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Original Article

International Tax, the G20 and the Asia Pacific: From Competition to Cooperation?

Miranda Stewart*

Abstract

Nation states in the Asia Pacific need to increase tax revenues but face many challenges. This article discusses the challenge of taxation in an age of capital mobility and tax competition. It then considers two opportunities that have recently been championed by the G20, which could enable governments to strengthen national tax systems by international cooperation. The first opportunity is the establishment of transnational tax administrative cooperation. The second opportunity is the potential for countries to develop a new multilateral framework for sharing the international capital tax base, which may arise under auspices of the Organisation for Economic Co-operation and Development Base Erosion and Profit Shifting project. As Chair of the G20 in 2014, Australia has a key leadership role to play in supporting countries in the region to grasp these opportunities.

Key words: international tax, tax haven, G20, tax competition, ASEAN, OECD, BEPS, fiscal policy, tax treaties

* Director, Tax and Transfer Policy Institute, Crawford School of Public Policy, The Australian National University, Canberra, Australia; email <miranda.stewart@anu.edu.au>.

> 'These are the rights which make the essence of Sovereignty . . . the power of raising money.' Hobbes (1651, 2011, p. 93)

1. The Need for Revenues

The power to raise revenues is an essential feature of national sovereignty. Nation states in the Asia Pacific need to raise more revenues, but face many challenges in the current era of economic globalisation. At the same time, governments seeking to improve the well-being of their people through economic development and growth often seek to attract foreign direct investment through lower taxes on capital. This in turn causes political dissent especially in light of increasing inequality in income and wealth, for which taxation—and adequate public spending—is likely the best solution (IMF 2014).

The government's task in taxation, viewed in isolation from other countries, is one of identifying, and implementing, the distribution of governmental benefits and fiscal burdens that is able to be negotiated with interests in its own population, in such a way as to ensure a stable fiscal bargain (Levi 1988). Of course, states do not exist and taxes are not levied in a vacuum. The existence of other states, and of an international economy, affects both the capacity and the way in which governments raise money. Today, when passive and active investment (and skilled labour) is increasingly mobile across borders, the 'fiscal bargain' is fundamentally changed. The state is no longer

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simply allocating fiscal benefits and burdens among its own population. Instead, the state becomes a 'recruiter' of capital and skilled labour, and this changes the entire dynamic of fairness and efficiency that is the mainstay of contemporary tax policy (Dagan 2012). This tax competition between countries is seemingly irresistible to many governments. Yet it is most likely to undermine the sovereignty—or policy autonomy (e.g., Mosley 2005)—of governments seeking to raise sustainable tax revenues in the long term.

This article first discusses the need for revenues of governments in the Asia Pacific, and the challenge of the international, in particular of tax competition, to the power of governments to raise revenues. It then considers two opportunities for governments to strengthen national tax systems by international cooperation, which have both been championed by the G20. The first opportunity is the establishment of new modes of transnational tax administrative cooperation that are particularly addressed at international tax evasion using tax havens, especially by individuals. The second opportunity is the nascent potential for a new global framework enabling sharing of the international capital tax base that may take shape under auspices of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project (OECD 2013). As Chair of the G20 this year, Australia has a responsibility to lead in furthering both of these opportunities to secure tax systems.

1.1. Fiscal Squeeze in The Asia Pacific

The Asia Pacific is very diverse, but most governments in the region face a common challenge of raising more revenues to address development, demographic and environmental demands. Except in countries where there are oil or mineral resources, these revenues must be raised through taxation. The specific tax reform and collection challenges differ significantly across countries, as does the proportion of the economy raised in taxation—the tax ratio, or revenue as a proportion of gross domestic product (GDP). There cannot be a single 'right' level of tax revenues as a proportion of the economy: this is a political question about the size, and role, of government, and the impact on the economy of taxation in any particular country. Still, where there is a formal market economy at least partly established (a prerequisite for taxation), it seems that a tax ratio that is lower than 15 per cent of GDP is unlikely to generate enough public goods to support the infrastructure and public investment in capability and well-being that many people would see as the appropriate goal of economic development. At the upper end, while Tanzi and Schuknecht (2000) suggest that the range of 20–30 per cent might be ideal, successful 'tax states' reveal a wide spectrum of tax ratios ranging from about 30 per cent of GDP (Australia, United States, United Kingdom) up to 50 per cent of GDP (some European states and the Nordic states) (Figure 1).

