

NETWORKS, NORMS AND NATIONAL TAX POLICY

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ABSTRACT

Global economic crisis demonstrates how critical it is for nations to determine ways to solve problems cooperatively. Tax experts have traditionally facilitated cooperation by participating in transnational networks, where they compare ideas and reach consensus on how nations can tax effectively. But while the merits of the norms developed by these tax networks have prompted much scholarly analysis, little is understood about the nature and function of the networks themselves. This Article argues that participants in networks use “soft law” mechanisms such as shared expertise, voluntary cooperation, and emulation to achieve tax policy convergence while preserving national autonomy. It analyzes how networks facilitate this convergence by drawing upon the institutional structure and processes of norm development and by examining evidence of the functionality of networking in U.S. law-making. It concludes that understanding why and how we use networks to produce tax norms is critical to ensure that law-makers have the tools necessary for developing effective national tax policy in a globalized world.

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I. INTRODUCTION

The current global economic crisis has taught us that nations cannot afford to be isolated in their efforts to develop effective regulatory policy. As the United States struggles to lead a global effort aimed at alleviating the crisis through targeted tax strategies, it is increasingly obvious that nations must determine ways to solve problems cooperatively.¹ Tax experts have traditionally facilitated such cooperation by participating in transnational networks, where they compare ideas and reach consensus on how nations can tax effectively.² But while the merits of the policy norms developed by these transnational tax networks have prompted volumes of scholarly analysis, little is understood about the nature and function of the networks themselves.

Understanding why and how we use transnational networks to produce tax norms is critical to ensure that law-makers have the tools necessary for developing effective national tax policy.³ Assessing the merits of tax norms requires an analysis of their origin and context. We need to understand why norms emerge through networks, how these networks function, and what the implications are for national law-making. One of the challenges of studying networks is their very nature—

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. 29, 2009, *available at* http://www.economist.com/finance/displaystory.cfm?story_id=13035552 (“[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.,* Treasury Department News Release, No. HP-1060, Statement for the Record of the Senate Committee on Finance Hearing on International Tax Reform Held on June 26, 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 *See infra* Part II (discussing these networks and their participants).

³ Of course, this is not to claim that all tax law-making is global, but rather to suggest that some tax law-making perceived as national is in fact global. *See* JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 3, 486 (Cambridge Univ. Press 2000).

sprawling, fluid, and dynamic; capable of rapid change in membership, venue, and configuration; and un-tethered to national bureaucratic structures.⁴ Despite these elusive features, we may begin to understand the power of networks and tax norms by focusing on the dominant institutions and their participants.

Arguably, the most important network for tax policy development today is the Organisation for Economic Cooperation and Development (OECD), whose membership comprises thirty of the world's largest economies, including the United States.⁵ The OECD is an inter-governmental organization that facilitates collaboration among official representatives and private-sector experts.⁶ Its central collaborative role has led the OECD to describe itself as a "market leader in developing tax standards and guidelines."⁷ This suggests there is a competitive market for tax policy, the OECD is a dominant supplier, and nations are its consumers. The OECD hosts hundreds of meetings around the world and issues hundreds of documents that address tax policy issues every year.⁸ This institution thus provides a vivid example of when and how nations look past their own borders to solve tax governance problems.

The OECD facilitates tax policy development by producing nonbinding (or "soft") standards, reports, statistics, and guidelines that allow nations to converge around norms without submitting to top-down

⁴ See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

⁵ See, e.g., BRAITHWAITE & DRAHOS, *supra* note 3, at 3, 486 ("[A]cross the spectrum of regulatory activity, the OECD plays a distinctively important role."); Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003) (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*, 89 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).

⁶ 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 February 22, 2009) (IFA membership list available only to subscribing members).

⁷ OECD, THE OECD'S CURRENT TAX AGENDA 74-75 (2008), available at <http://www.oecd.org/dataoecd/38/17/1909369.pdf>.document/26/0,3343,en_2649_34897_31920090_1_1_1_1,00.html.

⁸ OECD.org, *supra* note 6.

regulation.⁹ The implication is that nations prefer to achieve tax policy convergence through “soft law” mechanisms such as shared expertise, voluntary cooperation, and emulation¹⁰ over a strictly “hard” law format, such as a multilateral tax coordination regime.¹¹ The soft-law approach allows nations to continuously negotiate their acquiescence to global standards and preserve a sense of autonomy in decision-making, even while generally stepping in line with transnational norms.¹²

Soft governance thus facilitates transnational tax collaboration, but does so in a way that is consistent with an entrenched conventional view

⁹ This in contrast to a harder structure involving delegation of authority to a supranational body such as is characterized by the World Trade Organization (WTO). See SLAUGHTER, *supra* note 4.

¹⁰ Some 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., Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850 (1989); David Trubek et al., “Soft Law,” “Hard Law,” And *European Integration: Toward a Theory of Hybridity*, in NEW GOVERNANCE AND CONSTITUTIONALISM (Scott & Burca 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 WISC. INT’L L.J. 325 (2007).

¹¹ 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*, COL. J. EUR. L. (2007); Louise Trubek, *New Governance and Soft Law in Health Care Reform*, IND. HEALTH L. REV. (2006); Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago’s Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL’Y (forthcoming) (2009); Gregory Shaffer & Kalypso Nicolaidis, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in LAW AND CONTEMPORARY PROBLEMS (2005); Richard H. Thaler & Cass R. Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); Judd F. Sneirson, *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 Brauner, *supra* note 5 (arguing for “a gradual and partial rule-harmonization effort led, preferably, 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: WHY THEY ARE A PROBLEM AND WHAT WE CAN DO ABOUT IT* 49 (AEI Press 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.”).

¹² See, e.g., Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447 (2006) (“[G]lobalization is contested and negotiated.”).

that holds tax regulation sacrosanct to the nation-state.¹³ The trend toward soft forms of global tax governance is likely inevitable, because the traditional isolationist view is fundamentally incompatible with the reality of globalization.¹⁴ However, soft governance poses its own challenges for national law-makers, who must determine, with little guidance, the legal status of norms that emerge from transnational networks.¹⁵ This challenge is amplified as nations must increasingly rely on specialized experts to navigate the complexities of effective regulation in the context of a global economy.

The more globalization challenges the ability of individual nations to regulate effectively, the more critical it is to understand why tax policy develops in networks, how these networks produce norms, and what the implications are for national law-making. That is the aim of this Article. 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 we observe today. Part III analyzes how the OECD facilitates transnational tax policy coordination by drawing upon its institutional structure and processes of norm development, and by examining evidence of its functionality in U.S. law-making. Part IV examines some of the implications of the trend toward network- and norm-based tax governance. Part V concludes that understanding why and how we use networks to produce tax norms is critical to ensure that law-makers have the tools necessary for developing effective national tax policy.

¹³ See, e.g., Diane M. Ring, *What's at Stake in the Sovereignty Debate*, 49 VA. J. INT'L L. 155 (2008); Allison Christians, *Sovereignty, Taxation, and Social Contract*, 18 MINN. J. INT'L L. 99 (2009).

¹⁴ For a similar situation in the context of bond and e-commerce markets, see Christopher M. Bruner, *States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization*, 30 MICH. J. INT'L L. 125, 126 (2008) (identifying U.S. attempts to navigate tensions between Westphalian sovereign autonomy and economic globalization).

¹⁵ 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* (2008), available at www2.wu-wien.ac.at/taxlaw/publikationen/LangBrugger_australianforum_95ff.pdf; Frank Engelen, *Some Observations on the Legal Status of the Commentaries on the OECD Model*, 60 BULL. INT'L TAX 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 AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW* (2007).

II. WHY TAX POLICY DEVELOPS IN NETWORKS

Given the challenges involved in effectively imposing taxation in an economically globalized world, it seems inevitable that nations will be forced to coordinate their tax policy.¹⁶ But coordination is complicated by an entrenched view that nation-states are entitled to autonomy in tax law and policy-making.¹⁷ Mobilizing coordination through transnational networks is one way to reconcile the incompatibilities between economic globalization and ideas about sovereign entitlement. In taxation, this form of problem-solving appears to be the preferred approach.¹⁸

The history of tax policy coordination suggests that transnational networks became the preferred means for solving common tax problems when nations began to rely upon income taxation as their principal source of revenue. Adopting income taxation created a need for a new and significant transnational cooperation because nations tended to define income in ways that virtually guaranteed overlap with other national definitions.¹⁹ The resulting “double taxation” would make operating abroad potentially very expensive, curtailing potential for foreign export and investment-led growth.²⁰ Some nations, the United States chief

¹⁶ At the very least, nations need to respond to jurisdictional overlaps as people, goods, and transactions flow across borders. More fundamentally, tax policies adopted by one nation can have far-reaching effects on others, such as in the case of tax havens. *See infra* Part III. Nations can prevent overlapping taxation unilaterally, but the effort usually comes at a significant revenue cost if other nations do not take similar measures. *See* Allison Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 *BROOK. L. REV.* 639–713 (2005).

