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NETWORKS, NORMS, AND NATIONAL TAX POLICY

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ABSTRACT

Increasing economic integration inevitably draws states to coordinate their tax policies, yet policymakers are eager to protect their autonomous “tax sovereignty.” Cooperation and autonomy are balanced in transnational networks, especially the OECD, where state representatives, experts, and interest groups engage in continuous negotiation to develop nonbinding, or “soft” global tax policy norms. While the merits of these norms have prompted much scholarly analysis, little is understood about the nature and significance of using networks to develop tax policy norms in this manner. This Article demonstrates how and why states use the unique soft governance structure of the OECD to develop global tax policy norms and achieve national tax policy goals, and explores some of the implications of this particular means of balancing the competing goals of international cooperation and national autonomy in a politically, socially, and economically globalized world.

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I. INTRODUCTION

Increasing economic integration inevitably draws states to coordinate their tax policies, as the recent global economic crisis reminds us.¹ Yet politicians, public sector officials, and tax academics and professionals have become accustomed to working with a view of the state as a “hermetically sealed sphere”² of “tax sovereignty”—virtually complete autonomy in tax law and policy-making.³ In some areas of tax regulation,

1. The economic-stimulus efforts of the United States, currently at more than \$800 billion in tax stimuli and rising, are echoed in legislation adopted by nations around the world. *See, e.g., Big Government Fights Back*, ECONOMIST, Jan. 31, 2009, at 79 (“[T]he plans of 11 big advanced and emerging economies are worth an average of 3.6% of GDP—though spread over several years. The IMF expects tax cuts and spending worth 1.5% of global GDP to kick in this year.”). U.S. Treasury officials have expressly recognized the need for coordinated tax policy development that is created by global economic integration. *See, e.g., International Tax Reform: Hearing Before the S. Fin. Comm.*, 110th Cong. (2008) (“Globalization has made it imprudent for the United States, or any other country, to enact tax rules that do not take into account what other countries are doing.”).

2. Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 9 (Michael Byers ed., 2000) (describing the traditional conception of sovereignty as a static attribute).

3. *See, e.g.,* Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155 (2008); Allison Christians, *Sovereignty, Taxation and Social*

especially the WTO regime, states have traded complete autonomy for cooperation by forging agreement in a multilateral treaty and by using supranational institutions to police violations of agreed-upon legal precepts.⁴ But states have not similarly created a binding multilateral regime to trade autonomy for cooperation in income tax matters. Instead, states have come to rely on “soft” methods for coordinating income taxation through network-based collaboration, modeling, peer pressure, and emulation to reconcile these competing goals.⁵ The soft law approach involves political, social, and economic relationships among states and individuals that significantly impact the types of tax norms that arise and take root internationally.

Using transnational networks, the world’s wealthiest states have built a unique institutional infrastructure through which they continuously renegotiate, and disseminate globally, a set of mutually agreeable income tax standards.⁶ The main component of this infrastructure is the Organisation

Contract, 18 MINN. J. INT’L L. 99 (2009). For a classic discussion of tax sovereignty, see Joseph A. Schumpeter, *Die Krise des Steuerstaats* [*The Crisis of the Tax State*] (1918), translated in 4 INT’L ECON. PAPERS 5, 33 (1954). The importance of sovereignty as a hurdle to coordination is highlighted throughout the historical record of transnational tax policy coordination. See, e.g., *Report and Resolutions Submitted by the Technical Experts to the Financial Comm.*, League of Nations Doc. F.212, at 6 (1925) [hereinafter *Rpt. of the Comm. of Experts*] (stating that coordination of tax policy would require states to freely exercise their sovereign powers by adopting uniform laws according to their internal legislative processes).

4. Tax scholars have studied the various reasons why forms of taxation other than tariffs do not fit neatly within the WTO paradigm. See, e.g., Paul R. McDaniel, *Trade and Taxation*, 26 BROOK. J. INT’L L. 1621 (2001). On the other hand, trade scholarship suggests that the WTO may have a broader impact on national taxation than many may realize. See, e.g., Michael Daly, *WTO Rules on Direct Taxation*, 29 WORLD ECON. 527 (2006).

5. International law scholars use the term “soft law” to describe norms that may not themselves constitute law but seem to have effects that evoke a legal process or form because they compel a law-like sense of obligation in states. See, e.g., C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850 (1989); David M. Trubek, Patrick Cottrell & Mark Nance, ‘Soft Law’, ‘Hard Law’, and *EU Integration*, in *NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE US* (Joanne Scott & Gráinne De Búrca eds., 2005) (suggesting that a hybrid approach, seeking both hard and soft elements, is needed in analyzing issues of international law). For a discussion regarding the use of the term in the context of tax policy, see Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 WIS. INT’L L.J. 325 (2007).

6. See, e.g., Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447, 458 (2006) (“[G]lobalization is contested and negotiated.”). The use of soft law mechanisms as a means to bring about “optimal” policy results has received increasing attention across a wide variety of policy-making arenas. See, e.g., David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2007); Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139 (2006); Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW & CONTEMP. PROBS. 263 (2005); Judd F. Sneider, *Soft Paternalism for Close Corporations: Helping Shareholders Help Themselves*, 2008 WIS. L. REV. 899. For a contrary view of the prospects for tax policy coordination, see Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259, 326 (2003) (arguing for “a gradual rule-

for Economic Cooperation and Development (“OECD”), whose membership comprises thirty industrialized countries, including the United States, Canada, Australia, and most of Western Europe.⁷ The OECD facilitates tax policy development by hosting hundreds of meetings, conferences, and workshops for the purpose of producing nonbinding norms around which nations can converge.⁸ The OECD describes itself as a “market leader in developing standards and guidelines,” and policy norms it develops have worldwide impact.⁹ A volume of scholarly analysis is accordingly devoted to the merits of tax policy norms produced by the OECD. Yet little is understood about the nature and implications of developing tax policy norms in this manner.¹⁰

This Article demonstrates how states use the unique soft governance structure of the OECD to develop global tax policy norms and achieve national tax policy goals, and explores some of the implications of this particular means of balancing the competing goals of international

harmonization effort, preferably led by the OECD”); Avi Nov, *The “Bidding War” to Attract Foreign Direct Investment: The Need for a Global Solution*, 25 VA. TAX REV. 835 (2006) (arguing that a hard-law solution in the form of a multilateral agreement is needed to combat the negative effects of international tax competition); DANIEL N. SHAVIRO, CORPORATE TAX SHELTERS IN A GLOBAL ECONOMY 49 (2004) (suggesting that a multilateral tax organization could “aim to coordinate international cooperation where that would be to mutual advantage but is impeded by transaction costs”).

7. See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 486 (2000) (“[A]cross the spectrum of regulatory activity, the OECD plays a distinctively important role.”); Brauner, *supra* note 6, at 310 (identifying the OECD as the key source of international coordination); Arthur J. Cockfield, *The Rise of the OECD as Informal ‘World Tax Organization’ Through National Responses to E-commerce Tax Challenges*, 8 YALE J.L. & TECH. 136 (2006) (same). For a list of OECD members, see OECD.org, Ratification of the Convention on the OECD, http://www.oecd.org/document/58/0,3343,en_2649_34483_1889402_1_1_1_1,00.html (last visited Feb. 22, 2009).

8. See OECD.org, About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html (last visited Feb. 26, 2009). The OECD facilitates public/private collaboration both internally, by coordinating working groups with government and nongovernmental participants, and externally, by mobilizing nongovernmental networks such as the International Fiscal Association (“IFA”), a professional networking organization with a membership of approximately 11,500 accountants, lawyers, economists, business advocates, academics, and other interested parties. See IFA.nl, IFA Members, <http://www.ifa.nl/index.htm> (last visited Feb. 22, 2009) (IFA membership list available only to subscribing members).

9. CENTRE FOR TAX POLICY AND ADMINISTRATION, OECD, THE OECD’S CURRENT TAX AGENDA 74–75 (Sept. 2008) (on file with author) [hereinafter CURRENT TAX AGENDA].

10. For example, the OECD’s development of widely used model tax treaties and interpretive commentaries has prompted an ongoing debate about the legal status of these documents. See, e.g., Michael Lang & Florian Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 AUSTL. TAX FORUM 95 (2008); Frank Engelen, *Some Observations on the Legal Status of the Commentaries on the OECD Model*, 60 BULL. FOR INT’L TAX’N 105 (2006); David R. Tillinghast, *Commentaries to the OECD Model Convention: Ubiquitous, Often Controversial; But Could They Possibly Be Legally Binding?*, 35 TAX MGMT. INT’L J. 580 (2006); REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW (2007).

cooperation and national autonomy. Part II analyzes the emergence of network-based tax policy collaboration and argues that early decisions against multilateralism led to the soft global tax governance structure supported by the OECD today. Part III analyzes how the OECD network facilitates tax policy coordination, first by examining how the OECD “works” in terms of its institutional structure and processes, and second by showing how lawmakers in the United States use this soft governance structure as the intellectual foundation, the benchmark, and the impetus for national tax law reform. Part IV examines some of the implications of network- and norm-based tax governance and concludes that this approach presents serious challenges for monitoring the autonomy/cooperation tradeoff. Part V concludes.

II. WHY TAX POLICY DEVELOPS IN NETWORKS

Legal scholarship has only recently begun to recognize the characteristics of international income tax governance as a unique institutional infrastructure, but the history of this infrastructure dates back over almost a century. We may effectively trace a path from today’s network-based, soft tax governance structure back to the efforts of a few tax policymakers in the early twentieth century who convened in the world’s first transnational networks to resolve issues arising from the widespread adoption of modern income taxation. The structures these individuals created to navigate their shared concerns endures in the soft governance structure that develops global tax policy norms today. This part explores the historical issues that led policymakers to seek transnational cooperation, the factors that led them to use transnational networks as the optimal means of cultivating such cooperation, and the ultimate irresolution that resulted from their approach.

A. Collision of National Tax Bases

Like trade taxation, income taxation requires significant transnational cooperation, principally because nations tend to define income in ways that virtually guarantee overlap with other national definitions.¹¹ The United States was one of the first nations to adopt a tax regime that

11. For example, the United States defines gross income as “income from whatever source derived,” which includes income earned in foreign jurisdictions. I.R.C. § 61(a) (2006). The result is “double taxation,” which is seen to make operating abroad potentially very expensive, curtailing the potential for foreign export- and investment-led growth.

calculated liability based on income derived by its residents from all sources, whether domestic or foreign.¹² The nation quickly confronted the concern that U.S. residents earning profits abroad might also be taxed by foreign governments, resulting in double taxation. This would especially affect American exporters at a time when exported goods were the primary force driving the U.S. economy. In response, the U.S. Congress adopted legislation allowing for a deduction from income for foreign taxes paid.¹³

However, as tax rates rose and international commercial activity increased exponentially over the course of World War I, the tax deduction came to be seen as inadequate.¹⁴ Apparently on the advice of a single tax expert,¹⁵ Congress responded by allowing taxpayers to have a dollar-for-dollar credit, rather than a mere deduction, for taxes paid to foreign jurisdictions.¹⁶ The United States was the first country to provide this kind of comprehensive foreign tax credit.¹⁷ Under the new rule, although the United States nominally imposed taxation on its residents regardless of where the income was earned, the credit reduced or eliminated U.S. taxes to the extent foreign taxes were paid. Since the United States would only impose tax to the extent another country did not, the new rule made it

12. Modern income taxation in the United States emerged on the strength of the newly adopted Sixteenth Amendment, which gave Congress broad power to tax income “from whatever source derived.” U.S. CONST. amend. XVI.

13. Revenue Act of 1913, ch. 16, § IIB, 38 Stat. 114, 167–68 (1913).

14. See ELISABETH A. OWENS, *THE FOREIGN TAX CREDIT* 20 (“It appears that the foreign tax credit provisions were adopted . . . in response to the sharp increase in income tax rates both at home and abroad during World War I.”). The deduction was a partial solution since it was not a dollar-for-dollar offset of the foreign taxation, but rather a reduction of the amount of income subject to U.S. taxation. The foreign tax credit was enacted within five years of the 1913 Act and was limited to “income, war-profits, and excess-profits taxes.” See Revenue Act of 1918, ch. 18, §§ 222(a), 238(a), 40 Stat. 1057, 1073, 1080 (1919).