Whatever might be the actual or ideal tax ratio, countries both rich and poor in the Asia Pacific are in a position of fiscal deficit, especially since the global financial crisis. This means that countries are raising funds through borrowing, and not covering their outlays with taxation or other fees and charges. Overall, the IMF finds a negative (average) projected fiscal balance of approximately 3 per cent of GDP for Asian emerging economies in the current year.[1]

Wealthy OECD member countries, including Australia, Japan, Korea and New Zealand, are all feeling the pressure of ageing populations and increasing inequality. This demographic pressure is also very significant in China. Both pressures imply a need to increase taxation or expand public expenditures on welfare and infrastructure, but this is seen in direct contradiction of the discipline of global financial markets, which calls for maintaining fiscal balance, reduced government debt, cutting spending and low taxes to create incentives for investment and work.

Countries in the Association of Southeast Asian Nations (ASEAN) and South Asian regions face other pressures on revenues. The

1. IMF (2013, table 1) (Fiscal Balances 2008–2014).

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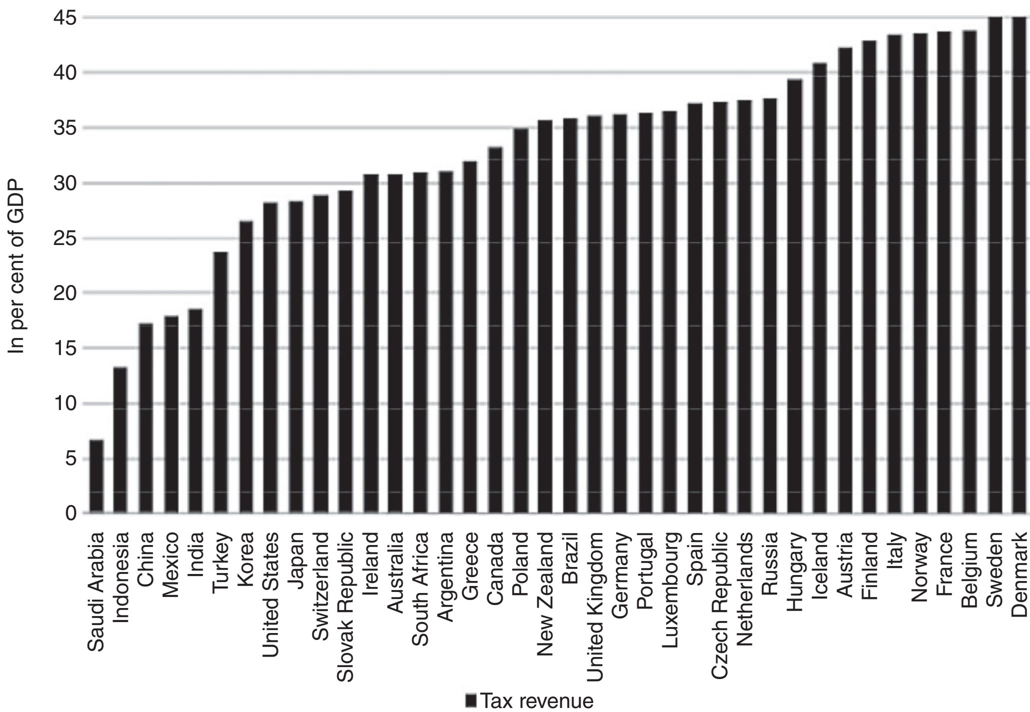
Figure 1 Tax Revenues of OECD-BRICS as Percentage of GDP



Source: IMF (2010).

ASEAN economic integration process, which is to reach its next milestone in the next few years, puts tariffs on a further downward track. As always, lowering tariffs causes a fiscal squeeze for newer members or poorer countries that continue to rely heavily on this source of revenue. The most recent review of ASEAN integration finds that import duties represented between 10 and 24 per cent of tax revenues in 2009 for Lao PDR, Cambodia and Vietnam, and that participation in the integration process will cause a drop of as much as 75 per cent in tariff revenues that will require replacement from new indirect tax sources (ASEAN/World Bank 2013, p. 42).

Low income countries, including Myanmar, Lao PDR, Fiji, Papua New Guinea, Timor L'Este and many smaller countries, need more revenue to provide the infrastructure, education and income support their people need. They face the ongoing challenge of generating sufficient tax revenues to finance development. For some of these countries, resource revenues are crucial. However, the ability of multinational resource companies to transfer price profits out of the jurisdiction poses a big challenge. The recent move by Indonesia to require the first stage of processing of mineral ores to take place onshore is one, perhaps extreme, way to address this problem.[2] On the other hand, for small countries, such as Vanuatu or the Cook Islands, tax haven status has been one way in which they have sought to establish a small economic base. The global developments in countering tax havens, discussed in Section 3, threaten this approach to development and may not put anything concrete in its place.

