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Campaign Against "Harmful Tax Competition"**

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*Working Paper*

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**Draft of October 27, 2011**



## Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"

Andrew P. Morriss\* & Lotta Moberg\*\*

*Formed in 1961 to promote global economic and social well-being, the Organization for Economic Cooperation and Development (OECD) has become the collective voice of rich countries on international tax issues. After an initial focus on improving commerce through addressing double taxation issues, the organization shifted to a focus on restricting tax competition and increasing automatic exchanges of tax information. In this paper we analyze the reasons for this shift in policy focus. After describing the history of the OECD's work on taxation, we examine the OECD's project against "harmful tax competition" as it has played out since its launch in the 1990s. We analyze the mechanisms behind the project from a public choice perspective. While typical economic models portray tax competition as a prisoner's dilemma between governments, a more powerful perspective is of the incentives of politicians and bureaucrats. We conclude that the project against tax competition is an example of the interplay between the interests of politicians and international bureaucrats, which illustrates the role international organizations play in competition among interest groups.*

The Organization for Economic Cooperation and Development (OECD) was formed in 1961 "to promote policies that will improve the economic and social well-being of people around the world."<sup>1</sup> Over the years, the OECD became one of the world's most respected and influential organizations; Anne-Marie Slaughter describes the OECD as "the quintessential host of transgovernmental regulatory networks, as well as a catalyst for their creation."<sup>2</sup> In particular, the OECD became the main multilateral forum on tax issues through its work on solving double taxation problems caused by the impact of differences across tax systems on entities and individuals operating in more than one jurisdiction.<sup>3</sup> This mission expanded significantly over time as a focus on preventing double taxation shifted to an effort to restrict "harmful" tax competition on rates among jurisdictions. The OECD began to seek to restrain both member and non-member countries from lowering taxes and to encourage lower tax jurisdictions to raise their rates. This represented a substantial departure from its earlier focus on finding solutions to the problems caused by differences in national tax systems.<sup>4</sup>

The change in focus is important because if the OECD is successful in its efforts, jurisdictions will have ceded an important aspect of policy autonomy to resolution in an international forum

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<sup>1</sup> See OECD Website (Oct. 2, 2011) ([http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html)). See also: OECD Website. (Oct. 2, 2011)

([http://www.oecd.org/document/53/0,3746,en\\_2649\\_201185\\_1876912\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/53/0,3746,en_2649_201185_1876912_1_1_1_1,00.html)) (Its predecessor, the Organization for European Economic Co-operation was formed in 1948 to coordinate the economic recovery from World War II.)

<sup>2</sup> Anne-Marie Slaughter, A NEW WORLD ORDER, 46 (2004).

<sup>3</sup> Thomas Rixen, THE POLITICAL ECONOMY OF INTERNATIONAL TAX GOVERNANCE 99 (2008).

<sup>4</sup> It also conflicts with other OECD advice about taxes and economic growth. For example, in its economic surveys, the OECD often recommends lowering taxes. Nordic countries are frequently advised to reform their labor markets based on the notion of the benefits of lower taxes and broader tax bases. See generally Andreas Bergh and, Margareta Dackehag, OECD recommends: A consensus for or against welfare states? Evidence from a new database, Ratio Working Papers, No. 159 (2010).

dominated by a small group of industrialized economies with relatively high tax rates. Domestic policy decisions constrained by competition among jurisdictions to attract capital will be transformed into international decisions dominated by a cartel of wealthy nations.

In this paper, we explore the evolution of developed countries' international cooperation on tax issues from the initial focus on finding solutions to problems that impeded international economic activity to a focus on protecting a few states' abilities to collect revenues at the expense of other states.<sup>5</sup> We ask why the OECD evolved from a forum focused on lowering transactions costs to increase private sector competition across borders into a cartel aimed restricting competition among states. We conclude that this transition was in part the result of entrepreneurship by a group of OECD staff, who spotted an opportunity to expand their mission, bringing with it a concomitant increase in resources and prestige. They accomplished this by providing a framework for interests within a group of high tax states to create a cartel that would channel competition in tax policy away from areas where those states had a competitive disadvantage and toward areas in which they had a competitive advantage. How an organization formed to promote economic development began devoting resources to restricting competition to benefit some states at the expense of others illustrates an important problem for international cooperation more generally. The dynamics at work in the OECD tax competition case are present elsewhere and suggest that the creation of forums to enhance international cooperation is not always a benign development for states and interests excluded from those forums.