15. Namely, T. S. Adams, Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1027–30.

16. H.R. REP. NO. 65-767, at 10 (1918). The difference in value between a credit and a deduction is significant. A deduction reduces the taxpayers’ income which is subject to tax, so that the value of the deduction to the taxpayer is a function of the applicable tax rate, while the value of the credit is its nominal value (so long as it is not limited). To take a simple example, if a taxpayer subject to a 35% tax rate earns \$100, she would incur a tax of \$35. If she was entitled to a \$20 tax deduction, she would subtract \$20 from her taxable income and calculate her 35% tax on \$80 instead, yielding a tax due of \$28, and a savings of \$7. On the other hand, if she was entitled to a \$20 tax credit, she would not subtract that amount from her taxable income but instead would subtract it directly from her tax due, thus reducing her tax to \$15.

17. See OWENS, *supra* note 14, at 20 (“While one or two countries had used the tax credit device prior to [the United States] for taxes paid to their colonies, the United States was the first country to apply the foreign tax credit on a world-wide basis as a means of relieving international double taxation of income.”); see also Graetz & O’Hear, *supra* note 15, at 1022; H. David Rosenbloom & Stanley I. Langbein, *United States Tax Treaty Policy: An Overview*, 19 COLUM. J. TRANSNAT’L L. 359, 361 (1981).

profitable for other nations to impose creditable taxes on income earned by U.S. investors in their jurisdictions.¹⁸ The U.S. regime was therefore seen as “making a present of the revenue to other countries.”¹⁹

In stark contrast to the generosity of the U.S. foreign tax credit, most other countries did not unilaterally address the problem of overlapping income taxation at this time.²⁰ For example, Britain imposed worldwide taxation, but provided only a partial foreign tax credit against income derived within its empire.²¹ As a result, Britain collected taxation on both its own investors who earned income abroad and, aided by the U.S. foreign credit, American investors who earned income in Britain.

The United States and Britain thus fundamentally conflicted over the issue of which country should cede its right to tax. The United States sought an international regime in which the country where income was earned (the source, or host country) had the primary right of taxation. Conversely, Britain sought an international regime in which primary tax rights would fall to the country that provided the investment capital (the residence, or home country). The two positions could not be reconciled with a compromise: rather, one view or the other must necessarily prevail. Moreover, as more countries adopted similar tax systems, the problem was becoming sufficiently prevalent that unilateral and bilateral solutions would be futile. With a growing number of nations aligning along the polarized U.S. and British positions, the desire to craft a mutually agreeable solution prompted the emergence of the first transnational tax networks. These early networks featured first interest groups, then experts, and finally government officials as countries navigated a workable approach to coordinating tax policy across national borders.

B. Early Networks: Interest Groups, Experts, and Officials

The newly formed International Chamber of Commerce (“ICC”), a non-governmental interest group of business executives, was the first

18. The foreign tax would not impede U.S. investors because they would pay the same level of tax as if they invested at home, but the tax credit ensured that the foreign jurisdictions would always collect the revenue. See RICHARD E. CAVES, *MULTINATIONAL ENTERPRISE AND ECONOMIC ANALYSIS* 190 (2d ed. 1996) (“Neutrality depends on who pays what tax, not which government collects it.”).

19. EDWIN R. A. SELIGMAN, *DOUBLE TAXATION AND INTERNATIONAL FISCAL COOPERATION* 135 (1928).

20. At the time, many countries such as France and the Netherlands did not tax the foreign income of their residents. For other countries, double taxation may not have been seen as a practical problem until the late nineteenth century, owing to their relatively low rates of taxation and international commercial activity. See Rosenbloom & Langbein, *supra* note 17, at 361.

21. See Graetz & O’Hear, *supra* note 15, at 1046.

institution to create a transnational space for debating tax policy.²² The ICC brought together “responsible business leaders” from the United States, Britain, and several other countries to collaborate on common issues of interest, including possible solutions to the problem of double taxation.²³ The identities of the particular individuals who worked in the ICC seem to be lost to history,²⁴ but they were linked by an “overriding aim that remains unchanged: to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital.”²⁵ The ICC was, and is, an interest group, serving the needs of its private sector members, and not a forum for coordination among government officials or lawmakers. But the ICC provided lawmakers a service by creating the first forum for aggregating views across countries and building consensus over the divisive issue of jurisdictional primacy.²⁶

As business leaders were mobilizing within the ICC, a major shift in international relations resulting from World War I brought into being the League of Nations, a diplomatic intergovernmental network that became an alternative and distinct site for transnational tax policy development. The original organizers have described the League of Nations as “the biggest world union ever brought about” and “the most ambitious political move ever attempted.”²⁷ The League was a product of the Treaty of Versailles, which sought to control conflict and promote peace between states.²⁸ Unlike the ICC with its private sector interest-group focus, the

22. The ICC was organized in 1919 with members from Belgium, Britain, France, Italy, and the United States. *See* What is ICC?, <http://www.iccwo.org/id93/index.html> (last visited Feb. 22, 2009).

23. *See* ICC 90 Anniversary, <http://www.icc90anniversary.org/> (last visited Feb. 22, 2009) (stating that the organization was founded “by responsible business leaders who believed that international trade provided a path to peace and prosperity [and who] called themselves ‘merchants of peace’”).

24. *See, e.g.*, Lara Friedlander & Scott Wilkie, *Policy Forum: The History of Tax Treaty Provisions—And Why It Is Important to Know About It*, 54 CAN. TAX J. 907 (2006).

25. *See* What is ICC?, *supra* note 22.

26. The ICC adopted an initial resolution that the taxing jurisdiction should turn on the nature of the tax, with distinctions being made between “super” and “normal” taxes. Exceptions were made for particular kinds of income, including that from international shipping (as to which residence-based taxation was to be preserved) and that from sales of manufactured goods (to be apportioned under formula). However, the United States rejected this approach, in favor of a system that would favor the source jurisdiction, as its credit system did. *Id.* The ICC ultimately came to a consensus in 1923, when it issued a new resolution on jurisdictional primacy.

27. *See Foreword*, THE LEAGUE OF NATIONS STARTS: AN OUTLINE BY ITS ORGANISERS, at v–vi (1920) (describing the League as “a cooperative association where the nations seek to overcome their mutual differences”); Raymond B. Fosdick, *The Structure of the League*, in THE LEAGUE OF NATIONS STARTS: AN OUTLINE BY ITS ORGANISERS 6 (1920).

28. Preamble, The Covenant of the League of Nations, June 1919, *available at* <http://avalon.law.yale.edu/imt/parti.asp> (last visited Nov. 9, 2009) (undertaking the parties “to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to

League of Nations provided a means of facilitating transnational cooperation by creating a new institutional space and mechanism for technical experts and national officials of varying diplomatic status to exchange knowledge and perspectives.²⁹ The League was expected to afford “authoritative channels for the use of scientific and expert knowledge in the interest not of any one Power, but of the solution of the problems themselves.”³⁰ As one of the League’s organizers expressed it, the League was viewed as a remedy for a world in which diplomatic and bureaucratic processes had hampered rather than promoted international cooperation in matters of vital worldwide importance, including in the field of economics and financial regulation.³¹ In this view, the League’s main function was to correct an existing international political malfunction, by creating a decision-making structure that focused on coordination as primarily a matter of collaborative technical problem solving rather than primarily a matter of diplomatic relationships.³²

The League quickly identified tax policy as a primary focus, and set in motion the desired technical problem solving. At a 1920 meeting in Brussels, the delegates declared that double taxation was a serious impediment to international relations and world production, and therefore a threat to global peace.³³ To address this threat, the League of Nations

resort to war by the prescription of open, just and honourable relations between nations by the firm establishment of the understandings of international law as the actual rule of conduct among Governments”). The United States was not a member of the League of Nations because the Senate refused its consent to ratification of the Treaty of Versailles, a failure that has been described as “the fuse which exploded twenty years later in the century’s second catastrophic global conflict.” Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 969 (“Many believed this failure—and the resulting interwar isolation of the United States, including its non-participation in the League of Nations—[lit this fuse.]”). Immediately upon ratifying the Treaty of Versailles, the United States would have been entitled to a seat on the League of Nations Council, which was described at the time as comparable to “the Cabinet of a Nation” and “the principal seat of power of the great nations.” Fosdick, *supra* note 27, at 7, 11. Nevertheless, the United States did participate in League activity: U.S. experts served technical and administrative functions in the League Secretariat. *Id.* at 15–16.

29. Fosdick, *supra* note 27, at 12–13 (During early League Sessions, most of the national representatives were ambassadors and cabinet members, while a few countries were represented by their heads of state.).

30. J. T. Shotwell, *First Pages from the History of the League of Nations*, in THE LEAGUE OF NATIONS STARTS: AN OUTLINE BY ITS ORGANISERS 46, 50 (1920).

31. *Id.* at 49 (describing the League’s reliance on technical expertise “in fields where purely political machinery tends to hamper rather than promote” cooperation).

32. See generally NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

33. League of Nations, Econ. & Fin. Comm’n, *Report on Double Taxation Submitted to the Financial Comm.*, by Profs. Bruins, Einaudi, Seligman and Sir Josiah Stamp League of Nations Doc. E.F.S.73 F.19 (1923) [hereinafter *Rpt. of Bruins et al.*].

used the prior work of the ICC as a basis for its initial discussions.³⁴ But the League did not simply defer to the ICC. Instead, it formed its own financial committee with the purpose of collaborating and producing a report on the best approach to the technical problem of double taxation.³⁵ The financial committee enlisted the intellectual input of a team of four respected economists from four nations: Professors Gijsbert W. J. Bruins of the Netherlands, Luigi Einaudi of Italy, Edwin R. A. Seligman of the United States, and Sir Josiah Stamp of the United Kingdom.³⁶

These individuals were chosen for their respective reputations as public finance, economics, and tax experts, as well as for their national affiliations. Bruins was a monetary expert who later served as a League of Nations commissioner and as a technical advisor to Austria.³⁷ Einaudi was a noted economist and editor of the *Review of Economic History* who later served as the governor of the Bank of Italy, premier and minister of the budget, and finally, President of Italy.³⁸ Edwin R. A. Seligman was a public finance, economics, and tax expert, one of the founders of the American Economic Association,³⁹ and the author of several prominent (now classic) articles and books on taxation.⁴⁰ Finally, Sir Josiah Stamp was a leading British economist and tax expert, who served on both Britain's Royal Commission on Income Tax and its Economic Advisory Council, as well as holding such high-ranking positions as Assistant Secretary of Britain's Inland Revenue and Director of the Bank of England.⁴¹ These experts were expected to bring about a neutral, objective, even scientific solution to the articulated problem of double taxation. As such, the League's structure as an intergovernmental network may have enjoyed a legitimacy advantage over its then available alternatives for global tax coordination: diplomatic relations between states on one hand,

34. See Graetz & O'Hear, *supra* note 15, at 1067–70 (suggesting that language in reports produced under the ICC's collaborative efforts resurfaced in League of Nations discussions).

35. *See id.*

36. *See Rpt. of Bruins et al., supra* note 33.

37. GIANNI TONIOLO, CENTRAL BANK COOPERATION AT THE BANK FOR INTERNATIONAL SETTLEMENTS, 1930–1973, at 93 (2005).

38. Einaudi, Luigi, in COLUMBIA ENCYCLOPEDIA 876 (6th ed. 2000); Einaudi, Luigi, in BRITANNICA CONCISE ENCYCLOPEDIA (2006), available at <http://www.britannica.com/EBchecked/topic/181310/Luigi-Einaudi>.

39. Seligman, in LYMAN ABBOTT ET AL., 10 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 49 (James T. White & Company 1899).

40. *See, e.g.*, EDWIN R.A. SELIGMAN, ON THE SHIFTING AND INCIDENCE OF TAXATION (1892); EDWIN R. A. SELIGMAN, PROGRESSIVE TAXATION IN THEORY AND PRACTICE (1894); EDWIN R. A. SELIGMAN, ESSAYS IN TAXATION (1895); EDWIN R. A. SELIGMAN, THE INCOME TAX (1911); Edwin R. A. Seligman, *The Cost of the War and How It Was Met*, 9 AM. ECON. REV. 739 (1919).