2. The Challenge of The International

Where two states assert jurisdiction to tax, widely accepted international tax rules do three things: (i) identify the residence or other

2. Indonesia, Ministerial Regulation No. 7/2012 implementing 2009 Mining Law, which required minerals processing to be carried out in Indonesia.

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jurisdictional link of entities to be subject to tax in the country; (ii) establish the geographical source or location of income, consumption or other activity that attracts jurisdiction and is liable to tax; and (iii) provide a rule for resolving inter-jurisdictional conflicts and so preventing 'double taxation' by more than one country. These international tax rules are well embedded in bilateral tax treaties (approximately 3,000 globally), based on models established by the OECD and the United Nations (UN), and in domestic laws. They might even rise to the level of an international customary law of taxation (Avi-Yonah 2007).

Fundamentally, these international tax rules leave the power to tax, and the definition of the tax base, to each nation state. Unlike other arenas of global governance or regulation, international tax rules do not establish a regime that actually addresses the problem of *how to tax* international flows. That is, these rules do not have the purpose, or effect, of taxing entities or transactions in the international economy, or of creating an international regulatory framework through which nation states agree to tax international activity. If 'full taxation' in contrast to 'non-taxation' of an international capital transaction comes about, this is a result of a happy coincidence of national tax rules for source, exemption or credit, or of national tax rates. It is unrealistic to expect such an outcome in the context of competitive pressures, diverse country tax rules and tax planning practices of multinational enterprises (MNEs) today.

2.1 Trends in Company Tax Rates and Tax Incentives

National governments seeking to attract investment have also undermined their own domestic tax bases through competitive behaviour in which they enact tax concessions or incentives, or generally lower the tax rate on capital that is mobile. In this way, states have behaved as 'rogue fiscal sovereigns' seeking to engage competitively in their national interest in a global economy (Braithwaite & Drahos 2000). In particular, in respect of the taxation of capital, states have failed to capture tax both from individual cross-border passive investment and from monolithic and flexible MNEs planning tax-effective transactions across multiple jurisdictions.

In many Asia-Pacific countries, company tax revenues form a significant part of the tax base. A threat to these revenues is then a major challenge to the fisc. Empirical evidence about tax competition in general and in the region is mixed (Tahori & Retnawati 2010). While developed countries have managed to maintain company tax revenues over time, even as headline company tax rates fall (Devereux Griffith & Klemm 2002), there is evidence that company tax revenues have indeed declined in many developing countries and that tax competition harms developing countries more (Keen & Simone 2004).

Moreover, tax competition in respect of company tax is likely to continue, causing both the 'headline' company tax rate to decline, and the maintenance or expansion of tax incentives or exemptions targeted at foreign direct investment (e.g., KPMG 2014); see Figure 2 for current company tax rates. Tax incentives are pervasive in in the Asia Pacific.[3] This has long been the case, and tax experts have long argued that countries do not benefit from such tax incentives, moreover that they generate significant opportunities for tax planning so that even the 'real' economic benefit of investment may not be as significant as is hoped (e.g., Holland & Vann 2000).

3. Opportunity I: Tax Administrative Cooperation

The first opportunity that may enhance national revenue raising capacity is transnational cooperation between tax agencies.[4] The recent and ongoing developments in this arena are unprecedented. While transnational tax administrative cooperation has a long history (Jogarajan 2011), it was until very recently, secretive, narrow and occasional in nature.

3. An illustration of the range of incentives is at Asian Development Bank, Regional Integration Centre, <http://aric.adb.org/taxincentives>.

