third section as it prompted the elevation of the G20 from a talking shop for finance ministers to a gathering of 20 heads of government claiming authority to guide and direct global economic matters. With the context set, the chapter then moves to the OECD's action to leverage FATCA compliance into support for global automatic reporting of individual taxpayer account details with a common reporting standard (CRS). From the global governance measures produced to deal with the individual tax nomad, the chapter then turns to the MNC and the OECD project to frame corporate tax minimisation practices such as base erosion and profit shifting (BEPS) and its proposed mechanisms to counter those practices. The chapter concludes with a brief assessment on the future prospects for the BEPS project.

The OECD and Tax Competition

The initial OECD project was substantially concerned with a state's tax rate and the special tax rate regimes applied to specific economic activities, policies it identified as preferential tax regimes (OECD 1998). There was no clear distinction made between the individual and the corporation at this stage in the OECD's project for addressing taxation as a competitive activity between jurisdictions. Globalisation was treated as the intervening factor that had prompted a competition among jurisdictions to attract 'geographically mobile capital' by introducing tax policies specifically intended to attract that capital regardless for any negative externalities they might inflict on other jurisdictions (OECD 1998, pp. 13–14). Because of the appearance that the primary concern for the OECD's endeavour was a competition over tax rates, the tax nomad is present only in a superficial fashion as the subject to be attracted by the preferential tax policy. The focus for the OECD was on changing the competitive behaviour of both member and non-member jurisdictions.

Briefly, the OECD initiated this project to investigate the problem of tax competition at the direction of the Group of 7 (G7) in 1996. The G7 communiqué expressed a belief that 'globalisation is creating new challenges in the field of tax policy', and it requested the OECD to 'develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions' (OECD 1998, p. 7). The report, 'Harmful Tax Competition: An Emerging Global Issue', was released in 1998 and, in addition to explaining tax competition as a 'global phenomenon', it attempted to define the features that identified a harmful preferential tax regime (operating for the most part in developed economies) as well as identify the distinguishing characteristics of a tax haven (a list that critically would contain only small developing economies).[1] One possible reason why it is only developing economies that were identified as a 'tax haven' may be a by-product of its evaluation criteria, the first of which is 'no or only nominal taxes' on the income in question (OECD 1998, p. 23). The developed economy with a large offshore financial services industry would have an established tax rate, which may not be applied to the income in question for some other reason permitted by its tax legislation (a preferential tax regime). An alternative set of evaluation criteria used to identify the OFC is to compare the size of the financial sector to the size of the overall national economy. Outsized financial sectors, as found with the small states of the Caribbean, stand out with this methodology, while other states with substantial financial sectors embedded in a large, diversified economy (e.g. the Netherlands) are not identified as a tax haven (Zoromé 2007).

The OECD report then provided a set of recommendations to counter the structures and practices identified as facilitating harmful tax competition along with suggested topics for further study (such as thin capitalisation, where cross-border intra-group loans are used to shift income, as a loan repayment, from one jurisdiction to another). The small jurisdictions identified by the OECD as a tax haven and listed by name in the 2000 follow-up report protested that characterisation and the project itself vehemently (OECD 2000; Vlcek 2008, pp. 68–75). These challenges combined with the withdrawal of support for the project by the US government (under a new Administration) in 2001, and resulted in the OECD renaming and redirecting the project.

Central to the small states' protest was a defence of their sovereignty arguing that the OECD was, through its recommendations to 'counter harmful tax policies', seeking to force them to change domestic legislation

and therefore explicitly violating the principle of non-intervention in the domestic affairs for a sovereign state as discussed in the chapter "Sovereignty and the Tax Nomad". The OECD countered their argument by asserting that the project was not a threat to the fiscal sovereignty of small states, and in fact the OECD claimed that increased global cooperation on taxation would lead to '*more* and not less fiscal sovereignty' (Owens 2001, p. 2, emphasis in original). Supporting this claim was an acknowledgement that as a multilateral organisation the OECD does not possess the power to tell a state what to do, only that it may attempt to persuade states to cooperate based on the quality of its analysis and the appearance for a global consensus in support of its proposal. Yet at the same time, this particular document observed that while tax policy was a sovereign right it also carried obligations, 'sovereignty also implies one's right to take action to protect the revenue base' (Owens 2001, p. 2). This observation returns to the point highlighted in the chapter "Sovereignty and the Tax Nomad", which state's sovereignty claim takes precedence in a direct conflict between competing sovereignty claims? At that point in time, the resolution to the question of precedence among competing tax claims was deferred and the OECD followed a more indirect path towards its goal to improve tax revenue collections among the OECD member states.

One step on that path was to expand participation in the OECD initiative to include non-OECD member states, and in particular those jurisdictions that the OECD had previously identified as tax havens. The Global Forum on Transparency and Exchange of Information for Tax Purposes is the successor group to the Global Forum on Taxation, and it serves to address the concern that the OECD include the jurisdictions that later would be subject to the multilateral framework it would produce. With the inclusion of non-OECD jurisdictions, the Global Forum could then claim that it was producing a 'level-playing field approach' by having a broadly representative group contribute to its deliberations and policy development (OECD 2011, p. 2).[2] Another step taken by the OECD was to revise its Model Tax Convention to include a requirement for transparency and information exchange between the signatories. The revision was made to §26 of the Model Tax Convention with elements from the 2002 Model Agreement on Exchange of Information on Tax Matters, also a creation of the OECD. Simultaneously the Harmful Tax Practices project was refocused as a campaign for international cooperation on transparency and the exchange of taxpayer information. It led to the creation of a 'tax information exchange agreement' (TIEA) to serve as an alternative

mechanism for implementing the 2002 agreement where there was no double taxation treaty (OECD 2006).

In keeping with the proposition articulated by US Secretary of State Hillary Clinton that policy-makers should not 'waste' a good crisis (Reuters 2009), the GFC provided an opportunity to resuscitate the OECD's tax competition project, restructured to address harmful tax practices and now under the guidance of the G20 (supplanting the G7). The emphasis placed on the production of taxpayer information exchange agreements as the means for determining a jurisdiction's level of commitment for this 'internationally agreed tax standard' is explored in the next section as the first step in OECD support to the G20 agenda (OECD 2011, p. 2).

Global Financial Crisis and the Rise of the G20

The elevation of the G20 to become the locus for global economic governance in 2009 provided an important discursive claim for legitimacy behind the OECD's position as the forum for the global governance of taxation. The genesis of the G20, however, rests in the Asian Financial Crisis (1997) as the response by the G8 to establish a group that would serve as a 'global financial and economic steering committee' (Kirton 2013, p. 3). The organisation consisted of the finance ministers with their central bank governors from 19 states and the EU.[3] In this way, the largest developed and developing economies' representatives met on an annual basis from 1999 to 2008. The deepening financial crisis in 2008 prompted the USA to support a proposal that it had previously rejected, which was for the G20 heads of government to meet on an annual basis giving this group of states greater authority as the world's economic steering committee (Kirton 2013, pp. 179–80). In November 2008, the heads of government for the member states of the G20 all gathered for the first time as the financial crisis threatened the smooth functioning of their economies.

With the second G20 heads of government meeting in London the following April, the responsibility for exploring questions on cross-border tax revenue collection and recommending solutions was delegated to the OECD. Moreover, the final communiqué from the G20 leaders' meeting asserted that they had agreed to

> to take action against non-cooperative jurisdictions, including tax havens. … The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information. (G20 2009)

The presence of this item in the communiqué was not without some debate within the membership of the G20 as it sought to coalesce into a functioning venue for global economic governance. As related by John Kirton, this issue was the most important one on the agenda for France after it identified the tax havens as one of the causes behind the financial crisis. Other G20 states were less concerned about the tax havens because they felt otherwise and were more focused on systemic problems in the global banking industry. The initial compromise to address the French concern was through the delegation of responsibility to the OECD and its list of non-compliant jurisdictions, in anticipation that the list would publicly identify them and bring about increased public pressure against them. But this compromise approach revealed further fractures in the attempt for a collective policy position as individual state positions were raised among the G20 member states (Kirton 2013, pp. 278–81).

The compromise reached between the position of France and other developed states concerning the use of the OECD to deal with the OFCs was not initially acceptable to China. China is not a member state of the OECD and would have no input over the composition of the list produced to identify non-compliant jurisdiction (Fidler and Batson 2009; Hall et al. 2009; Kirton 2013, pp. 278–81). As indicated in the preceding collection of references, this disagreement emerged in the press at the time, along with the fact that the new US President, Barack Obama, mediated a further compromise to address the concerns of China while at the same time satisfying the strongly held position of France (Dyer 2009). One reason for China's concern with the delegation of responsibility to the OECD was the fact that it would not be able to speak on behalf of its two Special Administrative Regions and their financial centres, in order to shield them from identification as non-compliant with international initiatives (Mitchell 2009; Dyer 2009). Consequently, Kirton writes, 'China acquiesced, in part because the solution did not materially affect the interests of Hong Kong and Macau' (Kirton 2013, p. 279). In fact, Hong Kong and Macau were obliquely present in the OECD's list of non-compliant jurisdictions, buried in a footnote tagged to China under the heading of compliant jurisdictions. The footnote simply stated 'Excluding the Special Administrative Regions, which have committed to implement the internationally agreed tax standard' (OECD 2009a). They would appear on the OECD's list as separate entries after they had achieved that status necessary to be considered among the 'Jurisdictions that have substantially implemented the internationally agreed tax standard' (OECD 2012).