The transformation was also in part the result of changes in the competitive position of developed economies with respect to the rest of the world. In the competition among states to attract economic activity, larger developed economies had been sheltered from competition by the combination of the costs of conducting international transactions and the barriers to such transactions provided by the mix of capital controls, trade barriers, and other restrictions on financial transactions. As these barriers declined and investors grew more sophisticated at making use of international financial structures to reduce tax burdens on international transactions, states whose economies' size had previously been sufficient to make them attractive locations for investment found themselves struggling to capture revenue from newly internationalized transactions. These states then sought to restrict tax competition, which in turn required them to create a means of delegitimizing such competition and by preventing each other from defecting from the cartel by lowering tax rates unilaterally.

Regardless of one's position on the merits of any particular tax regime, the evolution of the OECD from a facilitator of economic competition to a cartel enforcer represents something new in international organization behavior. Since World War II, the world economy has moved in fits and starts toward a more open financial architecture, one that has altered the relative positions of states in the competition for resources. The cartelization of tax policy is an important effort to hold off the impact of the forces unleashed by competition on a more level playing field, but it is certainly not the only one. There has recently been a spate of aggressive efforts by large developed countries to demand an end of financial privacy through tax information exchange agreements, threats of blacklisting, and direct payments to individuals for stealing data from financial institutions in other jurisdictions. These efforts have the same goals as the IRS' mail intercepts of Americans receiving letters from Swiss banks

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<sup>5</sup> In general, we use the term "states" to refer to jurisdictions without regard to whether they are independent states under principles of international law. Many low tax jurisdictions are dependent territories or crown possessions connected to Britain (e.g. the Bermuda, the Cayman Islands, the Isle of Man, Guernsey, Jersey, and Turks and Caicos). Where important, we distinguish between independent states and dependent territories by labeling the former "independent jurisdictions" and the latter "dependent jurisdictions." But constantly writing "jurisdiction" to cover both groups is both inelegant and tedious. Note also that "international taxation" generally refers to the international interaction of different national tax systems and the way that possible problems stemming from this are dealt with. Since there is no international statutory law, the term can be a bit misleading (see Alexander Jr. Townsend *Global Schoolyard Bully: The Organisation for Economic Co-Operation and Development's Coercive Efforts to Control Tax Competition*, 25(1) *FORDHAM INT'L L. J.* 215, 224 (2001-2002).

in 1967 and 1971,<sup>6</sup> Australia's severing of communications links to the New Hebrides in the early 1970s,<sup>7</sup> and the IRS's 1973 luring of a Bahamian banker to a romantic dinner date in Miami to allow it to break into his briefcase in search of documents that might incriminate American taxpayers.<sup>8</sup> If we are going to continue to reap the benefits of financial openness and relatively free capital flows, an international consensus on the shape of a level playing field for the competition for resources that takes into account the interests of more than a small group of developed economies will need to be formed.

Part I sets out a framework for evaluating debates over tax competition. Part II provides a brief history of efforts to address the problems caused by differences in tax regimes across states, focusing on the qualitative change in such efforts introduced by the OECD in the 1980s. Part III examines the evolution of the OECD's role in the context of the framework set out in Part I. Part IV concludes with observations on the parameters of state competition for wealth-creating activities.

## I. Jurisdictional Competition as a Framework for Tax Competition

States compete for economic activity in multiple ways, including offering different mixes of security of ownership, access to resources, regulatory climates, and demands on investors to share resources. Tax competition is but one aspect of this competition.<sup>9</sup> Thus a dictatorship with few checks on the arbitrary behavior of the dictator, like Zaire under its former dictator Mobutu Sese Seko, offered privileged access to economic resources in exchange for granting a share of the gains to the dictator while OECD countries have typically offered guarantees of security of title through independent courts and other features of the rule of law in exchange for compliance with regulatory regimes and payment of taxes.<sup>10</sup> This competition provides a lens with which to examine the issue of tax competition.

We begin with the uncontroversial proposition that states do not themselves act. Rather, individuals in positions of authority take actions, which together constitute the actions of the state. A state may thus act inconsistently in different forums, as different interest groups obtain the upper hand in determining a particular position or where different actors have greater influence in one arena relative to another. In discussing tax issues, it is important to remember that even those interest groups that share a broad agenda and operate in coalition within a particular government may have divergent interests with respect to particular tax issues. We will use the shorthand of referring to "states" because

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<sup>6</sup> Statement of William J. Anderson, Director, General Government Division, General Accounting Office, 31-32, in "Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries", Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, April 12 and 13, 1983.

<sup>7</sup> See note 138 *infra*.

<sup>8</sup> See note 130 *infra*.

<sup>9</sup> See generally Erin A. O'Hara and Larry E. Ribstein, *THE LAW MARKET* (2009).