4. For a detailed analysis of these developments globally, see Stewart (2012).

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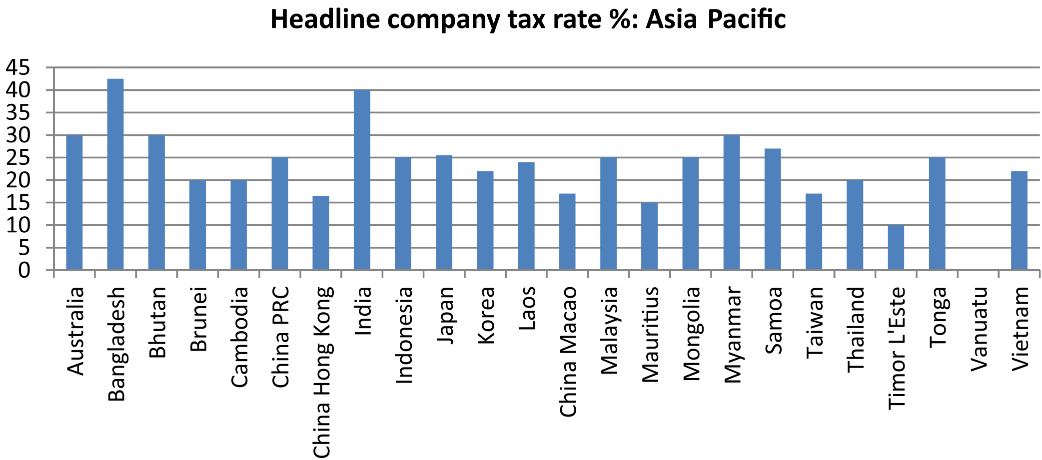
Figure 2 Headline Company Tax Rate Percentage: Asia Pacific



Source: Author's table, data sourced from International Bureau of Fiscal Documentation database, www.ibfd.org (July 2014).

Yet in the last five years, national tax agencies have taken a path towards effective cooperation involving the building of transnational administrative networks.

Tax cooperation has to date focused mainly on information exchange with the main goal of identification, assessment and collection of taxes in respect of individuals who have invested in tax havens. The ability to obtain information has been essential to the extraction of revenues that produced the success of the 'tax state' (Hood 2003). In the twentieth century, many developed country national tax agencies established systems for accessing and managing information and the collection of tax which grew hand in hand with corporate capitalist enterprise, in a striking illustration of successful 'regulatory capitalism' (Braithwaite 2008). The technologies of pay-as-you-go employee wage tax and social security withholding, self-assessment, company tax instalment systems, tax file numbers, computerised data matching utilising information from corporations and banks, and sophisticated risk-based investigative audit have enabled developed country tax agencies to collect very large tax revenues from businesses and individuals. These technologies are supported by laws that grant extremely wide information-gathering powers to revenue agencies, empowering them to demand information from taxpayers or third parties about their own or others' income, assets and financial transactions (Seer & Gabert 2010).

Transnational tax administrative networks extend these systems to the international arena and involve multiple actors, such as different government agencies, supranational organisations and financial intermediaries. These networks are becoming increasingly legalised and institutionalised. They fit Slaughter's definition of a global governance network as 'a pattern of regular and purposive relations among like government units working across the border that divide countries from one another and that demarcate the "domestic" from the "international sphere" ' (Slaughter 2003, 2004, p. 14). In this process, the nation state disaggregates into separate, functionally distinct parts, which work directly with their counterparts abroad. The state does not disappear but its separate parts—such as tax agencies or subdivisions—participate in 'a dense web of relations that constitutes a new transgovernmental order (Tshuma 2000, p. 130).

The involvement of banks or MNEs in these networks is recent, but crucial. The networked regulation of financial intermediaries ensured the success of tax information collection at the national level, and it is this that will ensure that

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states can fully govern on tax matters in the international arena. The involvement of financial institutions, in particular, has received a substantial push from the intricate and slowly progressing evolution of the US Foreign Account Tax Compliance Act (FATCA) regime into a network of similar bilateral treaties with other countries, requiring financial institutions to supply information backed by the threat of a substantial withholding tax on investors.[5]

Developing countries have been much less successful at collecting and utilising tax information through such systems to generate revenue. There are many reasons for this, including administrative capacity and the structure of the economy, especially the informal sector or a significant non-market subsistence economy (Bird & Casanegra de Jantscher 1992; Prichard 2010). A consequence is that it is also more difficult for developing countries to participate in transnational tax information exchange, or to benefit from information obtained in such exchanges so as to enhance domestic revenue collection.

3.1 Bilateral Tax Treaties

A web of bilateral tax treaties provides the legal authority for increasingly regular exchange between national tax agencies. Most bilateral tax treaties are based on either the OECD Model Tax Convention on Income or Capital or the UN Model Double Tax Convention Between Developed and Developing Countries. The obligation and form of information exchange in these treaties were fairly narrow when the OECD model was formalised after World War II. Since the 1970s, the models and many bilateral treaties DTAs have gradually expanded the possibilities for exchanging information, a process that has dramatically accelerated in the last decade.