Counting Tax Information Exchange Agreements

For all the apparent drama surrounding the release of the initial OECD progress report listing the progress on the implementation of its tax standard the results were something of a damp squib. The list of jurisdictions was grouped into three categories: 'substantially implemented', 'committed but not yet substantially implemented' and 'not committed' (OECD 2009a). The determining factor for categorisation of any jurisdiction was whether it had signed at least 12 agreements for information exchange on tax-related matters, either through an updated tax treaty with those provisions or with a TIEA. To have used the presence of a TIEA in this fashion is a bit problematic. First, it represents a rather low barrier to entry, merely having 12 such agreements was sufficient for a jurisdiction to be categorised as 'substantially implemented' regardless of the partner jurisdiction involved (OECD 2010, p. 2). This situation was a point of criticism made by those seeking greater pressure be placed on the OFCs, because there are sufficient jurisdictions in this group to top this bar by simply signing TIEAs with the other members of the group (Palan et al. 2010, p. 244). On the initial release of the list there were only four jurisdictions in the 'not committed' category: Costa Rica, Malaysia (Labuan, its financial centre), Philippines, and Uruguay. In the 'committed but not yet substantially implemented' category, there were 32 jurisdictions in the 'tax haven' sub-group and 8 jurisdictions in the 'other financial centres' sub-group (OECD 2009a).

When this first 'A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard' document was released, it included an explanatory note. The note reads in part that an 'internationally agreed tax standard' had been developed in partnership with non-OECD jurisdictions, and it had been endorsed by both the G20 Finance Ministers (Berlin 2004) and the UN Committee of Experts on International Cooperation in Tax Matters (October 2008). The standard

> requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged. (OECD 2009a)

The stated position for developing this tax standard rested on the argument that increased transparency would 'level the playing field', which was necessary to achieve a 'fair competition' between jurisdictions. It would overcome a situation where economic competition between jurisdictions may be based on a 'lack of transparency' rather than on the OECD's desired 'legitimate commercial considerations' (Global Forum on Taxation 2004, p. 2). Endorsement from the G20 Finance Ministers and the UN Committee on Tax Experts, combined together when neither group is fully representative for the range of jurisdictions subjected to the OECD's survey, is not sufficient to the claim for 'international agreement' if that is to be understood to mean universal acceptance. Particularly, when the OECD progress report identified on its initial release that there were four holdout, 'not committed', jurisdictions and forty 'committed but not yet substantially implemented' jurisdictions (which in itself suggests acquiescence rather than acceptance for this 'agreed' standard).

By September 2009, however, the updated progress report found that 'all jurisdictions surveyed by the Global Forum' were now committed to implementing its standard and even with the move of the four 'not committed jurisdictions' to the 'not substantially implemented' group its membership still declined as jurisdictions signed their 12th TIEA, reinforcing the point that this particular hurdle was easily cleared (OECD 2009b). In fact, the attention given to transparency and information exchange in 2009 led to the situation where the OECD could now honestly claim universal acceptance. The four OECD member states (Austria, Belgium, Luxembourg, and Switzerland) that had until then consistently resisted its revisions to Article 26 of the Model Tax Convention dropped their reservations to the change. Similarly the non-member states dropped their stated reservations and the UN also 'endorsed' the revised Article 26 (OECD 2010, p. 3).

The second reason that simply counting TIEAs as a measure of cooperation with the G20/OECD agenda on transparency (and relatedly to satisfy European desires to 'end the tax havens') is problematic is a result of the composition of the jurisdictions with TIEAs as compared to those with bilateral taxation treaties. Developed states and the larger developing economies tend to have a double taxation treaty with their main economic partners, while the TIEAs tend to involve as one partner a smaller developing economy and in particular those jurisdictions found in the OECD's 'tax haven' sub-group of its progress report. Consequently, this approach for assessing progress demonstrated a continued bias against non-OECD

states. This evaluation was highlighted in the analysis made of an earlier OECD survey of tax information exchange agreements and contained in a 2007 report commissioned by the Commonwealth Secretariat. The report interrogated the data compiled on the 82 jurisdictions covered in the '2006 Assessment by the Global Forum on Taxation' for the OECD update on *Tax Co-operation – towards a level playing field* (OECD 2006).

Camille Stoll-Davey's conclusions found that the notional 'level playing field' with respect to the dispersion of tax information exchange agreements possessed two significant areas of unevenness. The first area was the nature of the TIEA itself, 'disadvantageous in comparison with the normal DTC [double taxation convention]', because it privileges the interests of the developed state over those of the developing economy while a tax treaty is notionally between equals and accords equitable treatment to both parties.[4] The second area of unevenness was 'the lack of truly international standards' because Stoll-Davey identified instances where the standards imposed on developing economies were 'not uniformly applied' to the tax administrations of developed states (Stoll-Davey 2007, p. 32). In its 2006 report, the OECD accounted for a total of 2557 DTCs and 221 TIEAs for the 82 jurisdictions reviewed in the Global Forum on Taxation's assessment document (OECD 2006, pp. 80–85). As Stoll-Davey pointed out in her analysis, however, the OECD member states, on average, were party to significantly more tax treaties than the two subsets of developing economies she considered, which were groups of small jurisdictions hosting an international financial centre (Stoll-Davey 2007, pp. 24–25). Moreover, approximately one-third of all bilateral tax treaties were strictly between OECD member states while most of the remaining treaties had an OECD member state as one of the signatories (Stoll-Davey 2007, p. 26). Conditions for the developing economies had little changed by the time the OECD released its 'Progress Report' on the implementation of its 'Internationally Agreed Tax Standard' in April 2009 following the G20 meeting in London.

Revisiting the list of tax havens the OECD had introduced in its 2000 report, most were in the 'committed to but not substantially implemented' group and along with a further eight jurisdictions, none had signed more than eight tax agreements. In fact, many had merely one or none on that first release of the progress report. The enumeration of TIEAs meant that the document was essentially a census providing a list of the number of TIEAs each identified jurisdiction had completed and ratified at that point in time (OECD 2009a). This approach to interdicting international tax arbitrage

by the Global Forum subsequently moved from enumerating agreements as a demonstration of compliance to conducting peer reviews that assessed the level of implementation that was actually achieved in each jurisdiction. Peer review in turn gave substance to the OECD's discursive power in support of its role as a global economic governance body. For example, it noted in its 6 July 2011 'Information Brief' that nine peer review reports were adopted at the Global Forum meeting on 31 May–1 June 2011 and brought the total to 34 adopted peer review reports. Further, the Brief announced that in response to a previously adopted peer review report, 'Belgium moved quickly to adapt its domestic legislation to ensure access to bank information for its network of more than 80 double tax agreements' (OECD 2011, p. 3). Here it should be noted that the measurement of discrete values for assessing performance and compliance is a technique of governmentality (Neumann and Sending 2010, pp. 139–40). The statement in this OECD document therefore provides an example for where it is determining the compliance by a state within the structure of the global audit culture it has produced for international taxation. With this example of Belgium's reaction to a peer review report is a demonstration for the influence of discursive power even in the face of the OECD's self-professed inability to 'tell states what to do'. The reports categorising states based on the number of signed agreements have been superseded by reports collating the results from peer reviews (OECD 2011; Global Forum on Taxation 2015a).[5] This process will further evolve from peer reviews assessing compliance with information exchange based on the 2002 Model Agreement to compliance with a Common Reporting Standard (CRS).

The Common Reporting Standard Emerges

The network of bilateral information exchange agreements, both the stand-alone TIEA and the Article 26 component of a double taxation treaty, serves as the foundation for the transition from voluntary, on-request taxpayer account data information exchange to the automatic form of exchange that has been desired by some OECD member states for a number of years. The catalyst for this transition and the creation of the CRS, as acknowledged in OECD documents and press releases, was FATCA (OECD 2014b, p. 5; 2014a). As discussed in the last chapter, complying with FATCA provisions to transfer financial account details on US citizens to the USA introduced the leverage necessary for other states to demand comparable treatment on their citizens' foreign accounts.

For the OECD and its Global Forum, FATCA provided the impetus to overcome continued resistance against the persistent effort to establish an automatic exchange of taxpayer data regime as the better alternative to the on-demand information exchange procedures of the 2002 Model Agreement (Kudrle 2012, p. 716).