¹⁷ In prior work, I examined the problematic convergence of sovereignty and autonomy that seems prevalent in tax policy discourse. *See* Christians, *supra* note 13. For an alternative view, see Ring, *supra* note 13. For a classic treatment, see JOSEPH A. SCHUMPETER, *THE CRISIS OF THE TAX STATE* 33 (1918).

¹⁸ The network approach described here stands in contrast to the way nations have approached coordination over trade taxation, namely, the hard-law regime of the WTO. Instead of forging agreement in a multilateral treaty and using international tribunals to review and arbitrate violations of agreed-upon legal precepts, nations have turned to network-based collaboration for tax law and policy coordination outside the area of trade. 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 McDaniel, *The Pursuit of National Tax Policies in a Globalized Environment: 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).

¹⁹ For example, the United States defines income as “income from whatever source derived,” which includes income earned in foreign jurisdictions. I.R.C. § 61 (2009).

²⁰ *See, e.g.*, Stanley Surrey, *Preface*, in ELISABETH A. OWENS, *THE FOREIGN TAX CREDIT*, at vii (1961) (“[I]t is this foreign tax credit device which makes United States

among them, responded to the overlap by unilaterally adopting a credit system for allocating taxation among competing jurisdictions.²¹ Other nations—including several of the United States’ major trading partners—rejected the need for allocation.²² Law-makers desired to resolve this conflict through transnational coordination, but they also wanted to retain national autonomy over income tax policy.²³ Their solution was to reconcile their competing goals through soft methods of coordination, such as collaboration, joint reports, modeling, and emulation.²⁴

We may thus effectively trace a path from today’s soft tax governance structure back to the efforts of a few small groups of tax policy experts who, in the early 1900s, created intergovernmental and nongovernmental networks to resolve specific tax policy conflicts while jealously guarding their independence.²⁵ The challenges these individuals faced, the structures they created, and the solutions they proposed demonstrate the tensions that continue to characterize tax policy coordination among sovereign nations in a globalized world. These experts developed a network-based approach that remains the dominant mechanism for tax policy coordination today.

A. COLLISION OF NATIONAL INCOME TAX BASES

In effect, tax policy became a transnational subject when the United States and its major trading partners adopted overlapping forms of

trade and investment abroad possible in the twentieth century tax world—a world in which income taxes at high rates are the central theme.”).

²¹ The U.S. rules for foreign tax credits may be found in I.R.C. § 901 *et seq.*

²² The position of other countries, Britain chief among them, was that the taxpayer’s country of residence had the greater claim to tax revenues, so the country where the income was derived ought to cede its right to tax. This position was supported by countries like the Netherlands, which did not tax the foreign income of its residents. *See* Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1046 (1997).

²³ The importance of sovereignty as a hurdle to coordination is highlighted throughout historical tax records. *See, e.g.*, Committee of Experts on Double Taxation and Tax Evasion, REPORT AND RESOLUTIONS SUBMITTED TO THE FINANCIAL COMMITTEE OF THE LEAGUE OF NATIONS 5, League of Nations Doc. C.115. M.55. 1925 II (1925) (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).

²⁴ Intellectual development regarding the distinction between hard and soft tax law seems to have taken place largely after the events described here. For a discussion, see Anna diRobilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499 (2006). Accordingly there appears to be no contemporaneous literature or commentary addressing the soft nature of these solutions.

²⁵ *See, e.g.*, Ring, *supra* note 13.

income taxation.²⁶ The United States was one of the first to adopt a modern national income tax on a “worldwide” basis, meaning that it imposed taxation on income from all sources, whether domestic or foreign.²⁷ 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 a deduction from income for foreign taxes paid.²⁸

However, as tax rates rose and international commercial activity increased exponentially over the course of World War I the deduction came to be seen as inadequate.²⁹ Apparently on the advice of a single tax expert,³⁰ Congress responded by adopted a credit for taxes paid to foreign jurisdictions rather than a mere deduction.³¹ The United States was the first and only country to provide this kind of comprehensive foreign tax credit.³² Under the new rules, although the United States nominally

²⁶ A “tragedy or scandal or crisis” is frequently required to trigger legal change. 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, 1146–47 (2007). The language of crisis is reflected in the documentation of the international regimes that were created to address the newly emerging issue of double taxation; certainly, the world was in economic crisis and taxation was perceived as one factor that could contribute to or impede economic progress.

²⁷ 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.

²⁸ Revenue Act of 1913, ch. 16, § IIB, 38 Stat. 144.

²⁹ See Owens, *supra* note 20, at 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 simply reduced 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.

³⁰ Namely, T.S. Adams. Graetz & O’Hear, *supra* note 22.

³¹ H.R. REP. NO. 767, 65th Cong., 2d Sess. 11 (1918). A credit is generally more beneficial than a deduction because the deduction merely reduces the income subject to taxation while the credit creates a dollar-for-dollar reduction in tax due. For example, assume a person earns \$100 in income and is subject to a 25% tax. With neither a deduction nor a credit, the person owes \$25 in tax. With a \$25 deduction, the income is reduced to \$75, and the tax of 25% now yields a tax due of \$18.75, a savings of \$6.25. With a credit of \$25, however, the \$25 of tax is eliminated all together.

³² See Owens, *supra* note 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 the means of relieving international double taxation of income.”); see also Graetz & O’Hear, *supra*

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 profitable for other nations to impose creditable taxes on income earned by U.S. investors in their jurisdictions.³³ The U.S. regime was therefore seen as a “present of revenue to other countries.”³⁴

In stark contrast to the generosity of the U.S. foreign tax credit, most other countries did not address the problem of overlapping income taxation at this time.³⁵ For example, Britain imposed worldwide taxation, but provided only a partial foreign tax credit against income derived within its Empire.³⁶ 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 tax policies adopted by the United States and Britain thus fundamentally conflicted over the issue of which country—that of the taxpayer’s residence or that which produced the income—should cede its right to tax. The conflict prompted the emergence of the first transnational tax network.

B. EARLY NETWORKS: FORUM FOR DEBATE AMONG TECHNICAL EXPERTS

Debates about the primary right to tax initially took place within the newly formed International Chamber of Commerce (ICC), a non-governmental network of business executives.³⁷ This network brought together “responsible business leaders” from the United States, Britain,

note 22, at 1023; H. David Rosenbloom & Stanley I. Langbein, *United States Tax Treaty Policy: An Overview*, 19 COL. J. TRANSN’L L. 359 (1981).

³³ 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 (1996) (“Neutrality depends on who pays what tax, not which government collects it.”).

³⁴ EDWIN R.A. SELIGMAN, *DOUBLE TAXATION AND INTERNATIONAL FISCAL COOPERATION*, 133–35 n.10 (1928).

³⁵ 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 32, at 361.

³⁶ See Graetz & O’Hear, *supra* note 22, at 1046.

³⁷ The ICC was organized in 1919 with members from Belgium, Britain, France, Italy, and the United States. See INTERNATIONAL CHAMBER OF COMMERCE CONSTITUTION, available at http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/2008.pdf.

and several other countries to collaborate on common issues of interest, including possible solutions to the problem of double taxation.³⁸ The identities of the particular individuals who worked in the ICC seem to be lost to history,³⁹ 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.”⁴⁰ The ICC provided a forum for the United States and fourteen other member countries to come to consensus over the divisive issue of jurisdictional primacy.⁴¹

While business leaders were using the ICC to work out consensus on tax policy, a major shift in intergovernmental relations was taking place as a result of World War I. The Treaty of Versailles ended the war and created the League of Nations, a diplomatic intergovernmental network aimed at controlling conflict and promoting peace between states, albeit without the formal participation of the United States.⁴² At a meeting in Brussels, the delegates to the League of Nations declared that double taxation was a serious impediment to international relations and world production, and therefore a threat to global peace.⁴³ The League’s method for solving the problem was to form a financial committee, which

³⁸ See ICC90anniversary.org., Launch of the ICC Research Foundation, <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’”).