The OECD has now proclaimed a 'universally agreed' international standard on tax information exchange. Under the OECD standard, information exchange is not limited to residents of either contracting state; it is authorised for all taxes, not simply the taxes on income and capital covered by most tax treaties; and it is mandatory and cannot be declined 'solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity, or because it relates to ownership interests in a person' (Article 26.5). As a result of this clause, the G20 made its widely reported claim, in one of its first major statements about cooperation, that 'the era of bank secrecy is over' (G20 2009).

However, the actual provisions in tax treaties vary widely. Most older treaties do not contain the provision overriding bank secrecy, while some limit the forms of information exchange. On the other hand, some countries have taken cooperation further under the authority of bilateral treaties, for example through establishing informal cooperative networks, such as the Joint International Tax Shelter Information Centre, established between Australia, Canada, the United States, United Kingdom and Japan (China is an observer).[6] Bilateral treaty negotiation is time-consuming, ad hoc and linked to other economic and political pressures so that these provisions will be fragmented for some time to come. The network of bilateral tax treaties in the Asia Pacific is far from complete. The ASEAN member states had as a goal to complete their network of bilateral treaties by 2010; however, there are still significant gaps, while many countries in South Asia and the Pacific do not have a wide network of tax treaties. Even so, renegotiation of treaties, or the addition of protocols incorporating an updated provision, is underway between many countries. India has more than 80 treaties, including 19 recently negotiated and 23 renegotiations or protocols to existing treaties, aimed at

5. US Hiring Incentive to Restore Employment Act of 2010, Pub. L. 111–157 (HR 2847), Title V Subtitle A. See US Treasury, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>, for model intergovernmental agreements and guidance. So far, only Japan and Australia have signed FATCA agreements in the Asia-Pacific region.

6. Joint International Tax Shelter Information Centre Memorandum of Understanding, available from <http://www.irs.gov/pub/irs-utl/jitsic-finalmou.pdf>.

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strengthening information exchange, among other things.[7] India and Australia recently signed a protocol that updates the information exchange article, and includes additional provisions for mutual assistance and enforcement of tax debts across countries.[8]

3.2 Tax Information Exchange Agreements (TIEAs) and the Global Forum

The OECD campaign for negotiation of TIEAs has the main purpose of enabling countries to access information about their own residents' offshore investments in and through tax havens. The campaign grew out of the Harmful Tax Competition project (OECD 1998) and initially made slow progress. In 2002, the OECD released its Model TIEA and accompanying commentary; up until 2008, there had been only 44 TIEAs signed. However, between the G20 summit on 15 November 2008 and the G20 summit in Cannes on 4 November 2011, 700 TIEAs were signed, primarily between developed countries and tax havens. There are now more than 800 TIEAs (Global Forum on Transparency and Exchange of Information for Tax Purposes 2013). Triggers for this massive increase include the Liechtenstein, Luxembourg and UBS bank tax haven scandals (Kampen & de Rijke 2008), and the global financial crisis. Initially, identified tax haven jurisdictions were each required to sign 12 TIEAs with other governments in order to get off the 'black list'. Australia has, since 2008, negotiated 34 TIEAs.[9]

The central, and new, international organisational player is the Global Forum on Transparency and Tax Information Exchange.[10] The Global Forum was established initially by the OECD in response to concerns expressed by tax haven countries, which sought a voice in the coercive process of listing tax havens and requiring TIEA negotiation. The Global Forum was restructured at its meeting in Mexico in 2009 to give all country members an equal vote, even though technically it remains a program initiated by the OECD. Member countries contribute to administrative costs, with the bulk of funding coming from OECD member countries. The Forum is open to all and now has a membership of 121 countries, plus the EU and numerous international organisations as observers. The TIEA process and the Global Forum directly engage national tax agencies with each other. However, the Forum is a 'soft' institution in the sense that it has no rule-making or administrative power of its own and is not supported by any multilateral treaty or other delegated legal authority.

The Global Forum initially tracked and policed the signing of TIEAs; it has now moved to a detailed peer review process of domestic country laws to ensure that these will enable the practical implementation of TIEAs, for example by modifying bank secrecy laws and empowering the revenue agency to do information collection. The process has been criticised as too limited (e.g., Sawyer 2011) but it is unprecedented in scale and depth.