41. J. HARRY JONES, JOSIAH STAMP PUBLIC SERVANT (1964).

and the interest-based policymaking structure of the ICC on the other.⁴² The network was viewed as a viable means of meeting worldwide public welfare goals by “arriving at policies in the technical or limited fields in which they operate” without “infringing upon the principle of national sovereignty.”⁴³

The approach of the experts reflected the tension between the desire to problem-solve through expertise and the need to respect sovereign autonomy that contextualized their task. These noted and prominent economists asked themselves, “Can a remedy be found, or to what extent can a remedy be found, in an amendment of the taxation system of each individual country, independently of any international agreement?”⁴⁴ Posing the question in this manner suggests that these experts were not solely focused on finding a technically correct solution, but understood that any proposed solution would have to meet political goals. In assuming away a multilateral agreement, the experts reflected their expectation that states would only agree to coordinate tax policy through aligned, but voluntary and unilateral, state action rather than delegation of authority to a single supranational authority. Even so, each of the authors’ suggested methods of addressing double taxation would have required some person or institution to set uniform standards for adoption by individual states.⁴⁵ The authors suggested that states could claim the primary right to tax based on either the residence of the taxpayer or the economic source of the income; alternatively, states could apportion income among competing jurisdictions based on some predetermined formula, or they could agree to classify income by type and assign the primary right to tax accordingly.⁴⁶

The solutions devised by the experts were inherently transnational in scope. States could choose to acquiesce to a particular standard on a unilateral basis, by legislating accordingly, but cooperation could only be achieved if states chose and implemented the same uniform strategy. For example, states could uniformly implement residence-based jurisdictional primacy by (universally) exempting income earned within their jurisdictions by foreign persons, and by taxing their own residents on income from all sources. Conversely, states could uniformly implement

42. For example, one of the original League organizers posited that the League’s strength lay in its ability to prevent “matters which are primarily technical or economic” from acquiring “a political complexion” or “the colour of political controversies,” without leaving these matters “to the relative secrecy which is inherent in bureaucratic action.” Shotwell, *supra* note 30, at 55.

43. Shotwell, *supra* note 30, at 56.

44. *Rpt. of Bruins et al.*, *supra* note 33, at 3.

45. *Id.* at 40–42.

46. *Id.*

source-based jurisdictional primacy by (universally) taxing income earned within their jurisdictions by foreign persons, and by implementing U.S.-style foreign tax credits for foreign-source income earned by their residents. Neither solution would coordinate tax policy, however, unless countries adopted and implemented the same strategy in the same way. The report was silent on the details of how those choices would be negotiated and policed.

The expert consultation left unanswered the basic question of how to achieve coordination: for that, the Financial Committee determined that “they needed not only the opinions of experts but also those of the representatives of ‘certain (European) governments.’”⁴⁷ The committee hoped that these representatives would “discuss the possibility of an agreement to enable common action to be taken upon certain points, and . . . permit the drawing up of schemes, bilateral agreements and other arrangements concerning double taxation and the evasion of taxation.”⁴⁸ The Financial Committee therefore convened an intergovernmental committee of high-level officials from Belgium, Czechoslovakia, France, Britain, Italy, the Netherlands, and Switzerland to produce a second report.⁴⁹

These national officials, linked by common purpose, expertise, and national affiliation, determined that double taxation could only be solved if countries either adopted common rules via their individual legislative processes or agreed on universal standards in the context of a treaty or series of treaties.⁵⁰ In a rhetorical move that would resonate for decades to follow, and which continues to challenge tax policy-making today, these experts expressed a preference for bilateral treaties not as a first and best choice, but primarily to protect the sovereign right of each country to

47. *Id.* at 3.

48. *Id.*

49. *Id.* (listing the affiliations as follows: Belgium’s Director-General of Direct Taxation, Czechoslovakia’s Head of Department at the Ministry of Finance, France’s Director-General of Direct Taxation, Britain’s Deputy-Chairman of the Board of Inland Revenue, Italy’s Director-General of Direct Taxation, Holland’s Director-General of Direct Taxation, Customs and Excise, and Switzerland’s Director of the Federal Taxation Department).

50.

It should therefore be understood that the recommendations on which we have agreed and which are set out in the following pages will be of no practical value unless the League of Nations adopts them, and unless the various countries themselves, in the free exercise of their sovereign powers, recognise them and obtain parliamentary approval for the laws and conventions which they will necessitate.

Id. at 6.

impose taxation at their own discretion.⁵¹ With no ready supranational authority to take control, it was apparent that someone would have to set standards, but not as clear how that would, or could, be accomplished without violating sovereign autonomy.

C. Resolution: To Remain Unresolved

The League's financial committee attempted to synthesize the issues raised in the two reports they had commissioned, but could not reach consensus. The committee therefore drew up a series of model treaties to serve as templates for bilateral treaties to be negotiated on a case by case basis among its member countries.⁵² The model format was intended to produce universal standards over time, with the idea that multiple treaties built upon a structurally similar framework would converge into a single multilateral treaty, producing uniformity in international fiscal law even without a supranational authority to issue substantive rules.⁵³ The committee expressed its hope that its series of model tax treaties would eventually "make possible the unification and codification of the rules previously laid down" in a single, binding, multilateral tax convention.⁵⁴ Eight decades after this hope was first expressed, thousands of bilateral tax treaties, as well as thousands of protocols, amendments, memoranda of understanding, and side agreements are in force. But no single, binding, multilateral income tax agreement has emerged.

Instead of moving states incrementally toward such a multilateral treaty, the model format effectively entrenched a reliance on political cooperation, perhaps even soft law, to resolve common tax governance problems. The work of the League of Nations set in place a specific format for global tax policy coordination that involved continuous interaction between government officials, experts, and the private sector. The types of mechanisms these individuals chose—models, guidelines, and other "soft"

51. Thus, the report recommended, "[S]ome system of relief should be adopted, but does not, however, define the system. It expresses a desire . . . that more bilateral conventions should be concluded." *Id.* at 8. Further, the experts stressed, "[I]n drafting these resolutions, we have endeavored to avoid all interference with national sovereignty." *Id.* at 26. The assumed importance of sovereignty is a convention that continues to present contradictions and challenges for domestic and transnational tax policy. *See, e.g.,* Ring, *supra* note 3.

52. *Report Presented by the Comm. of Technical Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.216M.85 1927 II (1927) (prepared by The Comm. of Tech. Experts on Double Taxation and Tax Evasion).

53. *Id.* at 8 (proposing temporary tax coordination models that were expected to eventually lead to a single multilateral agreement).

54. *Id.*

methods of coordinating tax strategies—have become the mode by which tax norms are now developed and transmitted as international standards.⁵⁵ The ability to mobilize and meld the private and public sector in order to create norms endures as the primary source of global tax norms today, namely, the OECD.⁵⁶

III. HOW THE OECD DEVELOPS TAX POLICY NORMS

The OECD took the lead as the main forum for transnational tax collaboration beginning in the early 1960s, and it is a critical focal point for exploring how global tax policy currently develops.⁵⁷ The OECD Secretary General views the OECD as “at the forefront of setting tax

55. I refer here both to the use of model treaties and accompanying commentaries, and to the more typical form of modeling by which one country’s practices serve as guidance to others. Using models as a mechanism for diffusing global norms may be the most important form of globalization. BRAITHWAITE & DRAHOS, *supra* note 7, at 546–47 (stating that while “there is no master mechanism of globalization,” modeling may be the most consistently important because “modeling works with a subtlety that is intriguing, and intriguingly connected to normative theories of global politics”). Convergence has been achieved on a growing list of substantive tax law practices that originated in the United States and other key states, and modeling continues to be a principal factor in continuing and increasing this convergence.

56. The United Nations currently has a permanent tax policy committee, but to date the OECD has dominated the U.N. in terms of resources and personnel dedicated to tax policy matters. One important question that remains unanswered here is why the United Nations, which was the successor institution to the League of Nations, did not continue the tax work undertaken by the League’s Financial Committee. Its failure to do so left a gap that was later filled by the OECD, a relatively much less representative body (at least in terms of global population). When the U.N. finally did begin to turn to tax matters, in response to concerns about the inappropriateness of OECD tax treaty standards to the developing world, the OECD had already positioned itself as the central institution for tax policy matters, and the U.N.’s efforts were seen by many as largely duplicative. For a discussion, see Allison Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639 (2005).

57. The OECD describes itself as a standard-setter in “the international tax world.” CURRENT TAX AGENDA, *supra* note 9, at 5. Each year, national representatives who constitute the principal decision-making group in the OECD reaffirm their view that this institution plays a critical role in developing policy in a globalized world. *See, e.g.*, Meeting of the Council at Ministerial Level, Paris, Fr., May 21–22, 1996, *Communiqué*, ¶ 14 (“Ministers conclude that the OECD is an essential component of the multilateral system . . . [with a] vital role . . . in reinforcing democracy and demonstrating the values and dynamism of the free market.”). U.S. lawmakers, though sometimes ambivalent about the direction of particular OECD initiatives, nevertheless have described the institution as an appropriate forum for building consensus positions on tax policy and vital for achieving compliance with U.S. tax law. *See, e.g.*, Margaret Milner Richardson, Comm’r, Internal Revenue Serv., Remarks at the International Fiscal Association U.S.A. Branch Annual Meeting (Mar. 2, 1995) (transcript available at <http://www.unclefed.com/Tax-News/1995/Nr95-19.html>) (“[A]ttaining international consensus on transfer pricing [through the OECD] is absolutely essential to appropriate compliance in the area.”); Stuart E. Eizenstat, Deputy Sec’y, U.S. Dep’t of the Treasury, Remarks to the Tax Executives Institute Midyear Conference (Mar. 20, 2000) (transcript available at <http://www.treas.gov/press/releases/ls476.htm>) (expressing support for use of the OECD to create consensus for taxation of e-commerce).

standards for the global economy.”⁵⁸ This intergovernmental institution is by no means the only place where transnational tax norms are currently emerging or can emerge. For instance, the United Nations has a working tax policy committee⁵⁹ and international financial institutions, especially the International Monetary Fund, have had a significant influence on tax policy, particularly in developing countries, and particularly in the case of consumption taxation.⁶⁰ In addition, interest group organizations, such as the ICC and the International Fiscal Association (“IFA”), are also important tax networks. But the OECD occupies a historically significant role in tax policy development, and this institution is increasing in importance as economic globalization continues to present tax lawmakers with new and difficult challenges.

Yet the OECD is relatively understudied and, according to some OECD officials, misunderstood.⁶¹ To understand how the OECD’s structure as a network impacts the way tax policy develops requires an understanding of its institutional design, the process by which it facilitates the transition from ideas to norms, and its role in assisting national lawmakers to achieve tax policy goals. The OECD provides much information about its institutional features on its website and in its reports, standards, and guidelines.⁶² But these documents do not convey how the OECD works in practice, and how nations use it to accomplish policy objectives.⁶³ Nevertheless, some conclusions can be drawn from a

58. CURRENT TAX AGENDA, *supra* note 9, at 8.

59. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. of Experts on Int’l Cooperation in Tax Matters, *Report on the Fourth Session*, U.N. Doc. E/C.18/2008/6 (Oct. 20–24, 2008).

60. See, e.g., Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*, 42 BRIT. COLUM. L. REV. (forthcoming 2010); Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT’L L.J. 139 (2003); Lisa Philipps & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws and the Politics of Budgets*, 34 BROOK. J. INT’L L. 797 (2009); Miranda Stewart, *Tax Policy Transfer to Developing Countries: Politics, Institutions and Experts*, in GLOBAL DEBATES ABOUT TAXATION 182 (Holger Nehring & Florian Schui eds., 2007).

61. Interviews with several OECD officials suggest that these individuals perceive practitioners, academics, and politicians as either uninformed regarding how the OECD works and what it does, suspicious of the organization as a whole, or both. Interview with OECD Official, in Ottawa, Can. (June 2, 2008); Telephone Interview with OECD Official (Oct. 7, 2008); Telephone Interview with OECD Official (Nov. 25, 2008); Interview with OECD Official, in Brussels, Belg. (Aug. 31, 2008). For a consistent account based on personal experience in the institution, see James Salzman, *Decentralized Administrative Law in the Organization For Economic Cooperation and Development*, 68 LAW & CONTEMP. PROBS. 189 (2005).