³⁹ 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 CDN. TAX J. 907 (2006).

⁴⁰ ICCWBO.org, The ICC’s Origins, <http://www.iccwbo.org/id93/index.html> (last visited Feb. 22, 2009).

⁴¹ 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. The ICC ultimately came to consensus in 1923, when it issued a new resolution on jurisdictional primacy.

⁴² The United States failed to ratify the Treaty of Versailles after the Senate refused its consent. This failure has been described as “the fuse which exploded twenty years later in the century’s second catastrophic global conflict.” See Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 969 (“Many believed that this failure—and the resulting interwar isolation of the United States, including its nonparticipation in the League of Nations [lit this fuse.]”).

⁴³ *Reports Presented by Bruins et al. on Double Taxation*, League of Nations Doc. E.F.S. 73 F.19 II (1923).

commissioned various reports regarding the best method of preventing double taxation,⁴⁴ using the ICC's prior work as a basis for discussion.⁴⁵

A team of four individuals selected by the financial committee produced the first of these reports in 1923.⁴⁶ The team consisted of 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. Each was chosen for their respective reputations as public finance, economics, and tax experts, as well as for their national affiliations. Thus Bruins was a monetary expert who later served as a League of Nations commissioner and as a technical advisor to Austria.⁴⁷ 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.⁴⁸ Edwin R. A. Seligman was a public finance, economics, and tax expert, one of the founders of the American Economic Association,⁴⁹ and the author of several prominent (now classic) articles and books on taxation.⁵⁰ 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.⁵¹

These noted and prominent economists asked, "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?"⁵² Framing the question in this way suggests that these authors held an underlying assumption that tax policy was expected to emerge in the form of aligned, but voluntary and unilateral,

⁴⁴ See *id.*

⁴⁵ See Graetz & O'Hear, *supra* note 22 at 1067-70 (suggesting that language in reports produced under the ICC's collaborative efforts resurfaced in League of Nations discussions).

⁴⁶ See *Reports Presented by Bruins et al. on Double Taxation*, *supra* note 44.

⁴⁷ See GIANNI TONIOLO AND PIET CLEMENT, *CENTRAL BANK COOPERATION AT THE BANK FOR INTERNATIONAL SETTLEMENTS, 1930-1973* (Cambridge 2005).

⁴⁸ Columbia Encyclopedia (6th ed. 2001); BRITANNICA CONCISE ENCYCLOPEDIA (2006), available at <http://www.britannica.com/EBchecked/topic/181310/Luigi-Einaudi>.

⁴⁹ LYMAN ABBOTT ET AL., *NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY* 49 (J.T. WHITE & CO. 1900).

⁵⁰ See e.g., *THE SHIFTING AND INCIDENCE OF TAXATION* (1892); *PROGRESSIVE TAXATION IN THEORY AND PRACTICE* (1894); *ESSAYS IN TAXATION* (1895); *THE INCOME TAX* (1911); *The Cost of the War and How It Was Met*, 9 AM. ECON. REV. 749 (1919).

⁵¹ J. HARRY JONES, *JOSIAH STAMP, PUBLIC SERVANT: THE LIFE OF THE FIRST BARON STAMP OF SHORTLANDS* (Sir Isaac Pitman & Sons 1964).

⁵² *Reports Presented by Bruins et al. on Double Taxation*, *supra* note 43 at 2.

state action rather than delegation to a supranational authority. Even so, while the authors' suggested methods of addressing double taxation offered different technical solutions, each would require some as yet unnamed person or body to set uniform standards for adoption by individual states.⁵³ Thus, 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.⁵⁴ These solutions, though ostensibly unilateral, would involve states choosing and implementing a uniform strategy.⁵⁵ The report was silent on the details of how those choices would be negotiated and policed.

The League of Nations' Financial Committee determined that "in order to arrive at any real solution" of their common tax governance issues, they needed not only the opinions of non-governmental experts but also that of the representatives of "certain (European) governments."⁵⁶ 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."⁵⁷ To that end, the Financial Committee convened an intergovernmental committee of high level officials from Belgium, Czechoslovakia, France, Britain, Italy, the Netherlands, and Switzerland, to produce a second report.⁵⁸

These officials, linked by common purpose, expertise, and national affiliation, met five times over two years and determined that double

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Thus, states could uniformly implement residence-based jurisdictional primacy by 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 source-based jurisdictional primacy by 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.

⁵⁶ *Reports Presented by the Comm. of Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.115.M.55. 1925 II (1925).

⁵⁷ *Id.*

⁵⁸ *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).

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.⁵⁹ In a rhetorical move that would resonate for decades to follow and which continues to exacerbate tax policy-makers, these experts expressed a preference for bilateral treaties not as a first-best choice but primarily to protect the sovereign right of each country to impose taxation at their discretion.⁶⁰ Lacking supranational authority, 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. THE EXPERTS' RESOLUTION: TO REMAIN UNRESOLVED

The League's financial committee attempted to synthesize the issues raised in these two reports, but the alternative solutions and the tax systems of the key players were so distinct as to defy consensus. The committee therefore drew up a series of model treaties to serve as guidelines for its member countries to adopt.⁶¹ The committee chose the model format under the theory, that over time, the presence of multiple similar treaties would converge in a single multilateral treaty and thereby introduce uniformity in international fiscal law even without a supranational authority issuing substantive rules.⁶² The committee expressed its hope that the models would eventually "make possible the unification and codification of the rules previously laid down" in a single multilateral tax convention.⁶³

Instead, the decision to use model treaties effectively entrenched a reliance on diplomatic and political cooperation, perhaps even soft law, to

⁵⁹ *Reports Presented by the Comm. of Experts on Double Taxation and Tax Evasion*, supra note 56 ("It should therefore be understood that the recommendations on 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.")

⁶⁰ 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 13.

⁶¹ *Reports Presented by the Comm. of Technical Experts on Double Taxation and Tax Evasion*, League of Nations Doc. 1927.II.40 (1927).

⁶² *Id.* (proposing temporary tax coordination models that were expected to eventually lead to a single multilateral agreement).

⁶³ See *id.*

resolve common tax governance problems. Thus, no comprehensive multilateral convention exists eight decades after this hope was expressed. However, the use of networks, especially for modeling purposes, has served as a powerful mode of tax norm transmission.⁶⁴ Tax policy development from the ICC to the League of Nations draws a path toward the soft global tax governance that is observable today, in which governmental and nongovernmental interactions are viewed as key to effective problem solving. This early consensus set the stage for more extensive transnational collaboration going forward. Accordingly, the dominant venues for tax policy collaboration have largely been nonbinding, norm-creating networks, especially the OECD.⁶⁵

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 tax policy currently develops within transnational networks.⁶⁶ The OECD Secretary General views the OECD “at the

⁶⁴ I refer here both to the use of model treaties, 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 3 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.

⁶⁵ The United Nations currently has a permanent tax policy committee, but to date the OECD has dominated the UN in terms of resources and personnel dedicated to tax policy matters.

⁶⁶ The OECD describes itself as a standard setter in “the international tax world.” CTPA, CURRENT TAX AGENDA (2008), *available at* <http://www.oecd.org/dataoecd/38/17/1909369.pdf> [hereinafter, CTPA 2008 AGENDA]. 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*, at 1 (May 21–22, 1996), *available at* <http://www.g7.utoronto.ca/oecd/oecd96.htm> (last visited Feb. 29, 2009) (“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. law-makers, 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.,* Remarks by Margaret Richardson, Commissioner, IRS, Address at the International Fiscal Association U.S.A. Branch Annual Meeting (Mar. 2, 1995) (“attaining international consensus on transfer pricing [through the OECD] is absolutely essential to appropriate compliance in the area”); Remarks of Stuart E. Eizenstat’s, Deputy Secretary, U.S. Treasury Dep’t., Address to the Tax Executives Institute Midyear Conference (Mar. 20, 2000) (Expressing support for use of the OECD to create consensus for taxation of e-commerce).

forefront of setting tax standards for the global economy.”⁶⁷ This intergovernmental institution is by no means the only place where transnational tax norms are currently emerging or can emerge. For instance, tax experts at the United Nations are arguably making a renewed effort to influence the direction of tax policy,⁶⁸ and nongovernmental organizations, such as the ICC and the International Fiscal Association (IFA), are also important tax networks. But the OECD occupies an historically significant role in tax policy development, and this institution is increasing in importance as economic globalization continues to present tax law-makers with new and difficult challenges. Certainly, no analysis of how tax policy develops today could ignore the status of this organization as a central player.