<sup>10</sup> See Andrew P. Morriss, *The Role of Offshore Financial Centers in Regulatory Competition* in *OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION* (Andrew P. Morriss, ed.) (AEI Press, 2010). One recent statement of the regulatory bargain was by Harvard Law Professor (and potential Senate candidate) Elizabeth Warren, who argued in favor of higher taxes that:

There is nobody in this country who got rich on his own. Nobody. You built a factory out there — good for you! But I want to be clear. You moved your goods to market on the roads the rest of us paid for. You hired workers the rest of us paid to educate. You were safe in your factory because of police forces and fire forces that the rest of us paid for. You didn't have to worry that marauding bands would come and seize everything at your factory, and hire someone to protect against this, because of the work the rest of us did. Now look, you built a factory and it turned into something terrific, or a great idea — God bless. Keep a big hunk of it.

But part of the underlying social contract is you take a hunk of that and pay forward for the next kid who comes along.

the more accurate phrase of “the coalition of interest groups governing states” is too awkward for general use.

States want economic activity for three reasons, with different political actors putting different weights on each. First, states need revenues to pay for their activities. One major source of revenue is taxation of economic activity and the wealth that such activity creates. States with natural resources may raise revenue by selling access to those resources,<sup>11</sup> but most states are dependent on taxing economic activity in one form or another. The state activities that are funded may be the provision of public goods or genocide of disfavored ethnic groups. The crucial point is that, whether providing education or mass slaughter, governments need funds to pay their employees and buy supplies. Second, states may desire economic activity for its own sake, since it brings with it the generation of wealth. A benevolent ruler or coalition of interests will prefer a richer population to a poorer one, since the richer population will have higher standards of living, better health, more education, and other things that enhance the quality of life. Indeed, even a despotic regime bent on keeping power by maintaining a climate of fear may be interested in maintaining at least some minimum level of economic activity as a cheap means of quelling unrest. Third, corrupt interests seek economic activity because it offers opportunities for graft. From Chicago to Indonesia, corruption is a perennial problem with the provision of goods by the public sector.<sup>12</sup>

If we consider the total package of non-tax regulations, taxation, and property rights protection as a specific “regulatory bargain,” we see that a state may offer different bargains depending on the goals of the interest groups that control it, particular circumstances like its desirability as a location for particular economic activities, natural resource endowments and the level of competition from other states seeking the same economic activities, capital or entrepreneurs. This is readily apparent in the competition between London and New York for financial industry business.<sup>13</sup> It is also present with respect to a variety of regulatory areas, as with the debate over labor and environmental standards in trade.<sup>14</sup> Similarly, a jurisdiction with enormous natural advantages can offer a higher cost bargain than a state with less desirable climate and location: California can offer a bargain to businesses that will be more costly than the one offered by North Dakota.

This is *not* how the literature on tax competition traditionally considers these issues. Instead, the literature largely presupposes a benevolent government seeking to solve the problem of efficiently providing public goods. For example, in their influential 1986 article, Zodrow and Mieszkowski showed that mobile capital leads to a lower than optimal provision of a public good by the government using a model that treated all public expenditures as beneficial.<sup>15</sup> The same year, Wilson published his article laying out the equilibrium conditions under tax competition. He showed that with decentralized political decision making, the equilibrium utility level is reduced, but he again treated all government expenditures as producing public goods.<sup>16</sup> Numerous articles published since have examined how different tax structures and different assumptions about the mobility of capital, firms and people change

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<sup>11</sup> See, e.g., Thad Dunning, *CRUDE DEMOCRACY: NATURAL RESOURCE WEALTH AND POLITICAL REGIMES* (2008).

<sup>12</sup> See OECD, Directorate for Public Governance and Territorial Development, *Fighting Corruption in the Public Sector* (n.d.) available at [http://www.oecd.org/about/0,3347,en\\_2649\\_34135\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,3347,en_2649_34135_1_1_1_1_1,00.html) While there is evidence to suggest that moderate levels of corruption do not interfere unduly with economic growth, operating as an informal tax, more egregious corruption may reduce the beneficial impacts of economic activity but still promote the welfare of those receiving the corruption.

<sup>13</sup> See, e.g., John Gapper, *Are We No Longer the World's Financial Capital?*, *NEW YORK MAGAZINE* (Mar. 18, 2007) available at <http://nymag.com/guides/london/29440/> (discussing competition between New York and London).

<sup>14</sup> See Daniel Drezner, *Bottom Feeders*, *FOREIGN POLICY* 64 (Nov./Dec. 2000) (describing debate over existence of race to bottom).