62. The OECD website is extensive and many of its publications are freely available for download. See Organization for Economic Co-operation and Development, <http://www.oecd.org> (last visited Nov. 9, 2009).

63. Participant observation would be more revealing, but at least one participant has noted that even from the inside, network-based governance is difficult to understand and explain. See Salzman,

combination of the OECD's own publicly available resources, analysis undertaken by scholars regarding the OECD's role in developing tax policy (and the role of networks generally), and the accounts of individual OECD officials themselves about what they do and how they contribute to national law-making.⁶⁴ This Part uses these resources to shed light on the integral role that transnational networks like the OECD play in developing tax policy.

A. How Networking Works: The OECD's Institutional Structure

One of the challenges of studying networks is their very nature—sprawling, fluid, and dynamic; capable of rapid change in membership, venue, and configuration; and un-tethered to national bureaucratic structures.⁶⁵ Perhaps as a result, relatively few scholars have specifically addressed the institutional or administrative aspects of the OECD: its internal structure is complex, inconsistent, and not well explained.⁶⁶ “Who does what” at the OECD varies widely based on the composition of committees, the types of issues being considered, and the role assumed by OECD employees (Secretariat) on a case-by-case basis. One OECD official suggested that the potential for confusion is high, not due to a desire for secrecy, but because the OECD's structure and operations are “quite complicated” and “hard to understand from outside.”⁶⁷ Nevertheless, the formal structure of the organization does give some clues about how this network works.

The OECD is organized under a treaty that provides for some degree of supranational authority,⁶⁸ but it is not typically viewed as an institution to which states delegate decision-making authority in order to harness “real

supra note 61 (discussing his observations from his unique position as participant-observer over ten years).

64. To collect these accounts, I have engaged in a series of interviews with current and former OECD officials as well as practitioners who have experience working with and within OECD committees. *See supra* note 61. In most cases, the subjects of these interviews have requested confidentiality. References herein reflect these requests.

65. *See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER* (2004).

66. The work by James Salzman is thus an important contribution. *See Salzman, supra* note 61.

67. Telephone Interview with OECD Official (Oct. 7, 2008), *supra* note 61 (“I don’t think the OECD is particularly secretive. But it is quite complicated. It has a strange committee structure which is hard to understand from outside. You need to bear in mind it is consensus-based. All countries have to agree on working parties, money, declarations, determinations.”).

68. The organizing document is the Convention on the Organisation for Economic Co-operation and Development, Signed December 14, 1960 in Paris, which “reconstituted” the former Organisation for European Economic Co-operation. Convention on the Organization for Economic Co-operation and Development, Dec. 14, 1960, *available at* http://www.oecd.org/document/7/0,3343,en_2649_34483_1915847_1_1_1_1,00.html.

power.”⁶⁹ Instead of exercising centralized authority,⁷⁰ OECD participants generally develop tax policy norms through collaborative consensus-building.⁷¹ Tax policy develops in three intersecting networks within the OECD structure: the OECD Council, the Centre for Tax Policy and Administration (“CTPA”), and the Committee on Fiscal Affairs (“CFA”).⁷² Interested parties from member and non-member countries participate in each of these interrelated networks, either directly, by attending committee meetings and conferences, or indirectly, by interacting with participants in other formal and informal settings. Much of the work “goes on in countless little technical committees,” but collectively these committees are incrementally constructing legal regimes.⁷³

1. Diplomatic Network: The OECD Council

The OECD Council is a network for high-level diplomats. The members of the Council are ministers of finance, economy, trade, and foreign affairs; secretaries of state; and trade commissioners.⁷⁴ The Council creates a transnational space for these high-ranking national officials to aggregate their agendas, including those on tax policy, by disseminating official statements under the auspices of the institution.⁷⁵ As a body, these officials issue consensus⁷⁶ positions in the form of statements, reports, recommendations, standards, models, and, less frequently, in the form of formal international agreements.⁷⁷ In each case,

69. *Id.*

70. See SLAUGHTER, *supra* note 65.

71. See OECD.org, What We Do and How, http://www.oecd.org/pages/0,3417,en_36734052_36761681_1_1_1_1_1,00.html (last visited Feb. 22, 2009).

72. See OECD.org, Who Does What?, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html (last visited Feb. 22, 2009).

73. BRAITHWAITE & DRAHOS, *supra* note 7, at 503.

74. For the 2008 meeting, the United States was represented by Ambassador Susan Schwab, Trade Representative; Dr. Edward P. Lazear, Chairman, Council of Economic Advisors; Ambassador Peter Allgeier, Deputy Trade Representative, Executive Office of the President; Mr. Reuben Jeffery III, Under Secretary for Economic, Energy and Agricultural Affairs, State Department; and Dr. Joseph Glauber, Special Doha Agricultural Envoy, Department of Agriculture. OECD.org, Meeting of the OECD Council at Ministerial Level 2008: Who’s Who, http://www.oecd.org/document/9/0,3343,en_21571361_40155017_40466057_1_1_1_1,00.html (last visited Feb. 22, 2009).

75. OECD member countries prefer not to have their individual contributions “out in the public domain. They want to see the OECD as a body, exerting combined activity by all OECD countries, a unified front.” Telephone Interview with OECD Official (Oct. 7, 2008), *supra* note 61.

76. At least this was the case until 2006—the OECD Council now operates by “Qualified Majority Voting” pursuant to governance changes adopted in 2006. See OECD, ANNUAL REPORT 2007, at 106 (2007), <http://www.oecd.org/dataoecd/34/33/38528123.pdf>.

77. For example, the Convention on Mutual Administrative Assistance in Tax Matters is a

the substance of these documents and statements are forged from negotiation and collaboration within designated groups and committees that are organized by OECD staff. In the area of taxation, the statements and documents are typically drafted by OECD staff members,⁷⁸ and they are typically released without attribution to any particular state.⁷⁹

High-level diplomats use the Council to direct particular projects to various subcommittees of lower-level government officials. As national representatives, the members of this network serve as the primary conduits for interaction between sovereign nations. Their function in the OECD is simply one aspect of their national roles, and tax policy is just one of many issues in which they have an interest or for which they have responsibility. For example, the United States is represented in the OECD Council by the U.S. Trade Representative and the Chairman of the Council of Economic Advisors.⁸⁰ The practical job of the OECD Council, then, is not so much to make policy itself, but to mobilize policy development by mandating the OECD staff to organize and direct committees and subcommittees, and by ultimately reviewing and signing on to the consensus positions forged within these sub-networks.

2. *Expert Network: The CTPA*

The OECD staff—its Secretariat—mobilizes projects around the goals articulated by the Council. Secretariat staffers gather government officials and experts from the member countries, as well as observers from non-member countries in some cases, to negotiate a common position in

multilateral treaty which several—but not all—of the OECD members have signed and ratified. The United States ratified this treaty in 1990. *See* Legislative Actions on Convention on Mutual Administrative Assistance in Tax Matters, <http://thomas.loc.gov/home/treaties/treaties.html> (search “Convention on Mutual Administrative Assistance in Tax Matters,” then follow hyperlink “Treaty Number 101–6”).

78. One OECD staffer stated that the input of the Secretariat varied according to committee and subject matter, but that in tax matters, the Secretariat was typically quite involved in coordinating and authoring committee documents. Interview with OECD Official (June 2, 2008), *supra* note 61.

79. In some cases, an OECD report or statement may include an individual state’s opposition to a particular policy. However, since the OECD asserts its policy to be the product of unanimity and consensus, particular statements are not typically ascribed to one country or another. *See* discussion accompanying *supra* note 67.

80. National actors have been described as locked within a “complex interdependency” that transcends particular subject areas and engenders consistent cooperation. ROBERT KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 24–29 (1977). An inquiry regarding how deliberation occurs within the OECD is therefore simultaneously an inquiry about whether and how U.S. tax policy positions transmit globally through the structure of the OECD. Inconsistency in U.S. policy regarding the OECD harmful tax practices efforts might provide some insights here, but the details of these policy inconsistencies are not well documented.

Council-mandated projects. The department of the Secretariat that directs the OECD's work on tax matters is the Centre for Tax Policy and Administration. CTPA staffers are nationals from the United States and the other member countries who are employed by the OECD to organize and coordinate tax policy development among the member countries.⁸¹ The CTPA describes itself as "economists, scientists, lawyers, and other professional staff [who] work in Paris."⁸² This thin description fails to emphasize that these are experts in their fields who are chosen on the basis of their national reputations, experience, and technical knowledge, much like their predecessors in the League of Nations.

Accordingly, the CTPA is also a transnational network of tax professionals. Most CTPA staffers are hired at the OECD after serving as senior tax officials in their home governments, and most have had experience as member-country representatives on OECD committees.⁸³ OECD staffers are sometimes referred to as international civil servants, but they are not public servants. Rather, they are employees of the OECD who carry out their work not as national representatives, but in their personal capacity. However, their former affiliation with particular nations is an important factor in shaping their perspectives. As one commentator noted:

I am sure [CTPA staffers] perceive themselves as neutral but, in fact, they almost always have come from long careers with national governments and have absorbed (and often been instrumental in forming) the institutional memory and mindset of their governments. When they come to Paris, they are free from dealing with short-term crises and policy decisions but I doubt very much they stray much from the institutional flight plan. This is particularly true because the civil servants tend to have their own long-term viewpoint and plan which does not necessarily coincide

81. OECD.org, Job Vacancies: Who Can Apply and How to Apply to the OECD, http://www.oecd.org/document/49/0,3343,en_21571361_34950072_40802801_1_1_1_1,00.html (last visited Feb. 22, 2009).

82. CURRENT TAX AGENDA, *supra* note 9, at 4; *see also* OECD.org, Who Does What, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1,00.html (last visited Feb. 22, 2009). Some OECD officials, including at least one U.S. national, work in an "OECD Centre" in another country. OECD Centres are described as "regional contacts for . . . OECD activities, from the sales of publications, to inquiries from the media, to liaison with governments, parliaments, business, labour and civil society," which "help disseminate information regarding OECD activities, and serve to communicate priorities from member countries' capitals to OECD headquarters." *See* OECD.org, OECD Centres, http://www.oecd.org/document/63/0,3343,en_2649_201185_2663871_1_1_1_1,00.html (last visited Feb. 22, 2009).

83. Interview with OECD Official (June 2, 2008), *supra* note 61.

with that of their political masters at any particular point in time. It is that long-term view that I think they bring with them to the OECD. In the short run, it may not be identical to that of the government they come from, but long-term they will reflect the thinking of their long-time friends and colleagues.⁸⁴

By working together on various committees, or otherwise interacting in the halls of the OECD offices in Paris and elsewhere, the CTPA creates a transnational legal space in which these former national representatives can apply their expertise and experience to OECD projects. The type and degree of collaboration and norm development that occur within this network are undocumented and perhaps cannot be documented except by someone within the network.⁸⁵ However, consistent with other bodies that engage in collaborative problem-solving and decision-making, it is likely that some of the mechanisms observed in other regulatory areas are duplicated here. For example, we might expect to see reciprocal adjustments (compromises made when individuals with aligned interests seek a rules-based outcome to a common problem), as well as non-reciprocal coordination (compromises that occur when individuals do not have aligned interests, but seek alliances for mutual benefit) and capacity-building (helping individuals get technical assistance to implement global standards).⁸⁶ Just as in any other legislative setting, these collaborative mechanisms impact the substance of the consensus positions reached by the OECD.

The CTPA also creates collaborative venues by convening and participating in other transnational and regional networks. These include conferences and meetings involving individual countries, regional groups of countries,⁸⁷ other transnational governmental organizations, nongovernmental organizations, and international professional associations.⁸⁸ But within the OECD itself, the CTPA's main function is to

84. E-mail from law firm partner, Toronto, Ont., to Allison Christians (Jan. 26, 2009, 12:36:35 CST) (on file with author).

85. Reflective commentary by such insiders is therefore a welcome contribution to the scholarly literature. See, e.g., Salzman, *supra* note 61; Hugh Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 BROOK. J. INT'L L. 757 (2009).