Asia Pacific countries are engaged, but not fully, in the Global Forum. The most recent meeting of the Global Forum was hosted in Jakarta, Indonesia (November 2013). Malaysia sat on the previous peer review group, and Hong Kong sits on the 2014 peer review group. Many smaller Pacific nations, which are tax havens are members, including the Cook Islands, Vanuatu and Samoa. However, many countries in the region have still not joined the Forum, including Thailand, Lao PDR, Vietnam, Myanmar, Fiji, Papua New Guinea, Timor L'Este, Bangladesh and Sri Lanka.

3.3 A Multilateral Tax Administration Regime

The G20 has been critical in pushing forward the most important global development in tax cooperation, the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. After it was released in 1988 for EU and OECD member states only, the

7. See <http://law.incometaxindia.gov.in/DIT/intDtaa.aspx> for information on Indian tax treaties.

8. Protocol to Australia-India tax treaty, 11 December 2011, available from <www.treasury.gov.au>.

9. ATO, <http://www.ato.gov.au/businesses/content.asp?doc=/content/00161158.htm>.

10. Global Forum, <www.oecd/tax/transparency>.

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Multilateral Convention entered into force on 1 April 1995. However, it did not achieve widespread implementation. In 2010, a protocol was agreed that opened up the Convention to non-OECD or EU member states and made other amendments to expand its scope. The G20 was determined 'to make it easier for developing countries to secure the benefits of the new cooperative environment',[11] and this protocol entered into force on 1 June 2011. A process was established for a new country to join, which requires a decision by consensus of existing parties. Factors to be taken into account include confidentiality rules and practices of the applicant country and its membership of the Global Forum. The G20 leaders called in September 2013 for 'all countries to sign the Multilateral Convention . . . without delay'.

The Multilateral Convention sets out on request, automatic and spontaneous exchange processes. The Multilateral Convention also expands tax administrative cooperation mechanisms to cover audits, collection of tax debts, sharing expertise and resources and many other aspects. It aims to override the traditional rule of international law that countries will not enforce or collect other country tax claims. This rule has been abrogated in some recent bilateral tax treaties (including Australia-India and Australia-New Zealand). The Explanatory Report (OECD/EU 2010) states:

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

There are now 66 countries signatory to the Convention. In the Asia Pacific, however, many countries have not yet signed. Current signatories in the region are Australia, China, India, Indonesia (not yet in force), Japan, Korea, New Zealand and Singapore (not yet in force).

The most recent G20 statement is that 'automatic' information exchange is the new standard (2014). Automatic exchange involves large-scale computerised data sharing about income and assets of taxpayers on a regular basis between revenue agencies, and it is not mandated in the bilateral treaty models nor in the Multilateral Convention. The Indian Minister for Finance, Mr Gopalan, expressed in 2011 the hope that the Convention would facilitate widespread automatic exchange of information between signatories.[12] This does seem to be happening, and there has now been established an 'automatic' exchange group comprising at present 45 countries.

In addition to the Multilateral Convention, there have recently been negotiated a number of regional administrative agreements. These include the South Asian Association for Regional Cooperation (SAARC) Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance in Tax Matters, between Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. The SAARC Agreement was signed in 2005 and has been in force since 19 May 2010. It contains a provision for information exchange, although that is not as broad as the Multilateral Convention or OECD model, and does not explicitly override bank secrecy. It also provides for regional training, meetings and mutual assistance between tax officers of the different countries. This could be a model for ASEAN countries aiming to further integrate; it may be simpler, however, for these countries just to sign the Multilateral Convention.

Two other aspects of the Multilateral Convention are worth noting. First, the convention establishes a 'coordinating body' of representatives of the national revenue agencies to 'monitor the implementation and development of this Convention, under the aegis of the OECD' (Article 24.3). This coordinating body has the potential to develop greater powers and

11. G20 Leaders Summit: Financial Regulation Session, Remarks by Angel Gurria, OECD Secretary General, Cannes, 4 November 2011, available from <www.oecd.org>.

12. Minister Gopalan, cited in <http://chinaepress.com/tag/bank-secrecy/>, 4 November 2011.

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institutional character. Outside the European Commission, it would be the first international governing body properly authorised by treaty to manage tax coordination. Second, the Explanatory Report (para (245)) envisages that each national revenue agency should establish a single internal division to manage transnational information exchange and other assistance, to ensure 'direct and speedy contacts' being 'the only way to make the assistance effective' and to manage taxpayer confidentiality, which is only waived under the conditions established by the convention. It is these specialist units within revenue agencies that are networking across borders to build the transnational tax administrative state.