<sup>15</sup> See generally George R. Zodrow and Peter Mieszkowski, *Pigou, Tiebout, Property Taxation, and the Underprovision of Local Public Goods*, 19 *J. OF URBAN ECONOMICS* 356 (1986).

<sup>16</sup> See generally John D. Wilson, *A Theory of Interregional Tax Competition*, 19 *J. URBAN ECON.* 296 (1986).

the conclusions about the effects of tax competition<sup>17</sup> but virtually all model government expenditures as uniformly beneficial.<sup>18</sup>

If we limit our consideration to the special case of government as benevolent provider of public goods, the analysis can be summarized as the following: In a world without tax competition, the benevolent government sets its tax rates at a level sufficient to fund its welfare-enhancing activities. Firms and individuals pay their taxes, and public goods are provided. Governments with large economies raise substantial revenue with modest taxes, while governments with resource-poor or small economies are unable to do so because the levels of economic activity within their resource-poor/small economies are too low to generate sufficient tax revenue to enable their governments to purchase the public goods their populations' desire.<sup>19</sup> The introduction of tax competition offers these governments an opportunity to lure economic activity away from other, richer, economies by cutting tax rates. The lower rates lead the revenue for the poor governments to rise and the revenue for the rich governments to fall. Importantly, the models generally assume that the rich countries lose more than the poor countries gain, because the need to compete requires such low rates that the total tax collection summed across both jurisdictions falls. Tax competition thus reduces total government revenues across all jurisdictions even if it increases the revenue for the poor jurisdictions. Because the governments are buying only public goods, tax competition thus reduces total welfare by reducing the total revenues

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<sup>17</sup> See John D. Wilson *Theories of Tax Competition*, 52, 2 NATIONAL TAX J. 269 (1999), for a review of some of the theoretical literature on tax competition. For a thorough review of the empirical research on tax competition, see generally Philipp Genschel and Peter Schwarz, *Tax competition: A Literature Review*, 9 SOCIO-ECONOMIC REV. 339 (2011).

<sup>18</sup> The state is traditionally treated as a goal-directed organization that aims to solve market failures by taxing and spending and is therefore per definition benevolent. See Richard E. Wagner, *FISCAL SOCIOLOGY AND THE THEORY OF PUBLIC FINANCE: AN EXPLORATORY ESSAY* 3 (2007). In that context, an important concept in the economics of taxation is the level of "optimal taxation", which is determined by a relative weighing of efficiency and equity chosen to maximize social welfare. See Simon James, *Taxation Research as Economic research* in *TAXATION: AN INTERDISCIPLINARY APPROACH RESEARCH* (Margaret Lamb, Andrew Lymer, Judith Freedman and Simon James eds.) 34, 39-40 (2005), Following this tradition in the context of tax competition, a restriction on a government's ability to pursue its preferred fiscal policy is by assumption undesirable. See, e.g., William H. Hoyt, *Property Taxation, Nash Equilibrium, and Market Power*, 30 J. URBAN ECON. 123 (1991) (model of tax competition showing that the Nash equilibrium level of public goods provision is determined by the number of jurisdictions); Hans-Werner Sinn, *How Much Europe? Subsidiary, Centralization and Fiscal Competition*, 41 J. POL. ECON. 85, 99 (1994) (discussing future European tax competition and concluding that "tax rates have to be harmonized across all countries or chosen by a centralized agency" to avoid tax rates to be driven down by competition, as governments incur cost for supplying the mobile factors with public goods.) Assuming that inefficiency therefore is an inevitable outcome of non-cooperative behavior, other literature focus on how this cooperation can come about. See generally Ravi Kanbur and Michael Keen, *Jeux sans Frontières, Tax Competition and tax Coordination when Countries Differ in Size*, 83 AM. ECON. REV. 877 (1993) (discussing use of minimum tax rates to stem tax competition)).