86. BRAITHWAITE & DRAHOS, *supra* note 7, at 20–26, 543–49.

87. For example, the Unit for Cooperation with Non-OECD Economies, a subgroup of the CTPA, organizes some sixty conferences per year at which experts from OECD member countries meet with tax officials from non-member countries in order to “share practical experience and expertise.” See OECD.org, Taxation in the Global Context: Developing our Co-operation with Non-OECD Economies, http://www.oecd.org/document/2/0,3343,en_2649_34897_40603330_1_1_1_1,00.html (last visited Feb. 22, 2009).

88. For example, the OECD uses meetings of the International Fiscal Association as a forum for

coordinate and manage another transnational network: the OECD Committee on Fiscal Affairs.

3. *Public/Private Network: The CFA*

The Committee on Fiscal Affairs is where the “work” of transnational networking—meeting, negotiating, comparing, drafting, and compromising—takes place. The CFA is an umbrella committee under which there are currently five “Working Parties,” two “Forums,” and at least two “ad hoc groups.”⁸⁹ The task of these committees is “to advance ideas and review progress in specific policy areas,” as determined and defined by the OECD Council.⁹⁰ To accomplish this, the CFA “brings together senior tax officials from all OECD member countries,”⁹¹—typically treaty negotiators, policy advisors, and auditors⁹²—to collaborate with experts, most of whom are from member and observer countries.⁹³ The identity of the experts is not easily accessible, as it varies across issue areas and venues, but at least some of these individuals are well known as a result of their prominence in public settings or their contributions to tax literature.⁹⁴

Unlike the diplomatic and expert networks of the OECD Council and Secretariat, whose members are current and former national representatives, the CFA network is a potentially more inclusive network.⁹⁵ Thus, “[w]hile most of the Committee’s work is undertaken by

dialogue and dissemination of OECD policy. *See, e.g.,* Lee A. Sheppard, *OECD Officials Make Annual Visit to IFA World Congress*, 2005 Tax Notes Today (Tax Analysts) 184–86 (Sept. 23, 2005).

89. CURRENT TAX AGENDA, *supra* note 9, at 5–6.

90. In the OECD structure, the CFA is one of two hundred committees that are served by, and report their work-product to, the Secretariat. *See* OECD.org, Who Does What, *supra* note 82.

91. CURRENT TAX AGENDA, *supra* note 9, at 5.

92. Interview with OECD Official (June 2, 2008), *supra* note 61.

93. CURRENT TAX AGENDA, *supra* note 9, at 5 (“[W]ork . . . is carried out by groups of experts drawn from member and observer countries as well as other non-member economies in certain cases.”).

94. For example, Professor Hugh Ault, a Senior Advisor to the CTPA, is well known for his contributions to policy-making through the OECD as a result of his extensive scholarly writings. *See, e.g.,* Hugh J. Ault, *Tax Competition: What (If Anything) To Do About It?*, in INTERNATIONAL AND COMPARATIVE TAXATION: ESSAYS IN HONOUR OF KLAUS VOGEL I (Paul Kirchhof et al. eds., 2002); Hugh J. Ault & David F. Bradford, *Taxing International Income: An Analysis of the U.S. System and Its Economic Premises* (Nat’l Bureau of Econ. Research, Working Paper No. 3056, 1989); Hugh J. Ault, *The Importance of International Cooperation in Forging Tax Policy*, 26 BROOK. J. INT’L L. 1693 (2001).

95. In the past decade the OECD has attempted to include a broader range of what they call “stakeholders,” i.e., international civil society organizations. *See* OECD.org, Civil Society, http://www.oecd.org/departement/0,3355,en_2649_34495_1_1_1_1_1,00.html (last visited Feb. 22, 2009).

government officials and the OECD Secretariat,” CFA participation extends beyond country representatives to representatives of business and trade unions, as well as officials and experts from certain non-member countries on occasion.⁹⁶ The Business and Industry (“BIAC”) and Trade Union Advisory Committees (“TUAC”) to the OECD are two professional networks that were created for this express purpose.⁹⁷ The CFA also convenes “groups and round-tables” for business and government officials to interact on a regular basis.⁹⁸ In a more recent attempt to integrate the opinions and efforts of business and government in developing tax policy norms, the CFA now “seek[s] the input of business through the publication of consultation drafts on our website.”⁹⁹

These tax policy groups form an intertwined epistemic community that holds an important and influential position in the law-making order.¹⁰⁰ Together, the CTPA (OECD employees) and the CFA (public servants or national representatives) diagnose and prescribe tax policy reforms that are informed by, and that play out within, national legal regimes.¹⁰¹ This iterative process occurs through new-governance style mechanisms, such as reflexive and open coordination and dissemination through persuasion and pressure, rather than traditional command-and-control regulation.¹⁰²

96. CURRENT TAX AGENDA, *supra* 9, at 7.

97. See BIAC.org, The Business and Industry Advisory Committee to the OECD, <http://www.biac.org> (last visited Feb. 22, 2009); TUAC.org, Trade Union Advisory Committee to the OECD, <http://www.tuac.org/en/public/index.phtml> (last visited Feb. 22, 2009). The BIAC “plays a significant role across all domains in filtering business views to the OECD.” BRAITHWAITE & DRAHOS, *supra* note 7, at 488. In tax policy, however, BIAC appears to play a particularly significant role. The intersecting memberships of professional associations such as the BIAC, the ICC, and the International Fiscal Association, while beyond the scope of this Article, might help shed light on the constituents of global tax governance.

98. CURRENT TAX AGENDA, *supra* note 9, at 6.

99. *Id.* at 7.

100. See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992) (defining an *epistemic community* as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area,” whose members hold a common set of causal beliefs and share notions of validity based on internally defined criteria for evaluation, common policy projects, and shared normative commitments).

101. OECD officials have articulated the OECD’s position as “both reactive and proactive.” Telephone Interview with OECD Official (Oct. 7, 2008), *supra* note 61.

102. See, e.g., OECD.org, OECD Information Disclosure, http://www.oecd.org/document/26/0,3343,en_2649_34495_33945946_1_1_1_1,00.html (last visited Feb. 22, 2009) (stating that the OECD produces “‘soft’ laws [that] are nonetheless effective thanks to the OECD’s highly developed process of peer review”); OECD.org, The OECD’s Peer Review Process: A Tool for Co-operation and Change, <http://www.oecd.org/peerreview> (last visited Feb. 22, 2009) (“Among the OECD’s core strengths is its ability to offer its 30 members a framework to compare experiences and examine ‘best practices’ in a host of areas from economic policy to environmental protection.”). For a comparison of

This kind of governance is shaped by the ideas, knowledge, power, capacity, and relationships of its participants. Understanding which type of tax norms emerge from the interactions that take place in these transnational networks requires identification of the participants, a means of understanding their values and beliefs, an ability to trace their internal information gathering, collaboration and decision-making activities, and a means of exploring their influence on other decision-makers.¹⁰³ All of these inquiries would contribute to our understanding of the process by which tax norms develop.

B. The Norm-Building Process: How Much Can Be Observed?

Some aspects of the process of developing tax norms is observable in an ongoing, high-profile initiative undertaken by the OECD to eliminate tax havens.¹⁰⁴ Recent news stories have highlighted the ongoing tension between wealthy (high-tax) nations such as the United States and Germany, and several small nations traditionally viewed as enablers of tax evasion, such as Switzerland, Liechtenstein, and the Cayman Islands.¹⁰⁵ For many decades, the flight of capital to tax havens was a consequence of globalization that was occasionally bemoaned, but basically sanctioned, by national governments.¹⁰⁶ However, in 1996, tax havens suddenly became a

top-down and bottom-up globalization of regulation, see BRAITHWAITE & DRAHOS, *supra* note 7, at 554.

103. See Haas, *supra* note 100, at 34; see also ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES (2004).

104. The OECD's tax haven work is one of many distinct areas of influence on tax policy, and it may not even be its most influential. Other areas that may more directly impact substantive areas of law include its work on tax treaties and transfer pricing.

105. See, e.g., Glenn R. Simpson, Evan Perez & Carrick Mollenkamp, *U.S. Tax Case Against UBS Grows Wider; Talks to Settle*, WALL ST. J., Jan. 26, 2009, at C1; Joanna Chung & Francesco Guerrero, *UBS Agrees to Pay \$780m Over US Tax Evasions*, FIN. TIMES (London), Feb. 19, 2009, at 1; Steven Rosenberg, *Liechtenstein Fury at German Tax Snoop*, BBC NEWS, Feb. 22, 2008, <http://news.bbc.co.uk/2/hi/europe/7259913.stm>.

106. Charles I. Kingson, *The Great American Jobs Act Caper*, 58 TAX L. REV. 327 (2005) (arguing that every government knows that capital is evading taxation, but the situation is quietly ignored unless and until it becomes egregious enough to stir the public consciousness); Vincent P. Belotsky Jr., *The Prevention of Tax Havens via Income Tax Treaties*, 17 CAL. W. INT'L L.J. 43, 45 (1987) ("Tax havens have existed for some time but did not begin to present themselves as a major loss of revenue problem for the United States until 1970.") (footnote omitted); Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEXAS INT'L L.J. 377, 431 (2009) ("Reasonable people can differ over whether offshore financial centers in the 1970s (or today) primarily produced tax avoidance or tax evasion, or . . . led to capital inflows or money laundering. However, regardless of the motive, as the offshore world grew in significance, it began to be perceived as a threat by onshore interests that had previously ignored it.").

matter of urgent international attention through the mechanism of the OECD.

Over the course of several years, the OECD facilitated a process that transformed the issue of tax havens and tax evasion from a vaguely articulated problem to a concrete and coordinated transnational plan of action. The urgency of the tax haven problem first surfaced in 1996, when the heads of state of the G7 countries¹⁰⁷ determined that tax havens were posing a threat to their collective financial order.¹⁰⁸ The G7 (all of which are OECD members) issued a general summons delegating the matter to the OECD for a solution.¹⁰⁹ The OECD Council delegated the task to the CTPA, which directed the CFA network to negotiate a consensus position.¹¹⁰ Using the CFA network's results, the OECD Council¹¹¹ produced a report articulating its consensus on a list of criteria to identify and counteract what it defined as "harmful" tax practices.¹¹² Subsequent OECD progress reports deemed certain regimes harmful, called for sanctions on uncooperative member and non-member states,¹¹³ and later

107. That is, the Group of Seven, a network for the finance ministers and central banks of seven industrialized countries (United States, Canada, France, Germany, Italy, Japan, and the United Kingdom)—all of which are OECD member countries. The Group of Seven was organized in 1976 and has a "prominent, if ambiguous and not easily definable role in directing and steering governance and development trajectories." ANDREW BAKER, *THE GROUP OF SEVEN I* (2006). Like the OECD, the Group of Seven uses its network to direct the development of consensus-based policies on commonly held fiscal issues.

108. These heads of state determined that "[t]ax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases." Lyon Summit, Lyon, Fr., June 27–29, 1996, *Economic Communiqué: Making a Success of Globalization for the Benefit of All*, ¶ 16.

109. *Id.* (stating that the G7 members "strongly urge the OECD to vigorously pursue its work in this field"). The OECD Council further delegated the issue to the Secretariat.

110. Meeting of the Council at Ministerial Level, *supra* note 57, ¶ 15(xv) (committing the organization to "analyze and develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions, and the consequences for national tax bases").

111. OECD reports are rarely attributed to individual contributors or authors. Reports are typically not distributed until consensus is reached among all the OECD members.

112. OECD.org, More Information on the Harmful Tax Practices Work, http://www.oecd.org/document/49/0,2340,en_2649_33745_33995569_1_1_1_1,00.html (last visited Feb. 27, 2009); *see also* OECD, *Harmful Tax Competition: An Emerging Global Issue* (Apr. 9, 1998), available at <http://www.oecd.org/dataoecd/33/1/1904184.pdf> [hereinafter *1998 Report*].