The CRS builds on the groundwork accomplished by the USA for the implementation of data collection and transfer for jurisdictions and their financial institutions to meet FATCA obligations. Moreover, the OECD hopes that by following the same intergovernmental agreement procedures established by the IRS to facilitate FATCA compliance, jurisdictions' implementation of the CRS may be achieved with more efficiency and at less cost than might otherwise be the case with the introduction of a fully independent and unique procedure (OECD 2014b, p. 6). Nonetheless, there are differences between the CRS procedure and the FATCA procedure which will lead to some variance in the information collected and reported by financial institutions. The CRS process similarly involves a government collecting the relevant data from its domestic financial institutions (broadly defined to be more than just the local bank) and then to exchange financial data with the receiving jurisdiction's government on an annual basis. Potential avenues that were used by individuals to conceal their income from similar taxpayer account information exchange programmes, such as those experienced by the EUSTD (see the chapter "A Collective Response to the Tax Nomad"), are identified and should be blocked in a CRS implementation. The standards not only cover financial institutions beyond banks but also expect those reporting institutions to 'look through' any corporate vehicles in order to identify the beneficial owner and to report any financial payment that looks like income (OECD 2014b, pp. 7–8). Clearly, the lessons from over a decade of experience with designing and implementing taxpayer financial account data exchange in Europe when there are taxpayers actively seeking to conceal their income went into the development of the CRS (OECD 2014b, p. 5).

Notwithstanding the extent of support for the CRS as demonstrated by statements of commitment and the accompanying process of peer review, the actual operation of information exchange will likely remain uneven. The standards produced by the OECD must be transposed into local legislation which may potentially introduce gaps in the coverage of the data to be exchanged as legislators modify the model for domestic legal practice. The peer review process can serve to highlight deficiencies, but the Global Forum lacks the enforcement mechanism available to the

US tax authorities with FATCA for motivating full compliance. And even constructing a compliance process that serves to satisfy a jurisdiction's FATCA obligations does not mean that it will produce a process that will at the same time equally satisfy CRS obligations. The peer review process of the OECD will rely on peer pressure and its discursive power in publicly revealing non-compliance in order to achieve the goal for automatic information exchange. But the pressure produced by peers and discourse will not be felt equally by all jurisdictions, similar to the experience of the FATF with its blacklist and peer review process for anti-money laundering regulations in the first decade of the twenty-first century (Sharman 2011, pp. 99–130).

Resistance to the automatic reporting obligation imposed by the CRS continues to represent a limitation to full global implementation. Specifically there is the case of the USA, which is addressed in a footnote to the OECD list of current jurisdictions committed to the automatic exchange of taxpayer information under CRS. The footnote reads, in full:

> The United States has indicated that it will be undertaking automatic information exchanges pursuant to FATCA from 2015 and has entered into intergovernmental agreements (IGAs) with other jurisdictions to do so. The Model 1A IGAs entered into by the United States acknowledge the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. They also include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange. (Global Forum on Taxation 2015b)

It is reproduced here in its entirety to highlight the dissonance between OECD expectations and the US domestic context related in the previous chapter. The operative clause is 'a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation'. While the IRS and US Treasury Department have announced information exchange, it has been accomplished under a rule-making process that may yet be subjected to legislative revision by the US Congress or judicial suspension by US Federal Courts. Both actions have been threatened with regard to FATCA and its implementation by the IRS. Consequently, any political commitment simply may reflect the desires of bureaucrats and political appointees, and therefore it is subject to change under a future Administration. The USA may once again emerge as the spoiler for an international initiative that it was an important contributor for develop-

ing at the OECD, unless and until appropriate legislation has been ratified and implemented. The same situation may also emerge with the OECD's strategy for addressing the problems with corporate tax nomads outlined in the next section.

Naming Corporate Tax Minimisation Practices

While taxes on the wealthy may attract some headlines (refer back to the tale of Warren Buffett in the first chapter), the extent of corporate income tax and the methods used by corporations to minimise those taxes have produced many more headlines across North America, Europe, and Australia over the past few years. Examples involving IP in these minimisation activities are provided in the chapter "Multinational Corporations and the Digital Economy", and the efforts taken by the EU and the USA against MNC minimisation tactics are reviewed in the chapters "A Collective Response to the Tax Nomad" and "Hegemonic Response to the Tax Nomad: Using a Financial 'Big Stick'" respectively. In this section, the focus turns to the OECD's effort to address the problem of the corporate tax nomad. With the Harmful Tax Competition project, MNCs were present as a recipient of the tax competition, but were not explicitly a target for their tax minimisation practices. This particular lacuna does not mean that MNCs were not engaged in a variety of tax minimisation practices at the end of the twentieth century. As related in the last chapter, US MNCs have been engaged in efforts to avoid the grasp of the IRS on a percentage of their worldwide profits for some time. Similarly the EC proposed the establishment of a Common Consolidated Corporate Tax Base as the mechanism to resolve this issue in the context of the Single Market, which was introduced in the chapter "A Collective Response to the Tax Nomad". As noted there, this EC initiative may be coordinated with the actions of the OECD for a global solution if it is not determined to be unnecessary as a result of comprehension global implementation of the OECD proposals to deal with BEPS.

Introducing the terminology of base erosion and profit shifting, condensed into the acronym BEPS, grounds the discussion in a state-based perspective on corporate income and corporate profits as a natural/national resource for public finance.[6] This framing situates the discussion in opposition to a business perspective that determines tax to be yet another cost element in the corporate spreadsheet, and consequently it is a business factor to be reduced where possible for the overall profitability

and success of the firm. The later perspective sets taxation alongside other business cost factors, including labour, materials, facilities, transportation, and advertising. And while a frequent critique is that MNCs are benefiting from corporate income tax minimisation strategies not available to domestic-only firms that critique gracefully elides the multitude of tax benefits created specifically for their benefit. There are measures, for example, encouraging the growth of small and medium enterprises in many if not all developed economies (OECD 2015b). Thus, simple assertions that MNCs have opportunities to minimise their tax obligations not available to firms operating solely in single jurisdictions, while true, does not provide a complete picture for the complexity of national tax legislation. The complexity of tax legislation arises in part from efforts by legislators to craft tax laws with the intention of influencing behaviour and not only of businesses but also of individual citizens, a practice known in the literature as the use of a Pigouvian Tax (Fleischer 2015, citing Arthur C. Pigou, *The Economics of Welfare* (4th ed., 1932), pp. 172, 192–93). And while the OECD may claim that 'Ideally, a country's tax system should be neutral with regard to its impact on business decisions', states nevertheless write tax legislation explicitly to influence a business decision, creating special enterprise zones, offering tax holidays, or building infrastructure to meet a firm's needs, all in order to attract a firm and the employment it offers to citizens (OECD 2015b, p. 13).

With its 2013 report, *Addressing Base Erosion and Profit Shifting*, the OECD notes that this phenomenon is not new and provides a list of some of its previous publications involving international taxation relevant to the topic. At the same time, the report suggests that national tax systems and the agreements between jurisdictions to address cross-border taxation have not kept pace with 'today's environment of global taxpayers' (OECD 2013a, p. 5). Or as explained previously, *globalisation* is responsible for producing the spaces in which MNCs may arbitrage between national tax systems.[7] Significantly for the focus of this book, the report identified intangible assets and the growth of the digital economy as specific areas where national tax systems have not kept pace with new business practices (OECD 2013a, p. 7). As explained in more detail below, the use of intangible assets, most especially IP, to accomplish transfer pricing was an area of concern, and the OECD offered specific recommendations for dealing with this tax minimisation practice. The OECD report offers several notional examples for the mechanisms used by MNCs to accomplish what it frames as BEPS (see OECD 2013a, Annex C; and

also OECD 2015c, Annex B). In contrast to it, approach-specific case examples were provided above in the chapter "Multinational Corporations and the Digital Economy", because those cases are a matter of public knowledge and serve to demonstrate how the information provided in the media may be understood through the concept of the tax nomad as used here. Nonetheless, a central element in the OECD's notional examples is the arbitrage of national legal and regulatory systems, justifying its case for the need to establish a multilateral strategy to counter the practices used by MNCs to minimise their aggregate corporate income tax obligations.

A key point, however, is to establish exactly what it is we are talking about when we are talking about BEPS. The OECD report opens its Executive Summary by acknowledging that there are many ways through which a tax base may be eroded while also asserting that profit shifting represents 'a significant source' for such erosion (OECD 2013a, p. 5). But there is no clear and simple definition explicitly designating what is meant with the concept, notwithstanding the review of existing literature provided at Annex B of the Report. The tax base for a state consists of that income identified in its tax legislation as subject to taxation by that jurisdiction. But recall also the observation previously provided—the definition of 'income' is itself malleable (Sikka 2010). The definition of income is subject to interpretation (and thus negotiation between the MNC and the state's tax authority) and that variability itself will impact the size of the state's tax base. It is in this interpretive space for determining an MNC's income that profit shifting exists and operates. Profit shifting then represents the actions of the firm to move capital that in one location may be categorised as 'income' to a different location where even if categorised as income by that jurisdiction's tax legislation is subject to little or no corporate income taxation. A particular point of concern involved the use of a 'conduit company' to 'own' the income-generating asset (IP) in a jurisdiction with favourable tax treaties and little or no tax on the capital (OECD 2013a, p. 41). As seen with the case examples presented in the chapter "Multinational Corporations and the Digital Economy", what may be measured as income in one jurisdiction was instead transferred as a royalty payment for the use of IP owned by a subsidiary firm in another (low-tax) jurisdiction.