<sup>19</sup> Paradoxically, the anti-tax haven literature often identifies tax havens with the concealment of money stolen by tyrants. For example, Raymond W. Baker lists kleptocrats profiting from corruption, as a part of describing the global system of dirty money. Raymond W. Baker, *CAPITALISM'S ACHILLES HEEL: DIRTY MONEY AND HOW TO RENEW THE FREE-MARKET SYSTEM*, 52 (1977). Tax havens offering secrecy is a part of the "modern dirty-money system that significantly obscures global capitalism" Id. at 192. Saddam Hussein placed money from oil corruption in tax havens, Id. at 128, terrorists use tax havens "in the same way as criminal syndicates" Id. at 119. Yet when the money remains controlled by a government controlled by the same tyrant, this same literature assumes it is spent on public goods. See *Oxfam, Tax Havens: Releasing the Hidden Billions for Poverty Eradication*, Oxfam Briefing Paper (2000). (Stressing that "tax havens have contributed to revenue losses for developing countries of at least US\$50 billion a year. To put this figure in context, it is roughly equivalent to annual aid flows to developing countries" and arguing that "many developing countries have low tax revenues as well as resource constraints in form of large debt burdens, declining taxes from trade, and reduced aid flows. These constraints result in poor provision of public goods in the countries that have the greatest need.) Another class of literature on tax competition describes the state as a Leviathan. See e.g. generally Frode Brevik and Manfred Gärtner, *Can Tax Evasion Tame Leviathan Governments?*, 136 PUBLIC CHOICE 103 (2008). This view of the government, contrasting that of a benevolent social planner, follows the tradition of James M. Buchanan and Brennan, picturing the government as a tax maximizing Leviathan. See generally Geoffrey Brennan and James M. Buchanan, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION*, (1980). See also James M. Buchanan and Richard Abel Musgrave, *PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE*, MIT Press, 24 (2001), for a discussion on this issue.

available for their purchase.<sup>20</sup>

If we examine tax competition as a subspecies of the larger competition for economic activity, the incompleteness of this analysis is apparent. Governments do not buy only public goods. There is also waste, fraud, and corruption as well as considerable purchase of public bads such as genocide or attacks on peaceful neighbors. Tax revenues may buy textbooks for schools or shoes for a dictator's wife's closet. They may pay for lavish ceremonies and palaces or foster development and build roads.<sup>21</sup> Whether reducing a government's ability to charge a higher tax rate is welfare-increasing or welfare-decreasing will depend on the impacts on specific governments' spending patterns.<sup>22</sup> This ought to be obvious, since in other contexts governments, including OECD members, routinely assume that not all government revenues are devoted to enhancing public welfare. At the extreme, with pariah states, western governments frequently resort to financial sanctions and other measures designed to starve the pariah of revenue to help reduce its ability to oppress its population or to bring about its overthrow. The financial sanctions on the Khadafy regime in Libya and the Assad regime in Syria are examples where such pressures have been enthusiastically backed by OECD member states without much concern for whether school children in either country would lack textbooks as a result.<sup>23</sup> Some pariahs, such as Saddam Hussein's regime in Iraq, sought to undermine support for sanctions by arguing that the sanctions result in reduced public goods expenditures.<sup>24</sup> But we need not look solely to pariah states for examples of corruption, waste, fraud, and the purchase of public bads with tax revenues. Developed economies have their own pathologies of expenditures – ranging from former Governor Rod Blagojevich in Illinois<sup>25</sup> to the Parliamentary spending scandals in Britain<sup>26</sup> and the Common Agricultural Policy in the European Union.<sup>27</sup> The restricted view of tax competition thus incompletely captures important aspects of the competition among jurisdictions by failing to consider the full range

<sup>20</sup> See, e.g., Rixen, *supra* note 3, at 32-54, for a model of tax competition and coordination as a prisoners' dilemma.

<sup>21</sup> For example, the Central Africa Republic's dictator, Jean-Bedel Bokassa, crowned himself emperor in 1977 after a 12 year rule as president that had "established a reputation for megalomania and incompetence that rivals that of Uganda's Idi Amin Dada." *Mounting a Golden Throne*, Time (Dec. 17, 1977) available at <http://www.time.com/time/magazine/article/0,9171,945849,00.html#ixzz1ZgOt13nF>. His coronation cost \$20 million, an astounding sum considering the country's GDP was only \$250 million. Id. The country's only paved road was an 80km one between his imperial capital, Berengo, and the former colonial capital of Bangui. Brian Titley, DARK AGE: THE POLITICAL ODYSSEY OF EMPEROR BOKASSA 99 (1997).

<sup>22</sup> Interestingly, the OECD and other anti-tax competition groups appear to have different views of at least some limits on governments' abilities to regulate or confiscate property. The OECD, for example, often recommends the removal of capital regulations in its Economic Surveys, see Andreas Berghand Margareta Dackehag, *OECD recommends: A consensus for or against welfare states? Evidence from a new database*, Ratio Working Papers, No. 159, 4 (2010).