113. These sanctions were defined as "defensive measures" that member states were to take with respect to uncooperative states, including imposing penalties and other economic sanctions, cutting off "non-essential economic assistance," and other non-tax measures. OECD, Comm. on Fiscal Affairs, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*, 25–26 (2000), available at <http://www.oecd.org/dataoecd/9/61/2090192.pdf>. A 2001 OECD report reiterates that member states may use "defensive measures" against states with tax regimes deemed to be harmful. OECD, Ctr. for Tax Policy and Admin. [CTPA], *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* 13 (2001), available at <http://www.oecd.org/dataoecd/60/28/2664438.pdf>. Some practitioners suggest that the real threat presented by the OECD was "unplugging

reported on compliance.¹¹⁴ Finally, in the most recent iteration of this work, the OECD's sense of urgency on tax havens was projected by the G20, yet another intergovernmental network which comprises several OECD member nations and a select group of other countries that have been identified for possible OECD membership.¹¹⁵

Because of the OECD's work, it is now possible to identify an ostensibly global consensus on the problem of tax havens.¹¹⁶ The consensus involves a working definition of the term, a long list of countries that have taken steps to conform their rules to comply with OECD mandates, a short list of countries still considered to be tax

the offshore tax centers from the global financial grid." See, e.g., Patrick Tracey, *Int'l Taxes: Harmful Tax Competition Furor Raises Specter of Global Tax Forum*, 19 Daily Tax Rep. (BNA), at G-4 (Jan. 29, 2001).

114. See OECD, CTPA, *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report* (2004), available at <http://www.oecd.org/dataoecd/60/33/30901115.pdf> (discussing regimes that had been labeled as harmful that had been abolished or were otherwise deemed no longer to be so); OECD, CTPA, *The OECD's Project On Harmful Tax Practices: 2006 Update on Progress in Member Countries* (2006), available at <http://www.oecd.org/dataoecd/1/17/37446434.pdf> (same).

115. See What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Nov. 9, 2009) ("The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy."); see also OECD, *OECD Invites Five Countries to Membership Talks, Offers Enhanced Engagement to Other Big Players*, http://www.oecd.org/document/33/0,2340,en_2649_201185_38603809_1_1_1_1,00.html (last visited Nov. 9, 2009) ("OECD countries agreed to invite Chile, Estonia, Israel, Russia and Slovenia to open discussions for membership of the Organisation and offered enhanced engagement, with a view to possible membership, to Brazil, China, India, Indonesia and South Africa."). Each of the latter countries is a member of the G20, as is Russia. The only G20 developing country members not included in the OECD list for enlargement or enhanced engagement are Argentina and Saudi Arabia. Argentina participates as an observer on multiple committees and working parties, including in the area of tax policy. OECD, *THE OECD'S GLOBAL RELATIONS PROGRAM 2007-08*, at 18-22, 52, 109, 131, 138, 155, available at <http://www.oecd.org/dataoecd/57/5/39109041.pdf>. Saudi Arabia also appears to have some history of interaction with the OECD. See, e.g., MENA-OECD Investment Programme, Working Group 4 Meeting, Hosted by Saudi Arabian General Investment Authority (SAGIA) Feb. 7-8, 2005, Jeddah, Saudi Arabia, available at <http://www.oecd.org/dataoecd/48/16/34472285.pdf>.

116. This does not imply that the problem is solved or the consensus is static, however. Recently, several countries have expressed a renewed interest in revisiting the issue of tax havens, and recent high-profile media stories, such as those involving Liechtenstein and Switzerland, may prompt another round of consensus-building. See, e.g., David D. Stewart, *G-8 Finance Ministers to Discuss OECD Blacklist*, 2008 Worldwide Tax Daily (Tax Analysts), at 115-1 (June 13, 2008) ("At the June 13-14 G-8 Finance Ministers Meeting in Osaka, Japan, representatives will discuss a move by some members to revisit the OECD blacklist of uncooperative tax havens."); *France, Germany Led Charge for New Tax Havens Blacklist*, AGENCE FR. PRESS, Oct. 21, 2008, available at <http://afp.google.com/article/ALeqM5isimBdHGnswLKE6vRmsYeh98SyIA> ("Seventeen countries led by France and Germany decided on Tuesday to draw up a new blacklist of tax havens which could include Switzerland, in a first step toward rewriting the rules of global finance."); *Not-So-Safe Havens*, ECONOMIST, Feb. 21, 2009, at 53 ("The European Union is mounting a renewed campaign against tax havens deemed to be unco-operative ahead of a meeting of G20 countries in April.").

havens,¹¹⁷ and annual meetings to continue the effort to police the sorts of tax schemes governments may and may not pursue. Recently, the OECD Secretary General asked OECD member countries to continue to use the OECD as a source of policy in this area, with a specific request for “a mandate to OECD to produce a methodology that would produce more reliable data on the size of the [tax haven] problem, since this would provide a firmer footing for the political debate.”¹¹⁸ We may therefore expect the OECD to continue to play an integral role in the area of tax havens and tax evasion, even if we know little about how the tasks will be delegated.

The sequence of events in the tax haven initiative demonstrates that the OECD plays a facilitative role in tax policy development, but it does not reveal how ideas developed and flowed through the institution or what mechanisms led to consensus. We cannot observe, for example, why this particular issue arose for the G7 ministers when it did,¹¹⁹ who framed the areas and issues to be studied in response to the G7 communiqué to the OECD, who participated in the various levels of delegation and negotiation, or how the solutions were devised. Similarly, we cannot know what sources contributed to the development of ideas, or the interpersonal or institutional pressures that defined the range of potential policy alternatives.¹²⁰ If the debate had taken place within the U.S. law-making system, we might be able to re-create the process to some degree by consulting official records of legislative committees and public meetings.¹²¹ But the OECD is not a law-making body and is not open to direct public scrutiny in the same manner.¹²²

117. Namely, Liechtenstein, Andorra, and Monaco.

118. Angel Gurría, Sec’y Gen., OECD, Remarks at the Conference on the Fight Against International Tax Evasion and Avoidance: Improving Transparency and Stepping Up Exchange of Information in Tax Matters (Oct. 21, 2008) (transcript available at http://www.oecd.org/document/12/0,3343,en_2649_33745_41542604_1_1_1_37427,00.html).

119. Consistent with their shared political systems and intellectual backgrounds, the G7 finance ministers and central banks approach problems with a shared normative framework of economic principles that informs both what kinds of problems they identify and how they expect the problems to be addressed. BAKER, *supra* note 107, at 66 (“[T]he extent to which the G7 finance ministries and central banks share [a] basic consensus is often underestimated, while the extent to which a qualitatively different set of beliefs and principles have emerged in its place is often overstated.”).

120. Especially in the case of complex technical regulation, “ideas are political and serve political purposes, because the accompanying intellectual case and supporting evidence is often disputed or far from clear cut.” *Id.* at 66.

121. These records would probably include the names of participants, descriptions of the discussions, and drafts of documents related to, and considered in, the committee proceedings. In the United States, much of this information is readily available through a number of sources, including the websites of congressional committees, such as that of the Senate Finance Committee, at <http://www.senate.gov/~finance/sitepages/hearings.htm>; of individual members of Congress, such as that of the

Few of the internal processes by which these steps take place may thus be discerned through observation. The general public can learn about the OECD's tax policy work only by reading what the OECD chooses to publicize. This generally does not include detailed factual information about the collaborative process.¹²³ As a result, the institutional structure of the OECD produces a significant impediment to understanding how issues were chosen, what points were negotiated, how ideas developed, and what factors led to consensus.

More clues might be gathered through greater exposure to the key actors during the process of policy development, but the opportunities are limited. For example, a researcher might identify and follow a particular issue, such as the tax havens initiative, by attending various conferences where tax officials and experts present information in their capacity as OECD representatives or advisors. Some of these venues are fairly well known, such as the International Fiscal Association ("IFA").¹²⁴ However, these conferences tend to be expensive, exclusive, and aimed generally at lawyers, accountants, and particular business interests.¹²⁵ In addition, there

Chairman of the Senate Finance Committee, at <http://baucus.senate.gov/>; and of the U.S. Library of Congress website, at <http://thomas.loc.gov/>.

122. Salzman, *supra* note 61, at 218. Even so, someone determines what (and how) issues will be addressed, who will be involved, and how much information will be made public.

123. There is no lack of official reports, press releases or statements on the OECD website—the OECD publishes some 250 books per year and countless press releases, newsletters, statements, reports, and other documents, including, in some contexts, “consultation drafts” and working papers. See OECD.org, Publications, http://www.oecd.org/publications/0,3353,en_2649_201185_1_1_1_1_1_00.html (last visited Feb. 29, 2009). For example, the Forum on Tax Administration has released a series of “draft working papers,” which it describes as follows:

These draft working papers have been written by the study team for the purposes of the study. They have not been endorsed in advance by the FTA which established the study. They therefore do not necessarily reflect the views of the FTA. The study team has made them available to facilitate full consultation with business and tax intermediaries and to provide an update on the progress being made.

OECD.org, Tax Intermediaries Study: Draft Working Papers, http://www.oecd.org/document/27/0,3343,en_2649_33749_39006683_1_1_1_37427,00.html (last visited Feb. 29, 2009). The authors of these papers—the “study team”—are identified in the first working paper as “the United Kingdom and the OECD Secretariat assisted by senior representatives from Australia, Canada, Chile, France, Ireland, Mexico, South Africa, Spain, and the United States.” *How the Study Team is Working* 1 n.1 (Tax Intermediaries Study, Working Paper No. 1, 2007), available at <http://www.oecd.org/dataoecd/57/13/38393150.pdf>. Presumably we can attribute at least some of the authorship to four individuals, namely, Chris Davidson, Lisa Wise, and Simon Lake (each affiliated with the United Kingdom Inland Revenue Service), and Richard Highfield (a member of the OECD Secretariat), who are listed as contacts for the work of the study team. *Id.* at 2.

124. The OECD works closely with the IFA to direct the topics to be discussed at annual congresses.

125. For example, the cost of attendance at just the central IFA annual congress can exceed \$5,000. In addition, national chapters hold meetings within their regions, so that following a policy initiative through these networks would involve considerable effort and expense.

seem to be high personal and professional barriers to meaningful participation and interaction in these fora.¹²⁶ Finally, the ability to identify an issue as it is developing is challenging outside of “participant observation,” i.e., direct participation in the collaborative process such as in the capacity of an employee of the OECD, a national representative, or an expert consultant. Yet, outside of these large professional networks, the opportunities for empirical observation of the process of policy development appear to be remote or non-existent.¹²⁷

Only a limited understanding of the process of tax policy development through networking can be readily observed, but the inquiry clearly reveals that transnational networks like the OECD fulfill an extremely valuable function for their participants. Instead of addressing the problem of tax havens unilaterally or not at all, the United States chose to participate in the OECD’s diplomatic, expert, and national official networks as they forged a consensus position on tax havens over a period of several years.¹²⁸ Evidence of how states use the OECD helps explain how the network-based approach successfully produces and disseminates global tax norms.

126. The author’s informal and confidential discussions with participants in annual IFA meetings suggest that the amount of access to individuals and information appears directly related to the quality of an individual’s personal and professional ties.

127. This level of interaction with the public is by the design and discretion of those who make decisions within the various OECD committees. In other contexts on other committees, OECD policy work has been carried out in the context of open meetings to which non-state actors are invited, all documents are unrestricted and made available free to the public during negotiation and deliberation, and a broad and inclusive dialogue is fostered between private and public, state and non-state actors, as well as OECD and non-OECD member representatives and other interested parties with positions on all sides of the various issues being addressed. *See* Salzman, *supra* note 61 (describing OECD administrative procedures in the context of a project on standards for safety data of chemicals). That is not to say that similar openness should be the case for tax policy development. But it does suggest that it is important to understand why openness is the norm in some contexts while confidentiality is preserved in others, and who decides (and how they decide) that these should be the norms.

128. The U.S. administration apparently had a change of heart during the course of these events, leading Treasury Secretary Paul O’Neill to distance the United States from the OECD’s efforts. Press Release No. PO-366, U.S. Dep’t of the Treasury, Treasury Secretary O’Neill Statement on OECD Tax Havens (May 10, 2001), <http://www.treas.gov/press/releases/po366.htm> (“Recently, I have had cause to re-evaluate the United States’ participation in the Organization for Economic Cooperation and Development’s working group that targets ‘harmful tax practices.’”). However, this appears more to have served to redirect the OECD’s attention than to eliminate the role of the OECD in addressing tax evasion: Secretary O’Neill was careful to note his use of the G7 network to ensure that the U.S. view would be incorporated in future policy development. *Id.*

C. Evidence of Network-Driven Tax Policy Development in the United States

One means of assessing the power of transnational tax networks is to examine how lawmakers use the OECD to explain or promote national legal change.¹²⁹ In the United States, as in many countries, tax law emerges and evolves through iterative interactions among politicians, lawmakers, administrators, practitioners, taxpayers, advocates, the media, and academics.¹³⁰ Lawmakers thus represent only one aspect of policy development and legal change.¹³¹ But lawmakers are specifically called on to publicly explain the reason for legal change to their constituents. By examining the ways in which lawmakers refer to the OECD within remarks recorded as part of the Congressional Record or otherwise publicly available (such as on individual websites), we may draw some inferences regarding the utility of the network-based approach to producing tax norms.