III. HOW NETWORKS DEVELOP TAX POLICY NORMS

Networks are said to give nations the power to reconcile national sovereignty with the need to regulate in a global economy.⁶⁹ According to proponents of network-based governance, they do this by being “fast, flexible, cheap, and potentially more effective, accountable, and inclusive than existing international institutions.”⁷⁰ Whether these promises hold true depends on how these networks work and how nations use them to achieve goals. The OECD, though it plays a major role as a venue for networking on tax policy,⁷¹ is relatively understudied and, according to some OECD officials, misunderstood.⁷² We might better understand how networks like the OECD contribute to tax policy development by becoming familiar with their institutional structures, observing the process by which they facilitate the transition from ideas to norms, and exploring how nations use them to achieve tax policy goals.

⁶⁷ CTPA 2008 AGENDA, *supra* note 66, at 9.

⁶⁸ See, e.g., MICHAEL MCINTYRE, UN GROUP OF EXPERTS REPORT ON BEST PRACTICES IN TAX COMPETITION (2008).

⁶⁹ See Anne Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS (M. Byers ed., Oxford Univ. Press 2000).

⁷⁰ *Id.* at 191.

⁷¹ See *supra*, text at notes 66–68.

⁷² Interviews with several OECD officials suggest 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) (notes on file with author); Telephone Interview with OECD Official (Oct. 7, 2008) (notes on file with author); Telephone Interview with OECD official (Nov. 25, 2008) (notes on file with author); Interview with OECD Official, Brussels, Belgium (Sept. 4, 2008) (notes on file with author). 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 DUKE J.L. & CONTEMP. PROB. 189 (2005).

The conundrum for scholars and tax policy-makers alike is that the very qualities that allow networks to foster collaboration appear to prevent broad accessibility to their structure, processes, and instrumentalism. The OECD provides much information about its institutional features on its website and in its reports, standards, and guidelines.⁷³ Despite these resources, it is difficult to get a sense of how the OECD works in practice, and how nations use it to accomplish policy objectives.⁷⁴ Nevertheless, some conclusions can be drawn from a 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.⁷⁵ This Part uses these resources to shed light on the integral role that transnational networks like the OECD can play in developing tax policy.

A. HOW NETWORKING WORKS: THE INSTITUTIONAL STRUCTURE

How do tax networks work? We may begin to understand the power of networks in tax policy development from an analysis of the institutional structure and internal processes of the OECD. Relatively few scholars have specifically addressed the institutional or administrative aspects of the OECD, perhaps owing to a lack of primary source data: the internal structure is complex, inconsistent, and not well explained.⁷⁶ "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.⁷⁷ Nevertheless,

⁷³ The OECD website is extensive and many of its publications are freely available for download. See OECD.org, OECD: About, at www.oecd.org.

⁷⁴ 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, *supra* note 72 (discussing his observations from his unique position as participant-observer over ten years).

⁷⁵ 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. In most cases, the subjects of these interviews have requested confidentiality. References in the discussion following reflect these requests.

⁷⁶ The work by James Salzman, which derives from his unique position as participant-observer over ten years, is thus an important contribution. See Salzman, *supra* note 72.

⁷⁷ 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." Interview with OECD Official, Oct. 27, 2008, *supra* note 72 ("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

the formal structure of the organization does give some clues about how this network works.

Although it is organized under a treaty that provides for some degree of supranational authority,⁷⁸ the OECD is not typically viewed as an institution to which states delegate decision-making authority in order to harness “real [coercive] power.”⁷⁹ Instead of exercising centralized authority,⁸⁰ OECD participants generally develop tax policy norms through collaborative consensus building.⁸¹ This collaboration is organized and fostered by a staff consisting mainly of former government officials who are generally chosen for their knowledge and expertise in tax matters.⁸² Interested parties from member and nonmember countries participate directly, by attending committee meetings and conferences, and indirectly, by interacting with participants in other formal and informal settings. Much of their work “goes on in countless little technical committees,” but collectively these committees are incrementally constructing legal regimes.⁸³

In effect, tax policy develops in three intersecting networks within the OECD structure. These are the OECD Council, the Centre for Tax Policy and Administration (CTPA), and the Center for Fiscal Affairs (CFA).⁸⁴ Each of these components of the OECD structure is a transnational network. Each functions in independent and interdependent ways, and each overlaps and interacts with other networks, as well as within national law-making structures.

(1) Diplomatic Network: The OECD Council

The OECD Council is a network for high-level diplomats. The members of the Council are their countries’ ministers of finance, economy, trade, and foreign affairs; secretaries of state; and trade

outside. You need to bear in mind it is consensus-based. All countries have to agree on working parties, money, declarations, determinations.”).

⁷⁸ 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. A copy of this document is available on the OECD website at http://www.oecd.org/document/7/0,3343,en_2649_34483_1915847_1_1_1_1,00.html.

⁷⁹ *Id.*

⁸⁰ See SLAUGHTER, *supra* note 4.

⁸¹ See OECD.org, What We Do and How, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Feb. 22, 2009).

⁸² The staff thus constitutes a network within the OECD, as discussed *infra*.

⁸³ BRAITHWAITE & DRAHOS, *supra* note 3, at 503.

⁸⁴ See OECD.org, Who Drives the OECD’s Work?, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html (last visited Feb. 22, 2009).

commissioners.⁸⁵ The Council creates a transnational space for these high-ranking national officials to pool their agendas, including on tax policy, by disseminating official statements under the auspices of the institution.⁸⁶ As a body, these officials issue consensus⁸⁷ positions in the form of statements, reports, recommendations, standards, models, and, less frequently, in the form of formal international agreements.⁸⁸ In each case, 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,⁸⁹ and they are typically released without attribution to any particular state.⁹⁰

Thus, through the Council, high-level diplomats determine and direct particular inquiries and projects to various collectives 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

⁸⁵ 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 Council at Ministerial Level: Who’s Who (June 12, 2008), at http://www.oecd.org/document/48/0,3343,en_21571361_31547318_31602416_1_1_1_1,00.html (last visited Feb. 22, 2009).

⁸⁶ 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.” Interview with OECD Official, Oct. 27, 2008, *supra* note 72.

⁸⁷ 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), available at <http://www.oecd.org/dataoecd/34/33/38528123.pdf>.

⁸⁸ For example, the Convention on Mutual Administrative Assistance in Tax Matters is a multilateral treaty which several—but not all—of the OECD members have signed and ratified. The U.S. ratified this treaty in 1990. See Thomas.loc.gov, Convention on Mutual Administrative Assistance in Tax Matter, <http://thomas.loc.gov/cgi-bin/ntquery/D?trty:1:/temp/~trty:PQETEG::> (last visited Feb. 27, 2009).

⁸⁹ One OECD staffer stated that the input of the Secretariat varied according to committee and subject matter, but that in tax matters, the Secretariat were typically quite involved in coordinating and authoring committee documents. Interview with OECD Official, June 2, 2008, *supra* note 72.

⁹⁰ 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 *supra* note 77.

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.⁹¹ 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 Secretariat is the engine of the OECD. With its mandate from the Council, Secretariat staffers mobilize government officials and experts from the member countries, as well as observers from nonmember countries in some cases, to negotiate over the identified issues. The department of the Secretariat charged to direct the OECD's work on tax matters is the Centre for Tax Policy and Administration (CTPA). CTPA staffers are U.S. and other member country nationals who are employed by the OECD to organize and coordinate tax policy development among the member countries.⁹² The CTPA is described as "economists, scientists, lawyers, and other professional staff [who] work in Paris."⁹³ These are experts in their field, chosen for their national reputations, experience, and expertise.

Accordingly, the CTPA is also a transnational network of tax and government professionals. Most CTPA staffers are hired at the OECD

⁹¹ National actors have been described as locked within a "complex interdependency" which transcends particular subject areas and engenders consistent cooperation. ROBERT KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE* (1989). 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.