4. Opportunity II: BEPS

In February 2013, the OECD released its report, Addressing Base Erosion and Profit Shifting, which argued that company tax bases were at risk of erosion, and that 'current international tax standards may not have kept pace with changes in global business practices' especially of MNEs. Around the same time, several countries issued their own reports on taxation of MNEs, including Australia (Treasury 2013). At the request of G20 finance ministers, the OECD released the BEPS Action Plan in July 2013.

BEPS is a very large project, albeit with a dramatically short timeline of two years, and there is not scope to address it in detail here. The OECD proposes 15 action items, which range from more technical 'fixes', for example for hybrid instruments that are taxed differently in different jurisdictions, to broad statements about improving 'transparency', expanding general anti-abuse rules and a focus on 'commercial substance', and reforming transfer pricing rules and other international tax rules to respond to integrated cross-border production in MNEs and the growing digital economy.

BEPS does not focus on the issue of tax competition by lowering company tax rates or enacting tax incentives to encourage foreign direct investment. In the OECD language, it aims to address 'gaps' in the international tax rules by which MNEs can take advantage of the different rules of 'host' and 'home' countries and can utilise tax haven jurisdictions, to achieve non-taxation or lower taxation of international transactions. The OECD is focusing on 'real' economic activity or value-adding. For example, where countries do not have effective transfer pricing rules or cannot enforce them, MNEs can locate profits in low tax jurisdictions and deductions in high tax jurisdictions, and can utilise excessive debt deductions in what is called 'thin capitalisation'. BEPS also aims to address the 'digital economy', or what one Australian tax official has recently called the 'digitalisation of the economy' (Konza 2014), referring to the transfer of value from 'real' to 'virtual' transactions, or real assets to intangibles.

4.1 Corporate Tax Transparency

One of the important initiatives in BEPS (Action Item 13) is template and country-by-country reporting of profits and losses for transfer pricing purposes (see OECD 2014). The OECD has adopted this as a goal, although some studies have been sceptical of what it can achieve (Devereux 2011). While related to the substance of the corporate tax base, this is essentially a tax administrative step that is likely to be crucial in bringing MNEs to the table, when combined with the exchange of information and administrative cooperation discussed above. One reason might be that it leads to increased tax assessments in some jurisdictions, which may then demand compensating adjustments that require negotiation between governments and MNEs.

In this regard, it is interesting to note that in 2013, the Australian government enacted a law aimed at 'greater transparency of tax paid by large and multinational enterprises' (Bradbury 2013). The new measure, effective from the 2013–14 tax year, requires the Commissioner of Taxation to publish certain tax information of large corporate taxpayers with 'total income' of $100 million or more each year, or responsible for paying resource taxes.[13]

13. New s 3C, 3D, 3E of Taxation Administration Act 1953 (Cth), introduced by Tax Laws Amendment (2013 Measures No. 2) Act 2013 Schedule 5.

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The Commissioner will be required to release the company's name, total reported corporate income, taxable income and income tax payable. These will be the details on the company's (self-assessed) annual corporate tax return. It will be interesting to examine what impact, if any, increased transparency of corporate tax paid by specific companies might have on tax law and administration.

4.2 BEPS and the Asia Pacific

The approaches of countries in the region to the BEPS process and more generally to these corporate tax challenges have varied significantly. The BEPS project involves major countries in the Asia Pacific, including China, India, Japan, Korea and Australia. However, there is no direct engagement with other countries in the region, except insofar as the OECD and G20 have promised to engage with developing countries in addressing global challenges. In February 2014, the first OECD-Asia regional meeting was held in Korea to consult with regional tax officials.[14] The consultation indicated that many countries are very concerned about harmful tax competition in the region, highlighting the following:

- base erosion through interest deductions and other financial payments (Action Item 4)
- avoidance of harmful tax practices among countries in the region (Action 5)
- prevention of treaty abuse (Action 6)
- redefinition of the concepts of resident and permanent establishment to align the tax nexus with economic reality (Actions 6 and 7)
- the clarification of the tax treatment of intangibles, particularly concerning royalties (Actions 8–10)
- base eroding payments via management fees and head office recharges (Action 10)
- more effective transfer pricing documentation requirements, including country-by-country reporting, without imposing an onerous burden on business and tax administrations (Action 13).

Many developing countries in the region lack basic anti-abuse, transfer pricing or thin capitalisation laws, or any enforcement capacity for such rules, that are taken as a starting point in the BEPS project. In contrast, India and China are moving fast to strengthen these rules and are well aware that they need to engage internationally to address global challenges to tax revenue collection. Both countries are actively engaged with BEPS and also work with the UN on transfer pricing and tax treaties.