These problems with determining the nature and extent of BEPS is recognised in the report's summary of the literature. One conclusion was that there may not be 'conclusive evidence that BEPS behaviours are prevalent' from its review of the literature analysing the effective rate of

tax actually paid by MNCs (OECD 2013a, p. 63). Part of the challenge facing the effort to determine the existence of intentional profit shifting is the presence of other, equally valid, reasons for the differences found with the effective rate of corporate income tax paid by any MNC. Similar conclusions were reached in a review article published in 2014, in which Dhammika Dharmapala determined that the data sets available and used for estimating the magnitude of BEPS influenced the resulting value reached for the size of BEPS in the world economy. Consequently, while media headlines reporting the small quantities of corporate income tax paid by an MNC capture our attention, the empirical analyses working from firm-level data found 'the estimated magnitude of BEPS is typically smaller than that found in earlier studies' using country-level data (Dharmapala 2014, p. 423). Naturally, both the OECD report and this more recent review of the literature conclude that further research is necessary. Dharmapala also suggested that the heterogeneity of MNC tax practices and the significant percentage of MNCs that do not appear to engage in tax minimisation practices should be investigated as an indicator for the actual impact of tax legislation on MNC tax practices (Dharmapala 2014, p. 445). Understanding actual practice under current national legislation and the international environment in which that legislation operates could provide guidance for the production of improved legislation to address the issue of profit shifting. The complexities, however, for determining an MNC's taxable income (after all deductions and credits that reduce it) suggest that each MNC may need to be addressed on an individual basis, limiting the effectiveness for any potential universal solution developed by the OECD or any other multilateral organisation.

A concluding recommendation of the OECD report on BEPS was a call for the development of an action plan to develop proposals for a coordinated global strategy for countering the issue of BEPS by an MNC. The OECD would in turn release its Action Plan several months later (OECD 2013b). The G20 Finance Ministers, in the communiqué released following their July 2013 meeting in Moscow, endorsed 'the ambitious and comprehensive Action Plan submitted at the request of the G-20 by the OECD' (G20 2013, p. 5). In addition, they looked forward to further progress on the production of 'recommendations to tackle the 15 issues identified'. It should be noted that the sentence containing the latter quotation concluded with a qualifier, that 'We, the G20 Finance Ministers and Central Bank Governors', will 'commit to take the necessary individual and collective action with the paradigm of sovereignty taken into consideration' (G20 2013, pp. 1, 5).

This qualifying statement appears to suggest that notwithstanding the unanimous agreement required to include this item in the G20 communiqué disagreements still remained over potential strategies and tactics for dealing with BEPS. Such fissures may reflect differences in definitions as much as they may reflect the continued desire of states to use taxation as a mechanism for attracting investment and encouraging economic development.

Taking Action on BEPS

The OECD's Action Plan on BEPS identified 15 issues requiring further study in order to rationalise corporate income taxation at the international level (OECD 2013b, p. 13). In particular the document observed in its background section that 'the digital economy is characterised by an unparalleled reliance on intangible assets' (OECD 2013b, p. 10). As seen with the examples presented in the chapter "Multinational Corporations and the Digital Economy", the extensive use of IP in the tax minimisation practice of MNCs extends far beyond simply the 'digital economy', with the case of manufacturing firms represented by Apple Inc. and the case of service firms represented by Starbucks Corporation. Beyond simply the 'intangible' nature of IP, it is the construction of IP as *property* that facilitates its material relocation to other jurisdictions in order to accomplish tax minimisation at the aggregate global level. To reiterate, IP is as nomadic as the capital (rents) it collects and the MNC by which it is owned. Substantially the objective expressed in the BEPS Action Plan is to extend existing international coordination beyond the issue of double taxation in order to address the double *non*-taxation achieved through the cross-border arbitrage of national tax systems by the MNC. For the context of the corporate tax nomad as considered here and the tax minimisation practices outlined in the chapter "Multinational Corporations and the Digital Economy", the specific Actions to explore are: Action 1, 'Address the tax challenges of the digital economy', and Action 8, 'Assure that transfer pricing outcomes are in line with value creation – Intangibles' (OECD 2013b, pp. 14–15, 21).

Tackling the Digital Economy

The central focus placed on the digital economy is demonstrated by its position as the first action item to be addressed by the OECD's BEPS project. This position highlights a level of concern that the digital economy

represents a major challenge. As declared in the Executive Summary for the Final Report on this action item,

> Because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes. (OECD 2015c, p. 11)

This perception was at the forefront of the action plans but they also recognise that digital economy business practices may not produce additional challenges for efforts aimed at reducing BEPS. Rather, these business practices may simply utilise existing tax minimisation methods not covered by existing anti-avoidance legislation. The expectation is that other measures under development to address BEPS should capture digital economy firms in their broad net, as long as they incorporate expanded definitions that provide the scope to include coverage of digital economy firms.

It is also important to note that in addition to BEPS, the Final Report addresses the collection of consumption or sales taxes (grouped under the heading of value-added tax, VAT) on goods and services provided through the digital economy. The collection of these taxes may represent a significant portion of a jurisdiction's total tax receipts, for example, VAT provides roughly 20 per cent of the UK's total tax receipts as compared to 10 per cent for corporation income tax (HM Revenue and Customs 2016, p. 4). Collecting VAT on cross-border transactions conducted via the Internet can be particularly challenging, see the discussion provided in the Final Report of chapters 5, 6, and 8 along with the specific analysis included in the Report's Annexes C and D (OECD 2015c). The VAT is only collected by the firm and then remitted to the government, whereas the specific tax minimisation practices of the digital economy MNC are substantially comparable to those practices utilised by other MNCs. There are features, however, with the business models used by digital economy firms which may at the same time 'exacerbate risks of BEPS in some circumstances' (OECD 2015c, p. 78).

The aspect of interest here involves IP and the OECD does acknowledge in this report the role played by IP (as an intangible asset) in the operation and conduct of the digital economy. 'Digital economy companies rely heavily on intangibles in creating value and producing income' (OECD 2015c, p. 91). Again, this role for IP is not unique to the digital

economy (as demonstrated with the case of Starbucks Corporation in the chapter "Multinational Corporations and the Digital Economy" above), and consequently the work on Action 8 (discussed below) is expected by the authors of the report to adequately address the use of IP for BEPS in the digital economy (OECD 2015c, pp. 86, 90–91). A wide variety of approaches for implementing and collecting taxes in the digital economy, beyond the role of IP to facilitate transfer pricing, are described in the Final Report, but they are beyond the scope of the present study because they involve taxes on actual business practice (such as the collection of VAT) rather than the tax minimisation practices of the corporate tax nomad.

Revising the Policy on Transfer Pricing

The present practice for addressing intra-firm transfer pricing is to apply the 'arm's length principle'. This concept involves the treatment of the transaction between subsidiaries of an MNC 'as if' it were a business transaction between unrelated parties in order to determine if, and where, any taxable income was produced by the transaction. In principle, comparable transactions between unrelated parties should be considered as a baseline for determining if the intra-firm transaction was priced in a fashion that served to shift income from one subsidiary (jurisdiction) to another subsidiary (jurisdiction). Frequently, there is no comparable transaction because the item is specific to this MNC (i.e. an intermediate sub-assembly for a finished product) or it is a unique intangible asset. Consequently, it is the position of the OECD that this approach for determining the location of income may be manipulated by the MNC to shift income to a location different from the activity deemed to have produced that income in the first place. For the case of intangible assets, the situation is summarised on the OECD webpage 'Transfer Pricing Aspects of Intangibles' as requiring revision because 'new issues have emerged' since the OECD's guidelines on transfer pricing were approved in 1996 and 1997, and they do not adequately deal with the use of IP by MNCs.[8] To address this situation, the report of Action items 8–10 fundamentally consists of the proposed new text to update the OECD's Transfer Pricing Guidelines in order to correct the identified deficiencies (OECD 2015a).

As a starting point, and in contrast to the definition for an intangible asset provided in the chapter "Multinational Corporations and the Digital Economy", the OECD's guidelines on transfer pricing distinguish an intangible asset independent from how it may be recorded by the

MNC for accounting purposes. In particular, the document notes that while the intangible asset may not be recorded as an intangible asset in the firm's accounts, if the asset does produce 'significant economic value' it is appropriate to consider it as an income-generating intangible asset for the purposes of assessing transfer pricing (OECD 2015a, p. 67). The recurring text employed in the report for determining the transfer pricing circumstances of an intangible asset emphasises that it is necessary to make sure that all parts of the MNC are suitably credited and compensated for their contribution to the final form of the intangible asset (OECD 2015a, pp. 77, 78). The report further emphasises the point that the legal owner of an intangible asset does not automatically possess a claim on all income generated by the asset, unless it was fully and completely responsible for its development, maintenance, and use (OECD 2015a, pp. 10, 78). Alternatively, where that legal owner 'neither controls nor performs the functions' of development, maintenance, and use of the intangible asset, then the proposed new text reads that 'the legal owner would not be entitled to any ongoing benefit attributable to the outsourced functions' (OECD 2015a, p. 79). The overall objective of the transfer pricing guidelines revision is to separate ownership of IP from its substance, which is a move away from the concept of IP *as* property that may be leased, sold, or given away.