First, U.S. lawmakers often use the OECD as a source of intellectual guidance for substantive policy choices.¹³² As one lawmaker explained in citing OECD statistics, “These figures are compiled by what is known as the [OECD]. That is a fancy name for a statistical gathering group headquartered in Paris, which all of the major countries in the world support by giving it money. It gathers statistics on wages, taxes, and

129. Because the focus here is on the use of the OECD to promote domestic legal change, the following discussion omits reference to the OECD in matters of tax treaty policy, arguably the most prevalent source of transnational influence on U.S. international tax policy.

130. For a model of the law-making process in the context of corporate insolvency regimes, see Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1147 (2007) (charting a bi-level arena of lawmaking in which various actors interact and exert influence at different stages of legal reform and development).

131. This is “tax law on the books,” identifiable by virtue of its association with traditional lawmaking authority, through national legislative, executive, and judicial processes. Halliday & Carruthers, *supra* note 130.

132. For examples outside of tax policy, see, e.g., Ambassador Susan Schwab, U.S. Trade Rep., Remarks at Media Roundtable in Washington, D.C. (June 9, 2006), available at http://web.archive.org/web/20060924213445/www.ustr.gov/assets/Document_Library/Transcripts/2006/June/asset_upload_file598_9560.pdf, at 4 (“Look at the OECD report that just was issued within the last two or three days [which says that the] bulk of the benefits from a trade round in agriculture will come from market access . . . and we have a great agreement, the one thing that came out of Hong Kong that we can all point to is the elimination of [agricultural] export subsidies by 2013. That’s the OECD study.”); 138 CONG. REC. S3,179 (1992) (using OECD statistics to compare the relative cost of prescription drugs among the United States and other OECD members when debating a prescription drug reform bill); Economic Report of the President (February 13, 2007) (transmitted to Congress, Feb. 2007) (citing, inter alia, OECD country data on oil consumption and imports/exports to explain the global economic rebalancing that took place during 2006).

everything. It is a fine group.”¹³³ Tax lawmakers have cited OECD statistics and guidance to promote technical tax changes,¹³⁴ sweeping tax reforms,¹³⁵ and even national budget strategies.¹³⁶ OECD guidance also provides shortcuts for technical definitions, such as a “foreign shipyard,”¹³⁷ a “qualified foreign government security,”¹³⁸ or a “tax haven.”¹³⁹ These may seem like mundane uses of a highly sophisticated transnational network, but the collective effect of these casual references is to position the OECD as an expert body entitled to deference.¹⁴⁰

By providing technical research and guidance, the OECD has become a credible source of information that U.S. lawmakers draw upon to “pull” norms from the global into the national arena through the mechanism of emulation.¹⁴¹ Because the OECD’s research usually involves extensive comparisons of member country practices, its guidance facilitates modeling, arguably one of the most effective forms of soft governance. For instance, outside of tax law, legislators have used other OECD countries as the benchmark for reform in issues as diverse as broadband access,¹⁴² humanitarian aid,¹⁴³ and maternity leave.¹⁴⁴ Similarly, in the area

133. 139 CONG. REC. 13,759 (1993) (statement of Sen. Packwood).

134. *See, e.g.*, Introduction to Healthy Lifestyles and Prevention America Act, H.R. 5951, 109th Cong. § 2 (2006) (introducing a bill to provide tax incentives for employers to implement wellness programs, citing the fact that the United States spends 56 percent more per capita than the OECD median).

135. STAFF OF THE JOINT COMM. ON TAXATION, 107TH CONG., DESCRIPTION AND ANALYSIS OF PRESENT LAW AND PROPOSALS RELATING TO FEDERAL ESTATE AND GIFT TAXATION (JCX-14-01) (Comm. Print 2001) (comparing OECD data on inheritance taxes in other countries to the U.S.-style estate tax); STAFF OF THE JOINT COMM. ON TAXATION, 107TH CONG., OVERVIEW OF PRESENT LAW AND ANALYSIS RELATING TO SELECTED PROVISIONS OF THE PRESIDENT’S INDIVIDUAL INCOME TAX PROPOSALS (JCX-15-010) (Comm. Print 2001) (providing data tables on U.S. tax receipts from estate, inheritance, and gift taxes relative to OECD nations).

136. 139 CONG. REC. 13,759 (1993) (citing OECD statistics regarding the connection between rising taxes and spending as a percent of GDP); *see also id.* (“The ultimate question is: In 25 years, do we want to look like Sweden?”).

137. 138 CONG. REC. H3,190 (stating that the Ship Building Trade Reform Act of 1992 defines a foreign shipyard as including one in a country that was party to an OECD agreement).

138. H.R. COMM. ON THE JUDICIARY 109TH CONG., REPORT ON BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, H.R. REP. NO. 109-31, pt. 1, at 120 (2005) (“The term ‘qualified foreign government securities’ is defined to include [securities] that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD) . . .”).

139. Letter from James White, Director of Tax Issues, United States General Accounting Office, to Henry Watman and Jim Turner, Ranking Minority Members United States House of Representatives (Oct. 1, 2002) (GAO Doc. No. GAO-03-194R), *available at* <http://gao.gov/new.items/d03194r.pdf> (using the OECD definition to explain that four of the top one hundred federal contractors are headquartered in tax havens).

140. *See supra* text accompanying note 73.

141. BRAITHWAITE & DRAHOS, *supra* note 7, at 546–47.

142. *See, e.g.*, 148 CONG. REC. S3,400 (2002) (referencing U.S. position as fourth in the OECD to

of tax policy, lawmakers promote reform in the name of aligning or competing with other OECD countries.

Sometimes these efforts appear to be very successful, such as in the case of reducing the corporate tax rate. U.S. lawmakers often compare U.S. corporate tax rates to those of the OECD in support of rate-reducing legislation.¹⁴⁵ As one senator described the issue, “tax is not merely a domestic decision anymore and that when the U.S. tax rate is at the top of OECD countries, Congress should be taking note.”¹⁴⁶ However, this success has been proven futile to the extent that the other OECD member countries are also engaged in comparison and emulation using the United States as a benchmark. Thus, the U.S. Treasury has noted:

Since 1980, the United States has gone from a high corporate tax-rate country to a low-rate country (following the Tax Reform Act of 1986) and, based on some measures, back again to a high-rate country today because other countries recently have reduced their corporate tax rates. . . . The evolution of OECD corporate tax rates over the past two decades suggests that [corporate income tax] rate setting is an interactive game subject to the pressures of international competition.¹⁴⁷

promote legislation featuring targeted subsidies for broadband access); 149 CONG. REC. S303 (2003) (citing U.S. decline relative to other OECD nations with respect to broadband development in support of a bill to provide targeted tax incentives).

143. See, e.g., 142 CONG. REC. 5,047 (1996) (citing the fact that in terms of percentage of GNP given as humanitarian aid, the United States ranks last in a list of twenty-one OECD nations).

144. See, e.g., No Child Left Behind Act of 2001, 20 U.S.C. § 6301, Pub. L. No. 107-110, 115 Stat. 1425 (June 19, 2003) (comparing OECD member country policies on childbirth leave for purposes of promoting reform in the United States).

145. See, e.g., FIN. COMM. RPT. ON THE JUMPSTART OUR BUSINESS STRENGTH (JOBS) ACT, S. REP. NO. 108-192, at 248 (2003) (stating that the U.S. corporate tax rate is too high relative to other OECD nations and therefore should be lowered); *Carried Interest, Part II: Hearing Before the S. Fin. Comm.*, 110th Cong. (2007) (Statement of Sen. Charles E. Grassley) (referring to U.S. corporate tax rate in comparison to OECD averages); 154 CONG. REC. S5,835 (2008) (noting that the U.S. corporate tax rate is currently the second highest in OECD). The fascination with rates, though they paint a woefully incomplete picture of the burden of taxation, may be related in part to a similar obsession held by the media. See, e.g., *Raiders of the Lost Taxpayer*, WALL ST. J., Jan. 30, 2009, at A12 (“[T]he U.S. 35% corporate tax rate . . . is higher than in all of Europe.”); *Export Tax Follies*, WALL ST. J., May 5, 2004, at A14 (“U.S. corporate tax rates are far higher than they should be. An OECD study before President Bush’s 2003 tax cuts showed them to be the second highest in the industrialized world.”).

146. *A Tune-up on Corporate Tax Issues: What’s Going on Under the Hood?: Hearing Before the S. Fin. Comm.*, 109th Cong. 2006 (Statement of Chairman Charles E. Grassley).

147. See, e.g., U.S. DEP’T OF THE TREASURY, TREASURY CONFERENCE ON BUSINESS TAXATION AND GLOBAL COMPETITIVENESS BACKGROUND PAPER 1, 36 (2007); see also Eoin Callan, *Greenspan Warns on Borrowing Costs*, FIN. TIMES (London), July 27, 2007, at A6 (quoting former Federal Reserve chairman Alan Greenspan as saying, “Other nations have seen the results of the bold tax

Other times, comparison to other OECD members has failed to garner sufficient support for significant legal reform to date. For instance, Congress has repeatedly pointed to the experience of other OECD countries as evidence of the need for a national sales tax.¹⁴⁸ Nevertheless, the United States remains the only OECD country without such a regime.

Norms can be pushed as well, through the kind of peer pressure that the OECD promotes as one of its most effective tools.¹⁴⁹ The OECD suggests that “recommendations resulting from [peer] review can . . . help governments win support at home for difficult measures.”¹⁵⁰ U.S. lawmakers are familiar with the use of peer pressure to compel particular policy choices. For example, in a Senate discussion regarding a proposal to eliminate government promotion of exports, the Secretary of Commerce called in from an OECD meeting to tell the Senate, “Our global competitors are laughing at us [for thinking of taking the government out of the process].”¹⁵¹ Even so, the degree to which OECD peer pressure

reforms enacted by the US in the 1980s and they have moved to follow our example. And with much of the world having reduced their corporate rates, we now have the second highest statutory corporate tax rate among OECD nations.”); Henry M. Paulson, Jr., *Our Broken Corporate Tax Code*, WALL ST. J., July 19, 2007, at A15 (“Over the past two decades, while . . . our statutory corporate income tax rate has increased, other nations have been reducing their rates to replicate our miracle. . . . It’s not surprising then, that average OECD corporate tax rates have trended steadily downward.”). Note that the last year in which the top corporate tax rate was lower than the current top rate was 1940. See Jack Taylor, *Corporation Income Tax Brackets and Rates, 1909–2002*, STATISTICS OF INCOME BULLETIN, Fall 2003, at 284, 287, available at <http://www.irs.gov/pub/irs-soi/02corate.pdf>.

148. See, e.g., STAFF OF J. COMM. ON TAXATION, 102d CONG., FACTORS AFFECTING THE INTERNATIONAL COMPETITIVENESS OF THE UNITED STATES, at Part III (Comm. Print 1991) (discussing the viability of a value-added-style consumption tax, citing their widespread use in OECD countries); Record Testimony of Treasury Assistant Secretary (Tax Policy) Samuels Before the House Ways and Means Committee (testimony to House Ways & Means Committee comparing U.S. potential for consumption tax to OECD member countries’ existing practices); James Bickley, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: VALUE-ADDED TAX AS A NEW REVENUE SOURCE, CRS REP. NO. IB91078 (2002) (discussing viability of value-added consumption taxation in the United States based on OECD member country experience); Joint Economic Committee Report: Consequences of Replacing Federal Taxes with a Sales Tax (explaining why most OECD countries have national value added taxes and quoting extensively from an OECD report on the topic); CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS (1997) (analyzing how national value added taxation would work in the United States based on OECD experience and demonstrating that twenty-five OECD nations employed national value added taxes); PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO GROWTH: PROPOSALS TO FIX AMERICA’S TAX SYSTEM (2005) (including an extensive analysis of value added tax systems in OECD countries).