⁹² OECD.org, Job Vacancies / Who Can Apply / How to Apply, http://www.oecd.org/document/33/0,3343,en_2649_34481_34982305_1_1_1_1,00.htm (last visited Feb. 22, 2009).

⁹³ CTPA 2008 AGENDA, *supra* note 66, at 4; *see also* 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). 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).

after serving as senior tax officials in their home governments, and most have had experience as member-country representatives on OECD committees.⁹⁴ These OECD staffers—who are sometimes referred to as international civil servants—are not seconded to the OECD by their home governments, but are hired as private persons to work for the OECD as an institution. As employees, the Secretariat officially serve in a neutral capacity, but quite obviously this does not automatically remove the interests and perspectives these individuals once had as country representatives.⁹⁵

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 occurs within this network is undocumented and perhaps cannot be documented except by someone within the network. 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 the interests of actors are aligned and they seek a rules-based outcome to a common problem), as well as nonreciprocal coordination (compromises that occur when interests are not aligned, but parties seek alliances for mutual benefit) and capacity-building (helping actors get technical assistance to implement global standards).⁹⁶

In turn, the CTPA creates collaborative venues by convening and participating in other transnational and regional networks. Outside of the

⁹⁴ Interview with OECD Official, June 2, 2008, *supra* note 72.

⁹⁵ As one practitioner stated:

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 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.

Email correspondence with law firm partner, Toronto, Ontario, Jan. 26, 2009.

⁹⁶ BRAITHWAITE & DRAHOS, *supra* note 3, at 20–26, 543–49.

OECD structure, the CTPA convenes and coordinates broader transnational networks by participating in conferences and meetings involving individual countries, regional groups of countries,⁹⁷ other transnational governmental organizations, nongovernmental organizations, and international professional associations.⁹⁸ But within the OECD structure, the CTPA's main function is to coordinate and manage another transnational network: the OECD Committee on Fiscal Affairs (CFA).

(3) Public/Private Network: The CFA

The Committee on Fiscal Affairs is where the hard work of transnational networking—meeting, negotiating, comparing, drafting, and compromise—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.”⁹⁹ The task of these committees is “to advance ideas and review progress in specific policy areas,” as determined and defined by the OECD Council.¹⁰⁰ To accomplish this, the CFA “brings together senior tax officials from all OECD member countries,”¹⁰¹—typically treaty negotiators, policy advisors, and auditors¹⁰²—to collaborate with experts, most of whom are from member and observer countries.¹⁰³ 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.¹⁰⁴

⁹⁷ For example, the Unit for Cooperation with Non-OECD Economies, a subgroup of the CTPA, organizes some sixty conferences per year to which experts from OECD member countries meet with tax officials from nonmember countries in order to “share experiences 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).

⁹⁸ For example, the OECD uses meetings of the International Fiscal Association as a forum for dialogue and dissemination of OECD policy. See, e.g., Lee Sheppard, *OECD Officials Make Annual Visit to IFA World Congress*, 2005 TNT 184-6, available at http://taxprof.typepad.com/taxprof_blog/files/19508.pdf.

⁹⁹ OECD, *supra* note 7, at 5–6.

¹⁰⁰ In the OECD structure, the CFA is one of 200 committees that are served by, and report their work-product to, the Secretariat. OECD.org, Who Does What, *supra* note 93.

¹⁰¹ CTPA 2008 AGENDA, *supra* note 66, at 6.

¹⁰² Interview with OECD Official, June 2, 2008, *supra* note 72.

¹⁰³ CTPA 2008 AGENDA, *supra* note 66, at 6 (“Work is carried out by groups of experts drawn from member and observer countries as well as other non-member economies in certain cases.”).

¹⁰⁴ 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

Unlike the diplomatic and expert networks of the OECD Council and Secretariat, the CFA network presents the potential for greater inclusivity that is presumably engendered by the nature of network-based governance.¹⁰⁵ Thus, “[w]hile most of the Committee’s work is undertaken by 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 nonmember countries on occasion.¹⁰⁶ 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.¹⁰⁷ The CFA also convenes “groups and round-tables” for business and government officials to interact on a regular basis.¹⁰⁸ In a more recent effort to integrate the opinions and efforts of business and government in its tax policy development efforts, the CFA also “seek[s] the input of business through the publication of consultation drafts on our website.”¹⁰⁹

These tax policy groups of the OECD thus function as a group of intertwined epistemic communities that hold an important and influential position in the law-making order.¹¹⁰ Together, the CTPA and the CFA diagnose and prescribe tax policy reforms that are informed by, and that

KLAUS VOGEL (2002); HUGH J. AULT & DAVID F. BRADFORD, *TAXING INTERNATIONAL INCOME: AN ANALYSIS OF THE U.S. SYSTEM AND ITS ECONOMIC PREMISES* (1989); Hugh J. Ault, *The Importance of International Cooperation in Forging Tax Policy*, 26 *BROOK. J. INT’L L.* 1693 (2001).

¹⁰⁵ See Slaughter, *supra* note 69, at 191. 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/departments/0,3355,en_2649_34495_1_1_1_1_1,00.html (last visited Feb. 22, 2009).

¹⁰⁶ CTPA 2008 AGENDA, *supra* note 66, at 7.

¹⁰⁷ 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 3, 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.

¹⁰⁸ CTPA 2008 AGENDA, *supra* note 66, at 7.

¹⁰⁹ *Id.* at 7.

¹¹⁰ See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *INT’L ORG.* 1 (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).

play out within, national legal regimes.¹¹¹ 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.¹¹²

Accordingly, if we want to understand how and why tax norms emerge from transnational networks, we need to identify the participants, understand their values and beliefs, trace their internal information gathering, collaboration and decision-making activities, and explore their influence on other decision-makers.¹¹³ This may be challenging to do systematically, outside of long-term participant observation.¹¹⁴ However, we may begin to understand the issues involved by examining how much can be discerned about the process by observing a particular instance of tax policy development in the OECD.

B. THE NORM-BUILDING PROCESS: HOW MUCH CAN BE OBSERVED?

The OECD's process for building norms is demonstrated, though not perfectly revealed, by an ongoing, high-profile initiative to eliminate tax havens.¹¹⁵ Recent news stories highlight 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 and Lichtenstein.¹¹⁶ For decades, the tendency for capital

¹¹¹ OECD officials have articulated the OECD's position as "both reactive and proactive." Interview with OECD Official, Oct. 27, 2008, *supra* note 72.

¹¹² See, e.g., OECD, Are OECD Guidelines and Recommendations the Same as National Laws and How Are They Enforced?, 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 [which] 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 Cooperation 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 top-down and bottom-up globalization of regulation, see BRAITHWAITE & DRAHOS, *supra* note 3, at 554.

¹¹³ See Haas, *supra* note 110, at 34; see also ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES (2005).

¹¹⁴ See Salzman, *supra* note 72.

¹¹⁵ 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.

¹¹⁶ See, e.g., Glenn R. Simpson et al., *U.S. Tax Case Against UBS Grows Wider: Talks to Settle*, WALL ST. J., Jan. 26, 2009; Joanna Chung & Francesco Guerrera, *UBS Settles US Tax Probes for \$780m*, FIN. TIMES (London), Feb. 19, 2009; Steven

mobility to foster capital flight to tax havens was a reality that was occasionally bemoaned, but basically sanctioned, by national governments.¹¹⁷ However, in 1996, tax havens suddenly became a matter for international—though soft—resolution, through the mechanisms 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 tensions first came to the surface in 1996, when the heads of state of the G7 countries¹¹⁸ determined that tax havens were posing a threat to their collective financial order.¹¹⁹ The G-7 issued a general summons delegating the matter to the OECD for a solution.¹²⁰ The OECD Council further delegated the task to the CTPA, who mobilized the CFA network to negotiate a consensus position.¹²¹ The OECD Council¹²² then produced a report articulating their consensus on a list of criteria to identify and counteract what they defined as “harmful” tax practices.¹²³

Rosenberg, *Liechtenstein Fury at German Tax Snoop*, BBC News, Feb. 22, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7259913.stm>.

¹¹⁷ Charles I. Kingson, *The Jobs Act Capers*, 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).

¹¹⁸ 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: FINANCE MINISTRIES, CENTRAL BANKS AND GLOBAL FINANCIAL GOVERNANCE 1* (Routledge 2006). Like the OECD, the Group of Seven use their network to direct the development of consensus-based policies on commonly held fiscal issues.