The objective of the OECD is clearly to counter the nomadic potential of IP in the transfer pricing assessment of the MNC's cross-border operations and determine where its economic value is actually created. The business elements responsible for the different aspects (development, maintenance, and use) of the intangible asset (IP) will be assigned compensation for their contributions. In the language used by the OECD here, this assessment includes the 'exploitation' of the intangible asset, understood as its application or usage (OECD 2015a, p. 80). It is at this point that the objective for the revised guidelines on transfer pricing is to establish and retain the relationship of the intangible asset to any location where it produces 'economic value'. In this fashion, the OECD hopes to provide jurisdictions other that where the IP is registered as legally 'owned' with the grounds to claim tax on the added value or income produced in that jurisdiction as representing taxable income of the MNC in that jurisdiction (OECD 2013a, pp. 81–82, 87, 91, 145). The proposed text for revising the OECD Transfer Pricing Guidelines provides more detailed explanations than has been summarised here. Further, it contains 29 examples for the various permutations foreseen as possible in

a transfer pricing assessment to determine the appropriate allocation of income among the jurisdictions with a connection to an intangible asset. Nonetheless, the significant challenge for effective implementation of the revised guidelines on transfer pricing involves achieving consistent and consensual determinations for the amount of economic value produced in each affected jurisdiction.

A Future for BEPS?

For some observers, the OECD project is similar to the actions of the EU in its illegal state aid investigations, in that it appears to target the tax minimisation practices of US MNCs. The critics of Amazon, Google, and Starbucks in Europe are likely to welcome the apparent focus on those MNCs and the minimal corporate income tax they contributed in the past to European governments. If, however, these critics of the OECD project are located in the USA, then the apparent focus on US MNCs may be considered a raid on the tax base of the USA. Recall that US corporate income tax legislation claims a right on the firm's worldwide income, and the US government anticipates a tax payment from the firm when it eventually repatriates its foreign earnings. Should a perception develop in the USA that BEPS specifically targets the foreign business activity of US MNCs it could undermine support for BEPS and any effort to revise US tax legislation in order to comply with the BEPS Actions. Consequently, one question to consider as this manuscript was completed in early 2016 was whether the global governance of taxation experience in 2001 would be repeated in 2017? In 2001, a new US President and his Administration withdrew US support from the OECD's harmful tax competition initiative. Might the new US President in 2017 again withdraw US support from an OECD (under the guidance of the G20 it is true) global governance of taxation initiative in the form of BEPS?

Some of the issues raised by BEPS in the context of US corporate income tax policy were helpfully summarised in a working paper from the Petersen Institute for International Economics in Washington, DC, analysing the OECD's BEPS Action documents (Hufbauer et al. 2015). Its authors clearly situate their analysis as strictly from the perspective of the US economy and the negative consequences that might impact the success of US MNCs as well as the US corporate income tax base. Moreover, the authors emphasise that more is at stake than just tax revenue from MNCS, from a US perspective there is a concern that BEPS would negatively

impact 'the growth of US investment, R&D, and jobs', and this concern should supersede the concern over uncollected tax revenue (Hufbauer et al. 2015, p. 5). After categorising the BEPS Actions as troublesome, harmless, useless, or a work in progress, the authors explain the reasons behind placing a particular Action in one of these categories within the context of US tax policy and potential impact to US corporations. The overall conclusion is that 'the US Congress should lay aside the BEPS report' and focus instead on first rewriting US tax legislation to remove those aspects that incentivise the tax minimisation practices of US MNCs. The challenges for achieving a revision to US tax legislation were not addressed in this analysis of BEPS, but the complexities of US corporate income taxation were introduced in the previous chapter. Those complexities and the internal dynamics of the US legislative process present a significant barrier to the ratification of any BEPS-compliant tax legislation in the USA. The eventual outcome of debates in Washington, DC, over corporate income tax policy and any future synchronisation with the OECD BEPS project will occur beyond the publication of this particular study.

Notes

1. The list of preferential tax regimes and tax havens, as identified by the OECD, was published in the project's second major report, *Towards Global Tax Co-operation* (OECD 2000, pp. 12–14, 17).
2. I have challenged the discourse surrounding a 'level playing field' in the global political economy, in particular the claim that it would benefit small states, in more detail elsewhere, see Vlcek (2009a).
3. Formally, the member states of the G20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, UK, and USA. In addition to the numerous European states in this group, the EU as a separate entity is represented along with the international organisations of the IMF and World Bank. It should also be noted that other states have been invited to participate in these gatherings when requested.
4. The nature of tax treaties and the 'international tax law' they produce is not consistently equitable even among developed state treaty partners, see, for example, 'International Tax Law as a Ponzi Scheme' (Morgan 2011).
5. In fact, the original Progress Reports from 2009 to 2011 are no longer available on the OECD website; copies are on file with the author.
6. And interestingly on this point, media reports on the development and publication of the OECD document in 2013 stated that France, Germany, and

the UK were instrumental for getting the OECD to undertake the study and subsequent activity (Houlder 2013a, c).

7. The word globalisation first appears in the chapter "Multinational Corporations and the Digital Economy", 'Global business models, competitiveness, corporate governance and taxation', of the report (OECD 2013a, p. 25).
8. See the OECD webpage at http://www.oecd.org/ctp/transfer-pricing/transferpricingaspectsofintangibles.htm.

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Tax Nomads Versus the State

Across the preceding three chapters, I have surveyed a selection of approaches employed by states in their pursuit of the tax nomad. Efforts by individual states to collect income tax from nomadic wealthy persons and MNCs have met with varying success, in part influenced by the varying extent of cooperation provided by other states. Sovereignty and a desire to maintain existing relationships with tax nomads for the purposes of domestic economic benefits influence the level of cooperation provided by some jurisdictions. One quick conclusion to draw is that a global governance solution could provide the means to overcome the problem presented by variable cooperation. But that quick conclusion should immediately raise further questions, as hinted at in the previous chapter and the global solutions in development through the OECD under the direction of the G20. Whose global governance and global governance for whom? In reflecting back on the topics explored up to this point in the book and collating them together towards some form of synthesis, the following sections provide some possible answers to these questions.

The debates surrounding globalisation and the ability of the state to collect taxes revolve around the fundamental questions in politics and economics over the distribution of goods in society. Matters of concern to politicians may be distilled down to a simple decision over welfare and who gets what. The same logic operates for questions of cross-border taxation and the disagreements over issues that determine the distribution of goods (in the form of tax revenue collections) between jurisdictions. Fiscal sov-

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ereignty operates in both directions, for a state as well as for other states. A global system for a unitary corporate income tax, the European Union's CCCTB writ large, is proposed as one solution for overcoming the problems that exist in the current architecture of bilateral taxation agreements (see e.g. 'New rules, same old paradigm' 2015). But even in the context of a unitary system, the determination of an equitable distribution, based on determining the location for any specific income-generating economic value, will be contentious. The United States operates a domestic unitary corporation income tax for those firms conducting business in more than one sub-national jurisdiction, with its own saga for collecting sales tax in the digital economy and involving the business practices of Amazon.com in the USA (Rubin 2016). But reflect back on the case of Apple Inc. in the chapter "Multinational Corporations and the Digital Economy" and recall that its subsidiary (Braeburn Capital) is a Nevada corporation and not a California corporation. Thus, while neither discussed nor explored in the context of the Subcommittee hearing, nonetheless Braeburn Capital serves to collect income for Apple in the state of Nevada (a zero rate corporate income tax jurisdiction) rather than in the state of California where its main corporate offices are located (Duke 2012). The point being that tax minimisation opportunities continue to exist within the context of a unitary tax system involving multiple sovereign jurisdictions.

Beyond the globalisation factor, there also is an equity aspect to this topic of global governance and the tax nomad that was not addressed in this book. It has been left aside for those scholars more qualified to engage with the ethical and moral dimensions they find in cross-border taxation as a global justice issue (Pogge and Mehta 2016; Dietsch 2015). Rather the focus here on sovereignty as creating the space in which a tax nomad may exist and operate remains separate from the global justice concern because the state actors involved privilege justice for their citizens' public welfare over justice for others' public welfare. When establishing the nature of base erosion and profit shifting in the world economy today and the need to address the problem, the OECD recognised that sovereignty is central and essential for the independent determination of a jurisdiction's tax legislation. When first describing the issue as a problem with BEPS, the OECD acknowledged that sovereignty was expressed through a jurisdictions' tax policy and its freedom to craft that tax policy as appropriate to its society (OECD 2013a, pp. 28, 39). At the same time, it asserted that BEPS represented a threat against the state's fiscal sovereignty and its ability to collect tax revenue (OECD 2013a, p. 47). The tension present in these competing

claims was not raised in the document, because arguably the problems with profit shifting arise from the interaction of sovereign tax systems and the different legislative choices made by each individual jurisdiction. With the 2013 Action Plan, taxation was framed as existing at 'the core of countries' sovereignty' (OECD 2013a, pp. 9, 15). Nonetheless, because the friction between jurisdictions' tax systems produced opportunities for tax minimisation, avoidance, and evasion, the existing international standards for cross-border taxation were identified as needing revision.