<sup>23</sup> See *Officials: EU moving toward more Syria sanctions*, Boston Globe (6 Oct. 2011) available at [http://www.boston.com/news/world/europe/articles/2011/10/06/officials\\_eu\\_moving\\_toward\\_more\\_syria\\_sanctions/](http://www.boston.com/news/world/europe/articles/2011/10/06/officials_eu_moving_toward_more_syria_sanctions/) (enthusiasm among EU members for more sanctions on Syrian government); Brooke Masters & David Dombey, *Gaddafi sanctions pose test for banks*, Financial Times (9 March 2011) available at <http://www.ft.com/cms/s/0/7fb969ce-4a80-11e0-82ab-00144feab49a.html#axzz1a46QISOg> (describing 2011 financial sanctions on Libyan government and government officials).

<sup>24</sup> See *Saddam's parades of dead babies are exposed as a cynical charade*, The Telegraph (25 May 2003) available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1431114/Saddams-parades-of-dead-babies-are-exposed-as-a-cynical-charade.html>. For a critical look at the impact of sanctions in Iraq on the civilian population, see Joy Gordon, *Invisible War: The United States and the Iraq Sanctions* (2010) (arguing that sanctions had a disastrous impact on population generally).

<sup>25</sup> See Elizabeth Brackett, *PAY TO PLAY: HOW ROD BLAGOJEVICH TURNED POLITICAL CORRUPTION INTO A NATIONAL SIDESHOW* (2009) (summarizing corruption scandals in Illinois).

<sup>26</sup> See John F. Burns, *In Britain, Scandal flows from modest request*, N.Y. TIMES (May 19, 2009) available at <http://www.nytimes.com/2009/05/20/world/europe/20britain.html?em> (describing scandal over MP's expenses).

<sup>27</sup> The CAP consumed two thirds of the Community Budget in the 1970s and 1980s, with one estimate that it cost each EU citizen about £250 per year in the 1990s. See David R. Stead, *Common Agricultural Policy*, EH.NET (available at <http://eh.net/encyclopedia/article/stead.cap>) (last accessed Oct. 25, 2011).

of behaviors by the regimes it models.

The benefit of more completely specifying the objectives of the interest group coalitions controlling governments is that doing so removes the artificial restriction of assuming that the sole objective of increasing government revenues is to fund public goods. We can also expand the analysis by removing a second artificial restriction at times imposed in the tax competition literature: that tax levels have no impact on levels of economic activity. A more nuanced view is that at least some taxes and some levels of taxes impede economic growth.<sup>28</sup> Precisely where the line is drawn is a matter of heated debate, and not a question we can resolve here. The important point is that if it is possible for particular taxes or levels of taxes to impede economic growth, a welfare analysis of the impact of tax competition is no longer simply a matter of maximizing the production of public goods by maximizing total tax revenue. In at least some circumstances, reducing tax levels is likely to increase economic activity and may even increase total tax revenue. Thus the levels of income taxation imposed in Britain in the 1960s and early 1970s, when marginal rates approached 100% on some forms of investment income, had impacts beyond inspiring the Beatles' *Taxman*.<sup>29</sup> Further, there is at least some evidence that at some point on the tax scale, reducing rates increases government revenue by both boosting economic activity and reducing the value of investments in tax avoidance and tax evasion. Thus even if one focuses entirely on maximizing government revenues, the simple model is inadequate.<sup>30</sup>

Within an interest group framework, the coalition of interest groups in power will at times have different goals with respect to tax policy. For example, within the federal bureaucracy in the United States, the Internal Revenue Service (IRS) is likely to favor increased enforcement powers for the IRS, deficit hawks will worry about ensuring revenues are sufficient, and the Department of Commerce may favor increasing tax incentives for business investment.<sup>31</sup> During internal British government debates over the establishment of tax havens in Britain's overseas territories, the British Treasury worried about revenue losses, the Foreign and Colonial Office about the fiscal sustainability of the territories and their budgetary impact on Britain, and the Bank of England about the implications for exchange control.<sup>32</sup> Internationally, offshore financial centers may be favored for providing competition in one sphere even as they are denounced for providing it in another.<sup>33</sup>

To evaluate the tax competition debate as a debate among interest groups within and across

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<sup>28</sup> This is recognized in OECD research on taxation outside the context of tax competition. See OECD, *OECD Tax Policy Study No. 21: Taxation and Employment*, Oct. 12 (2011), available at [http://www.oecd.org/document/19/0,3746,en\\_2649\\_34897\\_48851219\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3746,en_2649_34897_48851219_1_1_1_1,00.html) (last accessed Oct. 24, 2011) ("These tax burdens discourage employers from hiring. They also reduce the incentives for the unemployed to look for a job, and for those in employment to work longer or harder.") and Herwig Immervoll, *Average and Marginal Effective Tax Rates Facing Workers in the EU: A Micro-Level Analysis of Levels, Distributions and Driving Factors*, OECD Social, Employment and Migration Working Papers, Paris: OECD, 6 (2004), available at <http://www.oecd.org/dataoecd/39/51/34035472.pdf> (last accessed Oct. 24, 2011) (recognizing the linkage between tax burdens and economic development, they study the impact of taxation on the microeconomic level). More generally, see Richard Teather, *THE BENEFITS OF TAX COMPETITION* (2005).