The Indian revenue agency, legislature and courts have in various ways been extremely proactive in this area, for some years prior to BEPS. In particular, the Indian revenue agency has taken cases through the courts that have attracted significant attention from the international tax community, while the Indian government, sometimes retrospectively, has asserted jurisdiction to tax cross-border transactions by MNEs.[15] India has recently strengthened its general anti-avoidance rule and broadened definitions such as 'royalty' in relation to intangible or 'digital' transactions. In one illustration among many cases, a recent payment for digital bandwidth access was held by the Madras High Court to be an equipment royalty subject to Indian withholding tax; the Court held that in a virtual age, the physical presence of a taxpayer has become insignificant.[16]

It has recently been suggested that the China State Administration of Taxation has a particular interest in transfer pricing (because it has significant real foreign investment in its jurisdiction), the concept of a business permanent establishment in the jurisdiction and outbound fees for intangibles and intellectual property (Bell 2014). China is also interested in country-by-country reporting of profits and losses for transfer pricing, and in emphasising commercial or economic substance of transactions (Zhao et al. 2013).

14. See <http://www.oecd.org/tax/beps-regional-consultations-asia-latin-america.htm> for a summary of the meeting held on 20–21 February 2014.

15. A case of particular interest was SC, 20 January 2012, Vodafone International Holdings v. Union of India, (2012) 341 ITR 1; see further Desai and Kumar (2012).

16. Verizon Communications Singapore Pte Ltd v. ITO (2013) 39 <taxmann.com> 70; 263 CTR 497.

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At a minimum, the BEPS proposals will require substantial domestic legislation and enforcement, as well as strong international cooperation. For example, one of the first discussion drafts in the BEPS project, on hybrid financial instruments, recommends 'that every jurisdiction introduces a complete set of rules that are sufficient to neutralise the effect of the hybrid mismatch on a stand-alone basis, without the need to rely on hybrid mismatch rules in the counterparty jurisdiction' (OECD 2014, p. 11). These rules will be layered and complex, and will require coordination with the rules of other jurisdictions. Even if developing countries seek to engage in BEPS, it will be a major challenge for most to implement BEPS recommendations or to influence this international policy process.

5. Conclusion

Successful 'tax states' have harnessed the power of taxation to raise sufficient revenues for stable government while also generating economic growth for the well-being of their populations. However, key challenges for nation states in raising money arise from the international context, in particular individual income tax avoidance and evasion in havens, and competition in taxes on capital. The result is that as the international economy has grown, states have in effect lost sovereignty over their national tax bases. At the same time, states are failing to assert tax sovereignty over an ever-increasing number and size of international transactions between taxpayers in different states, especially within integrated MNEs across multiple jurisdictions.

Levi's model of rule and revenue (1988, p. 23) suggests that when factors such as capital are mobile, governments would prefer to coordinate with interests to ensure a stable fiscal bargain. In the global context, a negotiated compromise must include MNEs and other governments; however the domestic politics of global coordination must not be ignored.

Since the 1980s, tax competition seems to have dominated in the international arena, and fiscal bargains have remained, in general, within the boundaries of the nation state. However, the last five years have seen unprecedented international tax cooperation, presenting potential opportunities for nation states. On the administrative front, many countries do seem to be on a path towards increasing effectiveness of tax cooperation. The new transnational technologies and networks of tax administration have potential ultimately to extend 'the state's capacity to govern' (Weiss 2005, p. 346).

More fundamentally, safeguarding and increasing each country's national revenues will require radically new approaches to cooperation between countries in taxation. The BEPS project is an opportunity, but as Brauner (2014, p. 59) observes, it 'presents a mix of promise and concern' and faces many hurdles. Its most promising feature is an explicit acknowledgement that international capital transactions should be subject to tax. But, the contradictions in the BEPS process are revealed by recent statements of the British Chancellor, who expressed strong UK support for BEPS while in the most recent budget proudly announcing that Britain has the 'most competitive' business tax system in Europe, including a corporate tax rate of 21 per cent, enterprise tax zones, expanded research and development and film tax credits, an investment allowance, and ongoing low taxation of intellectual property (Osborne 2014).

So far, many Asia Pacific countries are on the sidelines of the BEPS debate. Asia Pacific jurisdictions that have held back would likely benefit from engaging seriously with the process. It is to be hoped that Australia's G20 leadership in 2014 may push this agenda further in the region to secure national sovereignty in taxation in the long term.

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