¹¹⁹ These heads of state determined, “Tax 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.” Group of Seven, *Lyon Summit Communiqué: Making a Success of Globalization for the Benefit of All* (June 28, 1996).

¹²⁰ Group of Seven, *Lyon Summit Communiqué*, *supra* note 119 (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.

¹²¹ OECD, *supra* note 66 (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”).

¹²² OECD reports are rarely attributed to individual contributors or authors. Reports are typically not distributed until consensus is reached among all the OECD members.

¹²³ 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 4 (April 27–28, 1998) [hereinafter 1998 REPORT].

Subsequent OECD progress reports deemed certain regimes harmful, called for sanctions on uncooperative member and nonmember states,¹²⁴ and later reported on compliance.¹²⁵

Because of the OECD's work, it is now possible to identify an ostensibly global consensus on the problem of tax havens.¹²⁶ 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 havens,¹²⁷ 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

¹²⁴ 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, TOWARDS GLOBAL TAX CO-OPERATION: REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS (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, 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 the offshore tax centers from the global financial grid." See, e.g., Patrick Tracey, *Harmful Tax Competition Furor Raises Specter of Global Tax Forum*, 19 DAILY TAX REPORT G-4 (2001).

¹²⁵ See OECD, 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 had been abolished or were otherwise no longer deemed to be so); OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: 2006 UPDATE ON PROGRESS IN MEMBER COUNTRIES, available at <http://www.oecd.org/dataoecd/1/17/37446434.pdf>.

¹²⁶ 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 Lichtenstein and Switzerland, may prompt another round of consensus building. See, e.g., David Stewart, *G-8 Finance Ministers to Discuss OECD Blacklist*, 2008 WTD 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 FRANCE 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. 19, 2008 ("The European Union is mounting a renewed campaign against tax havens deemed to be uncooperative ahead of a meeting of G20 countries in April.").

¹²⁷ Namely, Lichtenstein, Andorra, and Monaco.

mandate to [the] 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.”¹²⁸ Consequently, we may 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,¹²⁹ 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, and how the solutions were devised. Similarly, we cannot know what sources contributed to the development of ideas or the pressures that constrained the range of potential policy alternatives.¹³⁰ If the debate had taken place within the U.S. law-making system, we might be able to recreate the process to some degree by consulting official records of legislative committees and public meetings.¹³¹ But the OECD

¹²⁸ See Angel Gurría, Sec. 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 (October 21, 2008), *available at* http://www.oecd.org/document/12/0,3343,en_2649_33745_41542604_1_1_1_37427,00.html.

¹²⁹ 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 118, at 66 (“[T]he extent to which the G7 finance ministers and central banks share [a] basic consensus is often underestimated, while the extent to which a qualitatively difference set of beliefs and principles have emerged in its place is often overstated.”).

¹³⁰ 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.” Baker, *supra* note 118, at 66.

¹³¹ 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 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/>.

is not a law-making body and therefore is not open to direct public scrutiny.¹³²

As a result, few of the internal processes by which these steps take place may be discerned through observation. The general public knows what it knows about the OECD's tax policy work by reading what the OECD chooses to publish, which generally does not include detailed factual information about the collaborative process.¹³³ This presents 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, one might identify and follow a given issue, such as the tax havens initiative, through various networks 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).¹³⁴ However, these conferences tend to be expensive, exclusive, and aimed generally at lawyers,

¹³² Salzman, *supra* note 72. Even so, someone determines what (and how) issues will be addressed, who will be involved, and how much information will be made public.

¹³³ 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 they describe 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.” 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. See OECD, *supra* note 6, at 6.

¹³⁴ The OECD works closely with the IFA to direct the topics to be discussed at annual congresses.

accountants, and particular business interests.¹³⁵ In addition, there seem to be high personal and professional barriers to meaningful participation and interaction.¹³⁶ Finally, the ability to identify an issue as it is developing is challenging outside of participant observation. Yet, outside of these large professional networks, the opportunities for empirical observation of the process of policy development appear to be remote or nonexistent.¹³⁷

Accordingly, it appears that only a limited understanding of the process of tax policy development through networking can be readily observed, but the exercise clearly reveals that the OECD fulfills a valuable function for its member nations, including the United States. Instead of addressing the problem of tax havens unilaterally or not at all, the United States chose to participate in the G7, as it identified tax havens as a common problem in need of a coordinated solution. The United States further chose to participate in the OECD's diplomatic, expert, and national official networks as they forged a consensus position.¹³⁸ These factors suggest the OECD is instrumental to domestic law- and policy-makers.

¹³⁵ 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.

¹³⁶ 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.

¹³⁷ This level of interaction with the public is by 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 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 72 (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.

¹³⁸ 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, U.S. Dep't of the Treasury, Treasury Secretary O'Neill Statement on OECD Tax Havens (May 10, 2001), *available at* <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.*

Accordingly, we may better understand the role and importance of networks and norms in shaping national tax policy by understanding how the OECD fits into the structure of law-making in the United States.

C. EVIDENCE OF NETWORK-DRIVEN TAX POLICY DEVELOPMENT IN THE UNITED STATES

Although the direct influence of networks like the OECD cannot be easily measured, it seems clear that these institutions are instrumental in stimulating legal change in the United States. Evidence of this instrumentalism emerges in various points along the path of tax law development and evolution. Tax law emerges and evolves in the United States through continuous interactions among politicians, law-makers, administrators, practitioners, taxpayers, advocates, the media, and academics.¹³⁹ These public and private actors are not intellectually or professionally confined to the United States, but are integrated in the networks that claim global consensus on particular issue areas—namely the OECD, but also the G7, the UN, and the host of related professional associations including the ICC, IFA, and BIAC.¹⁴⁰ Accordingly, their approach to law, policy, and legal change reflects the power of networks, albeit usually in indirect ways.

One way to assess the extent to which U.S. tax law is influenced by transnational networks is to assess the ways law-makers use the OECD to explain or promote national legal change.¹⁴¹ These actors represent only one aspect of policy development and legal change: as U.S. tax law emerges in the form of statutes, regulations, treaties, and interpretive guidance,¹⁴² it is implemented by professionals, who also use networks to understand existing laws and to influence reform.¹⁴³ However, law-makers—perhaps more than accountants and attorneys—are called on to

¹³⁹ For a model of the law-making process in the context of corporate insolvency regimes, see Halliday & Carruthers, *supra* note 26, at 1147 (charting a bi-level arena of law-making in which various actors interact and exert influence at different stages of legal reform and development).

¹⁴⁰ See SLAUGHTER, *supra* note 4; Paul Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Halliday & Carruthers, *supra* note 26.

¹⁴¹ 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.

¹⁴² This is “tax law on the books,” identifiable by virtue of its association with traditional law-making authority, through national legislative, executive, and judicial processes. Halliday & Carruthers, *supra* note 26.

¹⁴³ *Id.*

publicly explain the reason for legal change to their constituents. A significant resource for assessing the importance of networks may lie within these explanations.

For example, law-makers often use the OECD as a source of intellectual guidance for substantive policy choices.¹⁴⁴ As one law-maker 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 everything. It is a fine group.” Accordingly, tax law-makers have cited OECD statistics and guidance to promote technical tax changes,¹⁴⁵ sweeping tax reforms,¹⁴⁶ and even national budget strategies.¹⁴⁷ OECD guidance also provides shortcuts for technical definitions, such as a “foreign shipyard,”¹⁴⁸ a “qualified foreign government security,”¹⁴⁹ or a

¹⁴⁴ For examples outside of tax policy, *see, e.g.*, Ambassador Susan Schwab, U.S. Trade Rep., Remarks at Media Roundtable in Washington, DC 4 (June 9, 2006), available at http://www.ustr.gov/assets/Document_Library/Transcripts/2006/June/asset_upload_file598_9560.pdf?ht= (“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.”); Senate Floor Debate on H.R. 4210 (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).

¹⁴⁵ *See, e.g.*, Introduction to Healthier Lifestyles and Prevention America Act, HR 5951, (Aug. 2, 2006) (introducing a bill to provide tax incentives for employers to implement wellness programs, citing the fact that US spends 56% more per capita than the OECD median).