Yet arguing that a collective international response is necessary because some actions by one sovereign actor undermine the sovereignty of other sovereign actors raises once again the question posed by Diane Ring (2008), which jurisdiction's sovereignty is to be privileged? Who has the authority and legitimacy to determine that an action taken by one jurisdiction (within the bounds of its sovereignty for the welfare of its citizens) at the same time undermines the sovereignty of other jurisdictions and is therefore 'harmful'? The experience of the OECD's project at the beginning of the twenty-first century demonstrated that material power is privileged, and small jurisdictions are forced to comply. The actions of the G20, channelled by the OECD in April 2009, further demonstrate the role of material power, and in that instance at the London G20 meeting, it was the material power of China as much as that of France which shaped the compromise. It is with all of this in mind that the argument is made in this book for the existence of a global governmentality regime in the G20/OECD's approach to cross-border taxation. Global governance in this instance operates through discursive forms of power, in support of those jurisdictions possessing material power and selected to hold a seat on the 'steering committee' for the world economy.

Reflections on the Effort to Counter the Tax Nomad

In looking at three different approaches undertaken by state actors to deal with their tax nomads, one objective for this book was to demonstrate the presence of global governmentality in the emerging global governance of international taxation. As defined in the chapter "Sovereignty and the Tax Nomad", the nomad for the purposes of this analysis exists and operates in the space that lays between and betwixt sovereign (and semi-sovereign) jurisdictions. These spaces are produced by sovereignty as the capability of a jurisdiction to establish and determine the legal framework operating

in and for its domestic society. Hence by setting one legal framework in opposition to another legal framework, individual taxpayers and MNCs have found opportunities to evade, avoid, and minimise their tax obligations and thereby establish themselves as tax nomads. Further, the determination that intellectual property (as a form of intangible asset) exists and performs as property in turn provides it with the ability for assuming nomadic characteristics. The ownership of IP may be transferred, sold, or bartered, facilitating its relocation to a jurisdiction with favourable tax considerations and in turn affording its legal owner the means to use the IP to further minimise the tax obligations of the owner.

For the individual, reduced to the acronym HNWI, the nomadic characteristic operates essentially in two ways. First, the individual may assume a nomadic identity and move to a jurisdiction offering more sympathetic tax circumstances. Switzerland, for example, developed a reputation as such a destination for British rock stars in the 1970s to avoid what they perceived as prohibitively high personal income taxes (Mastropolo 2015). The second way a HNWI may achieve nomadic tax status is to move their assets or the ownership vehicle for those assets to a tax efficient jurisdiction. Swiss banks acquired such a reputation along with Liechtenstein *Anstalts* and Netherlands holding companies (Browning 2007). It is a practice that is increasingly problematic for Switzerland when the HNWI is, at the same time, also a prominent foreign official or politician. The Swiss government is adjusting its banking practices in reaction to the attention focused on these 'politically exposed persons' (in the parlance of the FATF) as seen, for example, in relation to accounts and assets linked to Muammar Gaddafi (Masters and Dombey 2011; Simonian 2011).[1]

The nomadic practices of the MNC are more complex than with the individual because the treatment of the MNC by a government and local tax legislation involves many more variables and factors determining taxable income. This complexity arises in part because of the conflicted desires of a government between encouraging firms to set up a business activity for their contributions to society (employment, manufactured goods, and services) and collecting taxes from the firm's profits, again for the benefit of society (public goods and welfare). One result of these competing desires is corporate income tax competition and involves preferential tax rates, tax holidays, advanced tax rulings, and special credits and deductions, such as for research and development investment. Some or all of these measures may be offered to an MNC in order to attract it and the employment and locally produced goods and services it would bring to

the local community. Naturally, the MNC takes advantage of these conflicting desires when dealing with a government in order to achieve its own advantage, for corporate profitability and growth. Beyond simple tax competition, some MNCs also have structured their transnational operations in a manner that serves to minimise their tax obligations across and between jurisdictions, facilitated not only by nomadic IP but also in part by using arbitrage between the legal systems and tax systems of different jurisdictions. Some of these practices were demonstrated by the examples presented in the chapter "Multinational Corporations and the Digital Economy".

States have pursued these tax nomads, individually and collectively, via a broad range of mechanisms, revised tax legislation, initiated retrospective tax audits and strengthened licensing requirements. Some of the specific methods used were discussed across the previous chapters. In the absence of coercive power, such as demonstrated by the USA against its citizens, the success demonstrated by increased tax revenue collections has been mixed over the last few decades. The blame for limited success has been charged to globalisation for having facilitated cross-border transactions and movement. Yet it is sovereignty and the practices of state sovereignty that have hampered cross-border cooperation to resolve the problems with cross-border tax collections. As explained in the previous chapter, this problem with globalisation and cross-border cooperation on taxation was recognised at the end of the twentieth century. Efforts among the large developed economies to overcome the sovereignty barrier also met with mixed success, up until the financial crisis. The financial crisis put the differences between government revenues and government expenditures into stark contrast, and the financial crisis motivated the large developed economies (G7) to expand the remit for global economic oversight. The G20 included some of the large developing economies in these meetings on global economic guidance, John Kirton's 'global financial and economic steering committee' (Kirton 2013, p. 3). The claim to legitimacy for the decisions and actions of the G20 substantially rests on the collective economic strength of the participants, 90 per cent of the global economy, 80 per cent of global trade, and 66 per cent of the global population.[2] Once again, the issue of taxation is as much political as it is economic, with 20 voices in the room along with some special guests; yet many of the representative voices for the remaining sovereign jurisdictions of the world are not present. Consequently, for the absent voices it may appear that the G20 is a coercive organisation rather than a benevolent 'steering committee'.

To a great extent, the success (such as it is) with the FATCA legislation rests with US structural power in global finance as a coercive practice. It represents a form of material power exercised through the status of the US dollar in world trade and global financial markets, supported by the operation of the US financial system. The exercise of US structural power to gain compliance with FATCA may in turn be leveraged by the EU, OECD, UK, and other states, but without US complicity and support the pivot point for that lever may be weakened. The nature of US structural power in global finance served as a background feature in this book, and it extends beyond the pursuit of the tax nomad. The US government for a number of years has used its structural power to pursue terrorists and illegal drug traffickers and sanctions violators (see e.g. J.B. Taylor 2007). It is a topic deserving further study because as with the case of FATCA, the international initiatives to deal with financial criminality operate in conjunction with these US initiatives and US structural power.

Global Governmentality in Cross-Border Taxation

In situating the discussion on tax farming in the chapter "A Collective Response to the Tax Nomad" as a technique of privatised government revenue collection against the tension over cross-border taxation among sovereign jurisdictions, the objective was more than simply framing recent global financial governance initiatives as a new transnational form of tax farming. It is also to see in the actions of the G20 and OECD a form of governmentality. It is governmentality as a global effort to counter the free movement of capital permitted by the liberalisation of markets and the removal of capital controls, all of which is further accelerated by an electronic infrastructure now reaching directly into homes and mobile phones across the world. The construction of this 'internationally agreed standard' on taxation by members of the OECD club of states has been accepted by some observers to establish an international tax regime, all the more necessary to assure the tax revenue collection required to maintain the welfare state (Avi-Yonah 2007). On the other hand, Allison Christians noted that the use of the terminology for an 'internationally agreed tax standard' by the OECD emerged in conjunction with its association to the G20 in 2009, which suggests that the imprimatur of the G20 makes the OECD tax standard 'internationally agreed' (Christians 2010, p. 20, footnote 7). The latter observation highlights the question of legitimacy on the part of the OECD as much as with the G20. Both organisations possess limited

and somewhat self-selected membership that arguably is not representative. Nevertheless, the challenge to the welfare state was heightened by the financial crisis because it reduced the profits and income that may be taxed while government-financed efforts to counter its impact led to increasing government debt loads. In turn governments were induced to identify ways through which their revenue collections could be improved and increased.

Throughout the past few decades, a central concern among the OECD member states over the presence of tax competition in the world economy has been a persistent belief that it brought about a loss of tax revenue (accompanied perhaps by the elusive spectre of a 'race to the bottom'). Such a belief, however, has not been clearly substantiated by the OECD's own data. Both corporate tax rates and tax revenue (measured as a percentage of GDP) have remained stable within a general band for over 20 years (Hobson 2003; Stewart and Webb 2006; see also Schulze and Ursprung 1999). Challenging the relevance for this empirical situation are a number of observations. First, that baseline tax rates have declined over time (often scaled across the past half-century), while the tax base was broadened. The result was that the revenue collected remained essentially constant across the period. Second, panel data surveys performed by economists tend to lump together large and small economies reflecting the composition of OECD membership. The result, however, produces unweighted average OECD values which obscure or conflate the existing differences among these economies and their differing ability to adjust in response to tax competition (Palan et al. 2010, pp. 158–59). The latter point is true with respect to the OECD averages. Yet an annex to the report introducing BEPS provided the data on individual OECD member states across the time period 1990–2011. The table displays these differences between the individual member states, while also showing the relative consistency of corporate income tax revenue each state collected as a percentage of its GDP (OECD 2013a, pp. 57–59). It also may be observed from the data table that the rise and fall of these percentages across time tracks the boom and bust cycle of the world economy across those two decades. The OECD data represents but one way to determine if tax competition exists among its member states.