<sup>29</sup> See Martin Daunton, *JUST TAXES: THE POLITICS OF TAXATION IN BRITAIN 1914-1979* \_\_ (2007). Taxation was also high in the United States, where marginal rates for high income earners rose to 90% during the 1960s. CITE.

<sup>30</sup> Whether cutting current U.S. or French income tax rates would increase welfare is a hotly debated question beyond the scope of this paper.

<sup>31</sup> This can be seen in the debate over tax amnesties to encourage repatriation of overseas profits. See Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 *GEORGE MASON L. REV.* 667 (2007) (discussing debate over encouraging repatriation of overseas profits).

<sup>32</sup> [Archives docs]

<sup>33</sup> See Andrew P. Morriss, *Changing the Rules of the Game: Offshore Financial Centers, Regulatory Competition & Financial Crises*, 15 *NEXUS: CHAPMAN'S JOURNAL OF LAW AND POLICY* 15, \_\_ (2010) (describing competition in insurance); Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 *TEX. INT'L L. J.* 377, 409-414 (2009) (describing official encouragement of firms' use of offshore vehicles to access the Eurodollar market); id. at 419-426 (describing attacks on offshore sector in 1970s over tax competition).

nations, we must therefore consider how different types of competition affect different interests in different nations. Helleiner's account of how U.S. financial industry interests fended off aggressive measures sought by continental European governments to control capital flight after World War II provides a clear example of how one set of U.S. interests were able to influence the overall U.S. position to promote regulatory competition when it was to their advantage.<sup>34</sup> The cancellation of the U.S.-Netherlands Antilles tax treaty in 1987 provides an example of how a different set of U.S. interests (revenue authorities and law enforcement) were able to influence U.S. policy to close off a potent channel for regulatory competition when the domestic costs became too high.<sup>35</sup>

Further, discussions of "tax competition" are often framed as if the issue were about settling the rules governing a sporting event. In essence, these discussions proceed as if the problem were akin to deciding how to handle the differences between the National League and American League over the designated hitter rule in scheduling inter-league play.<sup>36</sup> (The American League has the rule; the National League does not.) Playing a game is impossible without knowing whether the rule applies or not. Some mechanism must be chosen to resolve the particular question but there is broad agreement on the rules of baseball with a small number of differences in rules to be resolved. Regulatory competition among nations is much more complex, however. A better analogy for tax issues than the baseball leagues' debate over the designated hitter rule would be imagining negotiations between Spain's Europa soccer league and the U.S.-Canadian National Hockey League over how to play a "fair" contest between the two league champions. Both leagues run organized sporting events but they are not playing the same game, differing on how to measure success, the type of playing field, the legitimate methods of play, and so on. Similarly, nations play quite different "games" in their tax policies. Some are attempting to attract investment to locations lacking resources; others seek to capitalize on the value of their national advantages. Even within the confines of public finance theory, technically optimal tax regimes will differ across nations. Moreover, cultural variables often influence tax policy.<sup>37</sup> Add the New Zealand All-Blacks rugby team, Indian cricket teams, and Japanese sumo wrestlers to the negotiations in our Europa-NHL hypothetical and our sports analogy becomes closer to capturing the real spread of differences in national tax policies' goals and methods.

Thus in tax competition between Ireland and France, competition is taking place across more dimensions than just tax rates. As noted earlier, tax systems differ in their definitions of income, levels of exemptions, and a host of other criteria. These differences mean that tax competition cannot be reduced to a simplistic analysis of rates alone. Not only must any analysis take into account specific details of the tax system, such as the effective rather than nominal rates after accounting for tax credits and deductions. Differences in definitions can form yet another species of tax competition. For example, "dividends" are defined differently by tax laws in different countries and this can result in either over-taxation or under-taxation of a particular payment.<sup>38</sup> There are thus many more issues than a

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<sup>34</sup> Eric Helleiner, STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990S 56-58 (1994).

<sup>35</sup> Boise & Morriss, *supra* note 33, at 419-26.

<sup>36</sup> The American League allows a player (the "designated hitter") to hit in place of the pitcher; the National League does not. See generally G. Richard McKelvey, ALL BAT, NO GLOVE: A HISTORY OF THE DESIGNATED HITTER (2004).