¹⁴⁶ JOINT COMM. ON TAXATION, DESCRIPTION AND ANALYSIS OF PRESENT LAW AND PROPOSALS RELATING TO FEDERAL ESTATE AND GIFT TAXATION (2001) (comparing OECD data on inheritance taxes in other countries to the US-style estate tax); JOINT COMM. ON TAXATION, OVERVIEW OF PRESENT LAW AND ANALYSIS RELATING TO SELECTED PROVISIONS OF THE PRESIDENT’S INDIVIDUAL INCOME TAX PROPOSALS (2001) (providing data tables on U.S. tax receipts from estate, inheritance, and gift taxes relative to OECD nations).

¹⁴⁷ Senate Floor Debate on the Omnibus Budget Reconciliation Bill of 1993 (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?”).

¹⁴⁸ Shipbuilding Trade Reform Act of 1992, H.R. 2056, 102d Cong. (May 28, 1992) (defining a foreign shipyard to include one in a country that was party to an OECD agreement).

¹⁴⁹ House Judiciary Committee Report on Sen. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. REP. NO 109-31 (April 13, 2005) (“The term

“tax haven.”¹⁵⁰ These may seem like mundane uses of a transnational network, but the collective effect of these casual references is significant.¹⁵¹

For all of these purposes, the OECD effectively serves as a research arm, providing a credible source of information that law-makers may draw upon as necessary to achieve tax policy goals. These intellectual resources may help coordinate tax policy because their research reflects the shared principles of member countries. Moreover, because the OECD’s research usually involves extensive comparisons of member-country practices, its guidance may also facilitate modeling, arguably one of the most effective forms of soft governance.

Accordingly, the OECD seems to serve as a resource for law-makers to “pull” norms from the global into the national arena through the mechanism of emulation.¹⁵² Outside of tax law, legislators have used other OECD countries as the benchmark for reform in issues as diverse as broadband access,¹⁵³ humanitarian aid,¹⁵⁴ and maternity leave.¹⁵⁵ In the area of tax policy, law-makers also promote reform in the name of either aligning or competing with other OECD countries. Sometimes, these efforts appear to have been successful, such as in the case of reducing the corporate tax rate.¹⁵⁶ Other times, for instance when pushing to adopt a

‘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)’).

¹⁵⁰ General Accounting Office, No. GAO-03-194R, Correspondence Regarding Information on Federal Contractors That Are Incorporated Offshore (2002) (using the OECD definition to explain that four of the top 100 federal contractors are headquartered in tax havens).

¹⁵¹ See *supra* text accompanying note 83.

¹⁵² BRAITHWAITE & DRAHOS, *supra* note 3, at 546–47.

¹⁵³ See, e.g., Senate Debate on the Energy Reform Bill, Sen. 517 (April 25, 2002) (referencing U.S. position as 4th in the OECD in broadband to promote legislation featuring targeted subsidies); Introduction to Legislation to Allow the Expensing of Broadband Internet Access Expenditures, Sen. 160 (January 16, 2003) (citing U.S. decline relative to other OECD nations with respect to broadband development in support of a bill to provide a targeted tax incentive).

¹⁵⁴ See, e.g., Senate Floor Debate on the Fiscal Year 1997 Budget Resolution, S. Con. Res. 57 (1997) (citing the fact that in terms of percentage of GNP given as humanitarian aid, the United States ranks last in a list of 21 OECD nations).

¹⁵⁵ See, e.g., Leave No Child Behind Act of 2003, 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).

¹⁵⁶ U.S. law-makers often compare U.S. corporate tax rates to those of the OECD in support of tax reform legislation. See, e.g., Senate Finance Committee Report on the Jumpstart Our Business Strength (JOBS) Act, S. REP. NO. 108-192 (Nov. 12, 2003) (stating that the U.S. corporate tax rate is too high relative to other OECD nations and

national sales tax, the proposed measures have consistently failed to garner sufficient support to date—but law-makers keep trying.¹⁵⁷ These examples demonstrate that U.S. law-makers voluntarily seek out ways to use comparison and emulation to explain why the United States ought to adopt particular norms.

Norms can be pushed as well, as through the kind of peer pressure that the OECD promotes as one of its most effective tools.¹⁵⁸ The OECD suggests that “recommendations resulting from [peer] review can . . . help

therefore should be lowered); Senate Finance Committee Release, Opening Statement of Senator Charles E. Grassley at SFC Hearing, “Carried Interest, Part II” (Aug. 1, 2007) (referring to U.S. corporate tax rate in comparison to OECD averages); Introduction to Manufacturing, Assembling, Development, and Export in the USA (MADE in the USA) Tax Act, Sen. 3162 (Jun. 24, 2008) (noting that the U.S. corporate tax rate is currently the second highest in OECD); Senate Finance Committee Release, Opening Hearing Statement of Chairman Grassley, A Tune-up on Corporate Tax Issues: What’s Going on Under the Hood? (June 14, 2006) (stating that 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). 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: A Tax Break for Tinseltown*, WALL ST. J., Jan. 30, 2009 (“The U.S. corporate tax rate . . . is higher than all of Europe.”); *Export Tax Follies*, WALL ST. J., May 5, 2004 (“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.”).

¹⁵⁷ See, e.g., 102d Congress, JCT Report on Factors Affecting the International Competitiveness of the United States (Jun. 06, 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); Congressional Research Service Report for Congress: Value-Added Tax as a New Revenue Source (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 Report, Reducing the Deficit: Spending and Revenue Options (analyzing how national value added taxation would work in the United States based on OECD experience and demonstrating that 20 of 25 OECD nations employed national value added taxes); Final Report of the President’s Advisory Panel on Federal Tax Reform—Simple, Fair and Pro Growth: Proposals to Fix America’s Tax System (Nov. 3, 2005) (including an extensive analysis of value added tax systems in OECD countries).

¹⁵⁸ OECD.org, What We Do and How, http://www.oecd.org/pages/0,3417,en_36734052_36761681_1_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.”).

governments win support at home for difficult measures.”¹⁵⁹ U.S. law-makers 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 that “Our global competitors are laughing at us for thinking of taking the government out of the process.”¹⁶⁰ Even so, the degree to which OECD peer pressure 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.¹⁶¹

These examples provide circumstantial evidence that networks provide U.S. law-makers 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.¹⁶² Of course, the path from policy development tools to the successful transplantation of norms is not clearly illuminated,¹⁶³ but

¹⁵⁹ OECD.org, The OECD’s Peer Review Process: A Tool for Cooperation and Change, <http://www.oecd.org/peerreview> (last visited Feb. 22, 2009).

¹⁶⁰ Senate Consideration of the Concurrent Resolution on the Budget, Sen. Con. Res. 13 (1995).

¹⁶¹ See, e.g., Lawrence Speer, *Conservative Think Tanks Attack OECD on Offshore Tax Scrutiny During Forum*, 219 DAILY TAX REP. G-3 (2005); Papali’i T. Scanlan, *Globalisation and Tax-Related Issues: What Are the Concerns?*, in INTERNATIONAL TAX COMPETITION: GLOBALIZATION AND FISCAL SOVEREIGNTY (Biswas, ed., 2002); Daniel J. Mitchell, *The Moral Case for Tax Havens* (Center for Freedom and Prosperity Foundation 2008) at <http://www.youtube.com/watch?v=Xf14lkyH2dM>.

¹⁶² Although it is beyond the scope of this Article, it also bears recognizing that just as transnational networks impact U.S. tax law-making, the United States likewise uses these networks to effectively transmit local norms to the rest of the world. For example, U.S. law-makers have noted how the OECD can help export certain U.S. tax rules to the rest of the world. See, e.g., IRS, Publ’n No. 3218, Report on the Application and Administration of Section 482 (April 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); IRS, Advance Pricing Agreements Program Annual Report, IRS Announcement 2000-35, 2000-1 CB 922 (Mar. 30, 2000) (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.” CTPA 2008 AGENDA, *supra* note 66, at 6. For a discussion of the implications of this kind of “globalized localism,” see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2d ed. 2002).