The debate over the nature of international tax competition is not easily untangled because different authors point to different data variables and measurements. For example, they may compare different tax revenue sectors as a percentage of GDP while the local (national) criteria defining

these sectors may differ. The essential point to understand here is that notwithstanding the technical character of these arguments and the econometric sparring over what is and is not relevant input data, measurements vary depending on the methodology and evaluation criteria used for analysis (Stewart and Webb 2006, pp. 157–60). It is all sufficiently complex that policy-makers' (and legislators') eyes may glaze over with boredom when confronted by the charts, graphs, tables, and accompanying detailed analysis. Headline statements, sound bites, and the profundities of commentators can be more easily grasped, repeated, and used as debating points. Hence, the stickiness for the seductive belief in a 'race to the bottom'—easily understood and visually attractive—even when confounded by conflicting data (e.g. this op-ed article by Jeffrey Sachs 2011). It offers an explanation for declining corporate income tax rates as much as it provides a justification for action to establish global governance for taxation.

A desired solution would be to maintain the state's tax authority without regard for the tax legislation of any other jurisdiction, in essence to collect tax from all assets owned by the state's resident persons (natural and legal). To achieve such a solution requires the tools to surmount the sovereignty barrier and discover the nature of financial accounts established and maintained by those residents in foreign locations. As already noted, the OECD redirected its attention from tax competition and tax havens to pursue the elements that facilitate them. In particular, it has sought to promote transparency and information exchange in financial matters as a norm in international society. While the OECD is an organisation of limited membership, its maintenance of the Model Tax Convention at the same time sets the agenda and nature for any debate surrounding these bilateral agreements. This situation is important because most existing treaties follow the Model Treaty with few changes (Sharman 2012, p. 27). It is substantially the same situation with TIEAs, consequently the format for the discourse within the Global Forum producing the Model Agreement at the same time shapes the discourse beyond the OECD Secretariat and meetings of the Global Forum. It is this discursive power for creating and shaping a global norm, and thus determining what is acceptable practice and what is not acceptable, that represents a fundamental determinant for the presence of global governmentality in international taxation debates (Neumann and Sending 2007, pp. 694–98). Following the initiative demonstrated by the US Congress with its passage of the FATCA legislation, the OECD was able to achieve automatic exchange of information through the CRS as directed by the G20.

Beyond identifying who makes the rules, the pivotal feature behind the production of global governmentality is the establishment of a discursive atmosphere where the only acceptable strategy is to follow the international standards and best practices produced by the OECD. It involves the repetition of the claim by the OECD that it provides the 'internationally agreed tax standard'. In the end, the analysis made in this book to identify a form of global governmentality in the international regulation of taxation and tax conventions unveils it as an effort to reassert control over global capital by the powerful states for their national economic benefit (see Tsingou 2010). It does so through the rules and regulations that are represented by the Model Tax Convention, Model Agreement on Exchange of Information on Tax Matters, and related international 'norms'.

On Reading International Taxation Through Foucault

The chapter "Globalisation and the Tax Nomad" contained an extract from the story of Libussa (as told by Franz Grillparzer), pointing toward the wider social concern behind the actions analysed here, for when citizens call on their government to take action the government in turn asks them to contribute. Government activity requires resources, and the practice of collecting taxes from residents, traders, and landowners has been a traditional technique for governments to acquire the necessary funding. Historical and contemporary manifestations of the tax farmer were described for the case of the EU in the chapter "A Collective Response to the Tax Nomad" as a prologue to suggesting that one instance for the presence of global governmentality in the realm of global financial governance involved a reintroduction of tax-farming practices. The motivations identified for tax farming in the past included the level of government effort and direct involvement required to collect taxes, the cost for the government to measure the tax base and the need to monitor the activities of its tax agents for corruption. With the development of an OECD tax standard following the direction of the G20, these factors have merged to become the cost with collecting information about taxpayers themselves. In other words, the barrier created by sovereignty proved too costly to overcome for any individual state for it to gather the knowledge about its taxpayers' foreign income necessary to assess taxes on that income. Treating this cost as a collective action problem of growing dimensions

(due to globalisation) in the 1990s the leading economic powers (G7) gave the OECD the task to craft a solution. The OECD's approach for countering harmful tax competition encountered difficulties, but subsequent events (various interconnected financial crises) provided the motivation (political will) to overcome those problems and facilitate the creation of mechanisms able to surmount the sovereignty barrier.

The problem, however, remains with getting citizens to declare *all* income for tax purposes. Whether we wish to call it an issue of tax morale or not, the problem for OECD states is that residents are not voluntarily declaring foreign income in order that they may avoid paying tax on it. The first collective solution that was crafted using the TIEA has, in essence, farmed out the task of compliance enforcement to foreign jurisdictions; the TIEA creates a 'contract' obligating these jurisdictions to collect and provide the information to home governments necessary for them to force their recalcitrant residents to pay tax on their foreign income. Rather than directly compensating the reporting jurisdiction as part of the contract, it receives nothing as the better alternative to international censure and economic sanctions as an uncooperative jurisdiction. In the language of psychology the OECD offers negative reinforcement rather than positive reinforcement under this regime of governmentality. Peer pressure and public naming and shaming serve to motivate jurisdictions in order for them to be viewed as good global citizens. The TIEA process is now evolving into the automatic exchange of information between jurisdictions using the CRS. The process remains, however, a cost to the financial sector and government of many jurisdictions. These governments will receive very little in exchange for helping the developed economies trace the movement and assets of their tax nomads. It is one reason for some states to resist the international call for compliance with the process.

One conclusion emerging from this analysis is the continuing importance of politics over the distribution of resources—of who gets what—because of the problems inherent to transnational taxation in a globalised world composed of sovereign jurisdictions. Very often an analysis of tax competition, tax havens, international tax conventions, or MNC tax practices is predicated on a loss to the representative (OECD) economy of tax revenue, which as a result shifted the 'burden' of taxation to other smaller and/or domestic firms and (immobile) labour. This claim asserts that the representative state must engage in tax competition in order for it to retain or attract mobile transnational capital, and as a result, other parts of society must pick up the slack in tax revenue contributions. It is a claim

that is problematic because it accepts without question the prerequisite need for tax revenue, anticipating that it is necessary for the provision of public goods while ignoring the other purposes for which tax revenue is used by the state, its politicians, and civil servants. Just as crucially, it also ignores the other purposes governments use tax legislation to accomplish in addition to the financing of public goods, for example, Pigouvian social engineering against smoking and private vehicle ownership. Rather than abstracting international tax issues away from politics and using them as a case study to demonstrate arguments about state sovereignty, the decline of the welfare state or the evils of MNCs, international tax issues instead should be recognised as but one element in a large, messy political debate seeking to resolve the perennial question of 'who gets what, when, and how' in a globalised world (Lasswell 1950 [1936]). In other words, to explicitly recognise that domestic tax legislation has consequences beyond borders and accept a situation that regardless of this obvious fact politicians care only for themselves and their electorate leading them to seek solutions privileging their home constituency over the residents of foreign jurisdictions.

At the same time, consensus opinions held among the policy-makers based in the major developed economies produced a discourse leading to the production of global financial governance that results in an unintended structure of governmentality in the global political economy. The extent to which one finds the G20/OECD Global Forum solution to be an improvement in global financial governance will depend on one's starting position on issues of state sovereignty and the role of taxation in society. Consequently, there is a further aspect to the international tax competition problématique that requires consideration. What is the source for the legitimacy of the OECD and G20 in the promotion of the 'international tax standard' which is claimed by the OECD's Committee on Fiscal Affairs along with its emphasis that the Model Tax Convention or TIEA (with CRS) be used by non-OECD jurisdictions? The legitimacy question arises from the limited involvement by these jurisdictions with the creation of standards which must then be reflected in domestic tax administrations. The preference for direct taxation over indirect taxation expressed by the OECD places pressure on tax administrations without the resources needed to operate a direct tax system familiar to a developed economy. The underlying issue, however, is less about the operation of the tax administration in a developing economy like Malawi and rather more about achieving information extraction from tax havens, like the Cayman

Islands and Hong Kong SAR. In sum, it is about the debt-ridden developed economies in the OECD achieving the means to extract tax from their residents no matter where the assets of their residents may be physically located in order that these governments may address their domestic economic problems. The desire for this capacity predates the financial crisis, but it took an event of global consequences to achieve the necessary cooperation among the major world economies to agree to a solution that violates the norm of state sovereignty and produces a regulatory regime understood here as an example for global governmentality.