149. OECD.org, What We Do and How, http://www.oecd.org/pages/0,3417,en_36734052_36761681_1_1_1_1_1_1,00.html (last visited Feb. 28, 2009) (“Mutual examination by governments, multilateral surveillance and a peer review process through which the performance of individual countries is monitored by their peers, all carried out at committee-level, are at the heart of our effectiveness.”).

150. OECD.org, The OECD’s Peer Review Process, *supra* note 102.

151. 141 CONG. REC. S7,358 (1995).

actually works to inform policy changes in the United States is not explicitly addressed by legislators, perhaps because critics may quickly raise the issue of sovereignty to defeat proposed tax reforms.¹⁵²

These examples provide circumstantial evidence that networks provide U.S. lawmakers with a toolkit of soft governance mechanisms for facilitating legal change. Politicians and legislators may use the OECD as a source of information, guidance, and even pressure, to inform national tax policy choices.¹⁵³ Of course, the path from policy development tools to the successful transplantation of norms is not clearly illuminated,¹⁵⁴ but the way individual lawmakers use institutions such as the OECD to further their tax policy goals suggests that networks may have a larger imprint on the shape of U.S. tax policy than is widely perceived.

IV. SOME IMPLICATIONS OF NETWORK-DRIVEN TAX POLICY DEVELOPMENT

Given the opaque nature of transnational networks and their relationship to national lawmaking, it is perhaps not surprising that we may underestimate the impact on national tax policy of the hundreds of

152. See, e.g., Lawrence Speer, *Conservative Think Tanks Attack OECD on Offshore Tax Scrutiny During Forum*, 219 Daily Tax Rep. (BNA), at G-3 (Nov. 15, 2005); Papali'i T. Scanlan, *Globalisation and Tax-Related Issues: What Are the Concerns?*, in INTERNATIONAL TAX COMPETITION (Rajiv Biswas ed., 2002); Video: *The Moral Case for Tax Havens* (Center for Freedom and Prosperity Foundation 2008), <http://www.youtube.com/watch?v=Xf14lkyH2dM>.

153. Although it is beyond the scope of this Article, it also bears recognizing that just as transnational networks impact U.S. tax lawmaking, the United States likewise uses these networks to effectively transmit local norms to the rest of the world. For example, U.S. lawmakers have noted how the OECD can help export certain U.S. tax rules to the rest of the world. See, e.g., I.R.S., PUBLICATION 3218, REPORT ON THE APPLICATION AND ADMINISTRATION OF SECTION 482 (Apr. 21, 1999) (discussing, inter alia, U.S. involvement in the OECD's work on adopting uniform standards for regulating electronic commerce and transfer pricing in multinational groups, and stating the intention to further contribute to the OECD to ensure international consistency in tax matters); I.R.S. Announcement No. 2000-35, 2000-1 C.B. 922 (indicating that the OECD used U.S. rules as the basis for an international standard for transfer pricing in multinational groups). In turn, the OECD asserts that its guidelines for transfer pricing in multinational groups, largely based on U.S. rules, serve "as the basis for legislation in OECD countries and an increasing number of non-OECD economies ("NOEs")." CURRENT TAX AGENDA, *supra* note 9, at 5. For a discussion of the implications of this kind of "globalized localism," see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE (1995).

154. As one OECD official explained it:

It is difficult to move from an [OECD] event . . . and trace it to the end result, where a regime comes in with particular . . . requirements within policy and legislation. . . . I would never suggest that we go in and say this is how you should do things. Obviously, we have no checkbook so we can't enforce that. But the main point is to help establish a framework of discussion, help countries to avoid the worst choices, pick up the best. The goal is framing.

Telephone Interview with OECD Official (Oct. 7, 2008), *supra* note 61.

technical tax conferences and committee meetings that take place all over the world every year. Because the network-based approach is “soft,” its procedural aspects may avoid the direct scrutiny that is applied to domestic lawmaking processes and multilateral regimes like the WTO. But the soft law approach presents challenges for monitoring the autonomy/cooperation trade-off in the development of tax policy. These challenges highlight the need for more attention to the institutions and processes through which global tax policy develops.

In contrast to domestic lawmaking and treaty-based multilateral regimes, the network-based approach to developing global tax policy norms does not formally bind states to particular actions. As a result, it is more difficult to assess whether states either should be or are in fact converging around consensus positions.¹⁵⁵ The soft governance structure thus creates a lack of clarity between tax norms and tax laws that makes it difficult to identify the factors that lead states to embrace more autonomy or more cooperation in tax policy.

Soft governance methods have engendered a great deal of uncertainty about legal status of tax norms created within the OECD,¹⁵⁶ most especially in the context of international tax treaty interpretation.¹⁵⁷ While scholars and policy-makers debate the relative merits of soft and hard coordinative methods,¹⁵⁸ practitioners and administrators must navigate the uncertainties on a daily basis. As a result, soft governance may appear suited to create tax norms, but it fails to explain as a practical matter the extent to which these norms can be reliably used as a source of legal reasoning or authority.

This uncertain legal status allows states to be opportunistic about their decision to cooperate or remain autonomous in specific tax policy matters. Cooperation appears to be most likely when like nations act in like fashion, and when they perceive that doing so will be to their long-term

155. See Christians, *supra* note 5.

156. See Beth Simmons, *International Law and International Relations*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 187, 189 (Keith E. Whittington et al. eds., 2008).

157. See *supra* note 10.

158. See, e.g., Anna di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 502 (2006): Some envisage soft law as the ideal tool for strengthening the European market, eliminating the obstacles resulting from the diversity of national laws and responding to the actual needs and demands of the business community. Others see soft law as the most effective means to implement a new social policy vision, coupling efficiency and solidarity, flexibility and security.

See also Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002); Trubek & Trubek, *supra* note 6.

interest.¹⁵⁹ By aggregating the shared tax priorities of its member states, the OECD provides these like nations with an opportunity to adopt a uniform approach.¹⁶⁰ However, these norms may be safely ignored, and even contradicted, any time it is perceived to be in the lawmaker's (or the nation's) interest to do so.¹⁶¹ A few lawmakers have explicitly recognized that the ability of states to unilaterally withdraw from a particular norm without losing their status in the network is a major impediment to achieving cooperation in taxation.¹⁶² As problems become more complex and "states are tempted to defect," the network approach can be undermined by adverse national acts or by institutional incapacity to compel compliance.¹⁶³

The impact of OECD norms is further obscured by the fact that the institutional structure and norms of the OECD do not replace, but generally work together with both national and multilateral lawmaking institutions and processes. Comparing the merits of domestic lawmaking, multilateral regime-building, and the soft governance approach of the OECD is compelling and necessary, but also challenging.¹⁶⁴ It is not always obvious what drives legal change at a given moment. As a result, it is difficult to assess whether a given tax norm is the product of OECD influence, whether a better outcome could have been achieved by employing some other means of developing tax norms, or whether the

159. See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 51–52 (1984) (“[I]ntergovernmental cooperation takes place when the policies actually followed by one government are regarded by its partners as facilitating realization of their own objectives, as the result of a process of policy coordination.” (emphasis in original)); BRAITHWAITE & DRAHOS, *supra* note 7, at 553 (“Self-regulated cooperation without enforcement by a leviathan is possible . . . ‘when there is a commitment to follow the rules so long as (1) most similarly situated individuals adopt the same commitment and (2) the long-term expected net benefits to be achieved by this strategy are greater than the long-term expected net benefits for individuals following short-term dominant strategies.’”).

160. This may occur in part because “dialogue that enables an issue to be defined as a problem constitutes incentives to subscribe to a global regime.” BRAITHWAITE & DRAHOS, *supra* note 7, at 553.

161. See, e.g., Pierre-Hughes Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT’L L.* 113, 115 (2009). A related implication is that the more nations diverge in their core approach to economic and fiscal policy, the less useful the network may be in achieving consensus. The inclusion of new nations in an existing network with the intention of broadening compliance with existing norms might therefore make it more difficult to settle on norms in the future.

162. See *supra* note 128 (discussing the change in U.S. policy toward the OECD’s harmful tax practices initiative).

163. Verdier, *supra* note 161, at 115. For an example in a non-tax context, see 142 *CONG. REC.* S10,256 (1996) (presenting an argument from Senator Moynihan that a proposal is diametrically opposed to an agreement the United States is trying to arrange through the OECD).

164. For a discussion of the analytical limitations presented by the inability to compare institutional alternatives, see KOMESAR, *supra* note 32.

various stakeholders—governments, businesses, or individuals—should mobilize scarce resources toward hard or soft modes of legal change.¹⁶⁵

Finally, the OECD's success in developing tax policy norms may alternately invigorate or constrain national legal change, depending on factors such as status and power within the network.¹⁶⁶ As the U.S. experience with corporate tax rates suggests, comparison and emulation can lock countries into ongoing and unwinnable regulatory races.¹⁶⁷ While the United States voluntarily participates in drafting the set of global tax norms that have fostered this competition, the competition extends globally.¹⁶⁸ The OECD has therefore begun to acknowledge that its ability to claim that its norms are “internationally agreed” requires participation from more than its member states.¹⁶⁹ However, increased participation may decrease the ability to achieve cooperation through soft governance, to the extent that new participants are insufficiently “alike” to engender cooperation.¹⁷⁰

Clearly, network-driven policy development presents a broad spectrum of implications for legal change both within the countries that participate directly and those with more peripheral status. The tensions raised here may be among the most observable, but many more are likely to surface as governments continue to navigate the ever-increasingly challenging terrain

165. An additional unexplored phenomenon of soft governance is that mismatches in information by stakeholders with different resources might alternatively introduce specialized interest group bias or majoritarian bias, thus creating additional layers of analytical complexity for scholars, practitioners, and policymakers alike. *See id.*

166. *See, e.g.,* Alex Cobham, *The Tax Consensus Has Failed!*, OCGG ECONOMY RECOMMENDATION No. 8 (2007) (“The tax consensus must be consigned to history—to allow countries to re-establish policy space and put a range of options back on the table.”); Christians, *supra* note 60. A few scholars have focused on how constraining tax norms are exported to developing countries through institutions such as the IMF and the World Bank. *See, e.g.,* Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT'L L.J. 139 (2003); Lisa Philipps & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws and the Politics of Budgets*, 34 BROOK. J. INT'L L. 797 (2009); Miranda Stewart, *Tax Policy Transfer to Developing Countries: Politics, Institutions and Experts*, in GLOBAL DEBATES ABOUT TAXATION 182 (Holger Nehring & Florian Schui eds., 2007).

167. *See supra* text accompanying note 145.

168. *See, e.g.,* VITO TANZI, TAXATION IN AN INTEGRATING WORLD 233 (1995) (Global tax trends are “reducing excessively the policy maker’s discretion about the tax systems that they can have in their countries.”).

169. Jeffrey Owens, *Enlargement of the OECD: Challenges and Opportunities*, presentation at The OECD’s Evolving Role in Shaping International Tax Policy, Washington D.C., June 2, 2009 (powerpoint materials on file with author).

170. *See supra* text at note 159. A few non-member states currently participate in OECD policy deliberations, albeit as “observers” rather than members, while others participate in some capacity through the OECD’s Centre for Cooperation with Non-OECD Economies. These opportunities may allow less developed countries to participate in global tax dialogue, but it is not clear whether they will ultimately influence OECD tax policy norms.

of economic globalization. More analysis is needed to identify and assess the implications of using networks, rather than other institutional mechanisms and processes, to achieve national tax policy goals.

V. CONCLUSION

Transnational networks are busy producing tax norms that impact national tax policy decisions. Using these networks, individuals are not intellectually or professionally confined to domestic society or its institutions, but are integrated into a mechanism for creating global consensus on particular issue areas. At the same time, the soft nature of the norms produced in networks ensures the competing goals of national autonomy and effective tax regulation through cross-border cooperation are constantly subject to negotiation. But the very qualities that allow networks like the OECD to foster collaboration appear to prevent meaningful access to their structure and processes: their power- and personality-driven nature makes them neither easily accessible nor well understood. If we want to understand how lawmakers develop national tax policy norms, we need a better understanding of the role of transnational networks in producing tax governance norms.