¹⁶³ 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 . . .

the way individuals use institutions like the OECD to further 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

It is perhaps not surprising that we may underestimate the impact on national tax policy of the hundreds of technical tax conferences and committee meetings that take place all over the world every year. Networks are difficult to map and the pathways upon which law evolves are murky in any case. Even so, as globalization creates both possibilities and limitations for effective governance, interest in the power and potential of transnational tax networks appears to be increasing. A few features of soft governance seem particularly germane to the task of exploring the implications of network-driven tax policy development in the United States.¹⁶⁴

First, soft governance coordination appears to be most successful when like nations act in like fashion, and when they perceive that doing so will be to their long-term interest.¹⁶⁵ Coordinating a uniform approach in accordance with a set of shared principles for mutually beneficent purposes is the central theme of OECD tax policy work.¹⁶⁶ Accordingly, law-makers use networks strategically to pull OECD-developed policy

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, and pick up the best. The goal is framing.

Interview with OECD Official, Oct. 27, 2008, *supra* note 72.

¹⁶⁴ Soft governance has many additional features that are also worth exploring, but these three features appear to resonate especially well in the historical and current aspects of transnational tax policy development.

¹⁶⁵ See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 51–52 (1984) (“Intergovernmental cooperation takes place when the policies actually followed by one government are regarded by its patrons as facilitating realization of their own objectives, as a result of a process of policy coordination.”); BRAITHWAITE & DRAHOS, *supra* note 3, 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.”).

¹⁶⁶ 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 3, at 553.

into the national arena.¹⁶⁷ One implication is that the network may be safely ignored or even contradicted, if and when it is perceived to be in the law-maker's (or the nation's) interest to do so.¹⁶⁸ A few law-makers have explicitly recognized this issue in taxation.¹⁶⁹ The cautionary tale is that as problems become more complex and "states have incentives to defect," the network approach can be undermined by advertent national act or by institutional incapacity to compel compliance.¹⁷⁰

Second, soft governance methods seem to engender a great deal of uncertainty about legal process and the status of norms.¹⁷¹ Thus, framing by the OECD has been so successful that it has prompted debate about the legality of OECD-produced tax norms, especially in the context of international tax coordination.¹⁷² While scholars and policy-makers debate the relative merits of soft and hard coordinative methods,¹⁷³

¹⁶⁷ Likewise, the United States can sometimes use networks like the OECD to push U.S. policy into the global arena. *See supra* note 162. However, U.S. law-makers occasionally acknowledge that successful norm transmission depends heavily on the ability of the network to rally the idea into consensus. S. Con. Res. 106, 102d Cong. (1992) (statement of Senator Breaux that U.S. negotiators failed to achieve policy goals through the OECD in the case of ship-building industry subsidies); 138 CONG. REC. H3188 (1992) (Statement of Rep. Lent) ("I am firmly committed to the ultimate objective of solving this shipbuilding subsidy problem through international negotiations but since that effort has not succeeded for the last several years, I believe that it is time for Congress to act.").

¹⁶⁸ *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.

¹⁶⁹ *See supra*, note 138 (discussing the change in U.S. policy toward the OECD's harmful tax practices initiative).

¹⁷⁰ Hughes-Verdier, *supra* note 168, at 115. For a recent example in a non-tax context, see Senate Debate on HR 3756, The Treasury, Postal Service and General Government Appropriations Act (1997) (presenting an argument from Senator Moynihan that the proposal is diametrically opposed to an agreement the United States is trying to arrange through the OECD).

¹⁷¹ *See* Beth Simmons, *International Law and International Relations*, in OXFORD HANDBOOK OF LAW AND POLITICS 188 (2009).

¹⁷² *See supra* note 15.

¹⁷³ *See, e.g.,* DiRobilant, *supra* note 24 ("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 11.

practitioners and administrators must navigate the uncertainties on a daily basis.

Third, success in developing tax policy norms could alternatively invigorate or constrain effective legal change.¹⁷⁴ U.S. law-makers' use of the OECD in their policy goals provide insights into some of these tensions. For example, U.S. experience suggests that comparison and emulation can create unwinnable regulatory races. Corporate tax rates—a standard subject of benchmarking against the OECD—provide a case in point.¹⁷⁵ Success in the effort to reduce rates relative to other OECD countries is futile to the extent to which these countries also engage in comparison and emulation using the United States as a benchmark.¹⁷⁶ Conversely, while scholars have long predicted a race to the bottom in taxation,¹⁷⁷ the current economic climate suggests that rising deficits¹⁷⁸

¹⁷⁴ See, e.g., Alex Cobham, *The Tax Consensus Has Failed!*, OCGG ECONOMY RECOMMENDATION No. 9 (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.”); Allison Christians, *Global Tax Policy Constraints and the Least Developed Countries*, UNIV. BRIT. COL. L. REV. (forthcoming 2009). 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); Miranda Stewart & Lisa Philipps, *Defining Fiscal Transparency: Transnational Norms, Domestic Laws and the Politics of Budget Accountability*, BROOK. J. INT’L L. (forthcoming 2009); Miranda Stewart, *Tax Policy Transfer to Developing Countries: Politics, Institutions and Experts*, in GLOBAL DEBATES ABOUT TAXATION 182 (F. Schui & H. Nehring eds., 2007).

¹⁷⁵ See *supra* text at note 156.

¹⁷⁶ See, e.g., Treasury Dep’t News Release, No. HP-500, Treasury Releases Business Taxation and Global Competitiveness Background Paper (July 24, 2007) (“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 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.”); Eoin Callan, *Greenspan Warns on Borrowing Costs*, FIN. TIMES (London) July 27, 2007 (quoting former Federal Reserve chairman Alan Greenspan as saying, “Other nations have seen the results of the bold tax 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 (“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.”).

¹⁷⁷ See, e.g., Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000).

may force countries to determine whether the same processes of comparison and emulation might be equally functional in reversing the trend. Of course, their potential for doing so will not be met with universal accord. The contest of principles that will inevitably take place will determine whether and how networks can remain functional in the future.

Finally, soft law institutions and norms do not replace, but rather generally work together with hard law institutions and laws; thus, comparing the merits of the two approaches is compelling and necessary, but also challenging.¹⁷⁹ The implication is that it is not always obvious whether a hard method, a soft method, or a combination, is driving legal change at a given moment. As a result, it is difficult to assess whether a given tax norm is the product of a soft or a hard institutional process, whether a better outcome could have been achieved by employing a hard method or a soft method, or whether stakeholders should mobilize scarce resources toward hard or soft modes of legal change.¹⁸⁰

Clearly, network-driven policy development present a broad spectrum of implications for legal change. The tensions raised here may be among the most observable, but many more implications are likely to surface as governments continue to navigate the ever-increasingly challenging terrain of economic globalization. To ensure that policymakers have the best possible means to adapt to new and complex circumstances, more analysis and focus is needed to identify and assess the potential and the limitations of using networks to achieve national policy goals.

V. CONCLUSION

U.S. law-makers use transnational networks as the intellectual foundation, the benchmark, and the impetus for U.S. tax law reforms.¹⁸¹ These are the marks by which we can observe that transnational networks

¹⁷⁸ Andrew Ward & Edward Luce, *Obama's Budget Set to Inflate US Deficit*, FIN. TIMES (London), Feb. 27, 2009, at 1; Jonathan Weisman, *Obama Seeks to Snap Gloom—President Says Economy Will Emerge Stronger: Push on Health, Energy, Education*, WALL ST. J., Feb. 25, 2009, at A1.

¹⁷⁹ See Trubek, *supra* note 10 (describing the hybrid nature of soft and hard law). For a discussion of the analytical limitations presented by the inability to compare institutional alternatives, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

¹⁸⁰ 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.*

¹⁸¹ See *supra* text accompanying notes 144–160.

lead to legal change; however, the process by which ideas transform into tax norms and tax norms into tax law is not sufficiently explored. As the global economy changes and becomes ever more fluid and dynamic, so too does the governance of economic actors at local, national, and transnational levels. If we want to ensure that law-makers have the tools necessary for developing effective national tax policy, we need a better understanding of why and how we use transnational networks to produce tax governance norms.

Understanding the power and potential of networks involves analysis of interpersonal and intergovernmental relationships that are often neither easily accessible nor well understood. We may ultimately determine that the relative openness of national law-making processes does not provide an appropriate or feasible model for the networks that produce tax norms. But it is a mistake to focus solely on the merits of the norms without asking whether and how the networks interact with and impact national law-making. Transnational institutions like the OECD serve a valuable role in balancing the competing goals of national autonomy and effective regulation through cross-border cooperation. We may better serve the future of tax policy development by increasing our understanding of the networks and norms that shape national tax policy in our globalized world.