Public support for this regulatory regime emerged in response to the criticism directed at the facilitators of tax avoidance as much as with the practices utilised by the tax nomad, both individual and corporate (Palan et al. 2010; Eurodad 2014; Christian Aid 2010). Such criticism is further reflected in the string of rebukes confronting corporate tax nomads during appearances before the Public Accounts Committee of the British Parliament, the Permanent Subcommittee on Investigations of the US Senate, the European Commission, and European Parliament. Part of the critique made by legislators involved the claim, not simply for fairness, but also for a sense of corporate responsibility to society and perhaps even a patriotic duty to the state. At which point one should wonder why there is a need to remind citizens of their duties and responsibilities at all? This question in turn leads to the issue of tax morale, such that the question may be reformulated. Is the concern expressed by legislators with an absence for any awareness among citizens of their financial duty to the state? Or is the concern rather with the tax nomad's resistance to the prolificacy of the state and a perception for governmental misappropriation and misallocation? The underlying problem may involve a lack of trust in the government which has been reinforced by media reports on government waste.

Beyond the problem with corporate tax minimisation, there also is the argument made against the imposition of a corporate income tax in the first place. It is a claim that the state need not worry about taxing corporate profits at source, but instead to collect taxes on the distribution of those profits to shareholders. This line of argument has been criticised on the position that many shareholders themselves are not taxed—pension funds, sovereign wealth funds, individual shareholders' tax-privileged retirement plans (at least for the case of the USA, see Citizens for Tax Justice 2013). The result from this situation of tax-privileged shareholders is that corporate profits would still not be taxed, at least not in the present moment. While true, the critique at the same time ignores the purpose for

the existence of tax-privileged investment vehicles, which is to encourage saving for the future. Hence this critique appears to be more concerned with collecting revenue for the state in the present moment instead of collecting that appropriate tax due at some indeterminate point of time in the future. In part this debate returns the reader to the disclaimer offered in the Preface, that one's political orientation on the role of the state and the function of tax contributions for the state determines one's view on this issue. The specific issue here is whether the concern is about providing public welfare in the present, or about underwriting individual welfare in the future. Ultimately all politics, beyond just this question over corporate taxation, is about economics and economic decisions are political, because they involve the distribution of goods and services in society.

Beyond the Developed Economies

It is important to acknowledge that this analysis has focused around the practices of the citizens and governments of the developed world, the EU, USA, and OECD member states. It is true that the OECD 'universalised' the development of BEPS and related taxation measures with its Global Forum, along with the G20 Development Working Group (Lesage 2014). Nevertheless, these practices and procedures are costly to establish and maintain while the agenda is more concerned with the tax nomads of developed states, than it is with capital flight from developing economies to the developed economy financial centres. In part the situation reflects much of the international dialogue over cross-border taxation and the problems with collecting tax revenue from tax nomads. It does not mean, however, that the rest of the world economy does not have an interest in these matters, simply that the problem rests with getting those voices heard. As one approach for getting these views presented in the wider global debate, there are NGO activists speaking on behalf of the developing economies. These perspectives often involve critiquing the structures of global trade and investment that hamper the collection of tax revenue by the government of a developing economy (Open Society Institute of Southern Africa 2009; Christian Aid 2010; Hearson and Brooks 2010; Eurodad 2014). Beyond the tax justice campaigners, there is academic work analysing the current situation in order to propose alternative policies for enhancing corporation tax revenue collection and the equitable distribution of corporate profits extracted by MNCs operating in developing economies (Sindzingre 2007; Bräutigaum et al. 2008; Lesage et al. 2010; Keen and Mansour

2010b; Janský and Prats 2015). Collectively, the concern is that the challenges facing the developing economy on taxation have significant differences from those challenges that face the developed economy.

It is natural, however, that the OECD, as a multilateral organisation in Paris, would be oriented towards the desires and goals of the member states that comprise and fund it. As noted by Robert Kudrle, the organisation is very conscious of its sponsors' interests, particularly as it seeks to demonstrate 'value for money' in order to rationalise and justify its budget (Kudrle 2014, p. 204). At the same time, the initiatives of the OECD may not address the circumstances experienced by a developing economy when dealing with an MNC. Rather than concerns with any specific practice of the corporate tax nomad, these jurisdictions would benefit more from support for building the institutional capacity of their tax administration. The OECD does recognise that institutional capacity has a critical role for the ability of developing economies to implement and support an internationally agreed tax standard. To help them acquire that capacity, the OECD provides support through its Tax and Development Programme.[3] The final communiqué from the February 2016 G20 Finance Ministers Meeting in Shanghai included their support for an OECD initiative to expand the scope of participation and involvement in its BEPS project. In order for the OECD to achieve its desired 'consistent global approach', wider participation is needed, and the G20 Finance Ministers 'endorse the inclusive framework proposed by the OECD' (G20 2016). This inclusive framework anticipates the participation of developing economies along with their support for the already existing BEPS strategies for dealing with the tax nomad. Speaking to the *Wall Street Journal*, a member of Oxfam described this situation with 'The OECD is only inviting poor countries to join now if they accept a tax reform package they had no say in designing, which doesn't meet many of their needs' (Hannon 2016). The cooperation of these jurisdictions is essential to prevent the emergence of alternative spaces for the tax nomad, even if the mechanisms fail to address issues specific to the relationship between a developing economy and a corporate tax nomad.

One line of argument in the literature on taxation and development that positions income tax revenue in opposition to the other sources for government revenue (such as natural resources) is that paying taxes gives the citizen a voice in government (Moore 2008; Everest-Phillips 2010). The argument is that when citizens pay taxes to finance public goods, they acquire a voice in how that tax revenue should be utilised and which public goods have precedence. For those economies that gather more revenue

from taxes on resource extraction than from personal income taxes or business taxes, the voice of citizens over public goods may be muted. It is a factor raised with regard to the presence of the 'resource curse' from the heavy reliance on resource extraction in some developing economies (Open Society Institute of Southern Africa 2009). Moreover, the literature on taxation and development generally promotes the transition from the informal economic activities that may dominate in a developing economy to formal economic activities that are both regulated and taxed. This transition could serve to formalise citizen employment leading to more efficient collection of income taxes, while encouraging civic participation for determining the allocation of tax revenue.

The case made by NGOs over corporate income taxation, to encourage MNCs to pay tax everywhere rather than engaging in tax arbitrage, is that paying taxes is good corporate social responsibility (CSR). It is a position situated in opposition to the oft-repeated Milton Friedman quotation, 'there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits' (Friedman 2002 [1962], p. 133). Rather as a member of society, the corporation is viewed as possessing additional responsibilities to society beyond simply its profitability for its shareholders. Aligning that position with the argument that *paying* taxes establishes a right to have a say in the allocation of public goods suggests that the corporation (a legal person) equally has a say in the allocation of public goods. As an element of CSR, that corporate voice should be expected to speak for public goods beyond simply those goods with an immediate benefit to the corporation. This relationship between taxation and democratic representation is relevant for developed economies as much as it is for the developing economies. The issue, however, may rest more with achieving democratic representation and a voice in government than with the level of taxation experienced by citizens.

Conducting the Conduct of Others

The line of argument developed here is made in support of a claim that the varied approaches taken to tackle the problem (for revenue-seeking governments) of the tax nomad collectively produce a regime of global governmentality. It has culminated in an OECD-guided set of practices intended to 'conduct the conduct' of governments with respect to taxation, with both domestic and international impact. It represents an

'internationally agreed tax standard'. There may be some observers with the perspective that the guidance of the OECD represents the latest in global 'best practices' for taxation, but as a set of global norms they represent soft law with a hard edge. These practices represent soft law, in that they are not presently part of an international treaty binding its signatories to implement and enforce the standards for transparency, information exchange, and BEPS. The hard edge is composed of the distinct disciplinary aspects, in an explicit Foucauldian sense, behind the implementation of these norms and best practices and represented by the penalties enforcing FATCA along with its subsequent transformation into a global information exchange regime under OECD guidance and G20 direction.

Beyond the Foucauldian aspects present in terms of power relations and governmentality, these features serve only to highlight the mechanisms undertaken to overcome the sovereignty barrier in pursuit of the tax nomad. There is a tension inherent in the situation, defending the sovereign state from outside interference while at the same time pursuing the state's 'rightful' due from nomadic taxpayers. The hegemonic state uses brute power, while the international organisation utilises the power practices of governmentality to coerce collective, global cooperation, but there remains the challenge to surmount the sovereignty barrier. On a practical level, the disciplinary action and response for a global governmentality regime on cross-border taxation is not equitable. Those states possessing material power retain the capacity to conduct their tax affairs as they see fit, regardless to international standards. It will be necessary then to rely on the peer pressure of other states to gain compliance with a 'norm' for global tax cooperation. Should that peer pressure fail, as suggested may emerge with the situation that is the US and its legislative constraints on tax policy formulation, then other states may find encouragement also to resist and fail to comply. In doing so, it would echo (in reverse) the use of FATCA by other states as leverage for gaining taxpayer information exchange with their tax authority. In other words, the future for global governance of taxation to address the challenges created by tax nomads will likely require more than just cooperation between states. Rather, the active participation of the one state with the material and structural power necessary to enforce a global norm is just as critical and necessary for the success of this global governance regime.

Notes

1. The politically exposed person (PEP) is defined in Recommendation 12 of the Forty Recommendations (Financial Action Task Force 2012).
2. See www.oecd.org/g20.
3. See http://www.oecd.org/ctp/tax-global/taxanddevelopment.htm.

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