<sup>37</sup> See, e.g. Jasmine Malone, *Greek tax evasion: 'There is just such little incentive to be honest,'* The Telegraph, Sept. 18, 2011 available at <http://www.telegraph.co.uk/finance/financialcrisis/8770940/Greek-tax-evasion-There-is-just-such-little-incentive-to-be-honest.html> (quoting a Greek businessman that "I don't feel comfortable with playing the game, but I feel justified in the sense that I am already taxed at a grossly unfair rate in my business. Everything is made difficult. I almost dread having a good year because I can never be sure that I won't be taken for a fool by the taxman after"). The Cayman Islands have a deeply rooted cultural tradition of no direct taxation (combined with substantial indirect taxation via customs duties) See, e.g., Cayman Islands, Economic Development Plan 1986-1990 at 2 (describing legend of the wreck of the ten sails that allegedly produced grant by British Crown of freedom from direct taxation and its impact on island culture

<sup>38</sup> University of Helsinki Prof. Marjaana Helminen's study of dividends in international tax law makes this point.

common tax rate to be agreed upon if countries were to cooperate to abolish just the tax competition between them in order to obtain complete neutrality in taxation.

The problem is even more complex than this, however. Accomplishing perfect global neutrality in taxation would require an unfeasibly extensive level of tax co-ordination. Deep coordination on rates, deductions, and definitions would be required, as well as on the structure of tax regimes themselves.<sup>39</sup> Only with complete co-ordination on taxation could countries see to it that all cross-border differences that create “distortions” were removed.<sup>40</sup> This can be seen by examining the ongoing debates over relative importance of capital import neutrality<sup>41</sup> and capital export neutrality,<sup>42</sup> whose conflicting requirements mean that no country can ensure that taxation is internationally neutral in both cases.<sup>43</sup> As long as tax rates differ between countries and investors are treated equally within a country while being exempt from taxation at home, they cannot be made neutral to investing at home or in a foreign country with lower tax rates.<sup>44</sup> Countries will be forced to choose which goal is more important.<sup>45</sup> They will make different choices depending on their own circumstances and differences in tax regimes will therefore persist regardless of specific efforts to harmonize portions of tax rules.

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Over-taxation or under-taxation may be caused, among other reasons, by different definitions of the term ‘dividend’ under two different states’ domestic tax law, and under different states’ domestic tax law and under tax treaties. The problem is obvious in a non-treaty situation, but it is also a problem in tax treaty situations because the definitions of the terms used in tax treaties may themselves be unclear and may leave room for interpretation. The problem also exists because the area of legal cases covered by the term used in other domestic legislation. Therefore, there is a lot of room for conflicts and interpretation. It is also possible that taxpayers purposely avoid tax by taking advantage of the differences in definitions. Alternatively, taxing authorities may intentionally seek to reach interpretations that bring tax returns to the state in question.

Marjaana Helminen, *THE DIVIDEND CONCEPT IN INTERNATIONAL TAX LAW* (1999) at 10.

<sup>39</sup> Tsilly Dagan, *The Costs of International Tax Cooperation*, Michigan Law and Economics Research Paper No. 02-007; and U of Michigan Law, Public Law Research Paper No. 13, 4-7, (2003), available at: ([http://www.biu.ac.il/law/unger/wk\\_papers.html](http://www.biu.ac.il/law/unger/wk_papers.html)) (last visited 2011-10-02) (pointing out that global neutrality is possible in theory but that the political hurdles would render it impossible. In the unlikely scenario that an agreement on global neutrality would be stricken and implemented, any country would have an incentive to shirk on the agreement, and the monitoring costs needed to prevent this would make the scheme too costly to be welfare improving.)

<sup>40</sup> Rixen, *supra* note 3, at 61.

<sup>41</sup> Capital import neutrality requires that investments returns not depend on the residence of the investor. This requires that foreign and domestic investors be treated alike in the source country, while the residence country exempts those investing abroad from any taxation on these returns.

<sup>42</sup> Capital export neutrality implies that an investor faces the same taxation no matter whether he invests at home or in another country, making his investment decision based on economic fundamentals alone. If country B has higher taxes than country A, country A will need to offer its taxpayers a tax credit to remove tax considerations from its taxpayers’ choices between investments in country A and country B. But if country C has a lower rate than country A, a taxpayer in the latter will need to make up the difference between country C’s lower tax rate and country A’s higher rate when profits are brought back to country A.

<sup>43</sup> Rixen, *supra* note 3, at 61-63. Capital export neutrality, in which people within a jurisdiction are not affected by taxation in their decision about where to invest, requires that the country follows the residence principle of taxation, while granting a foreign tax credit on foreign investments. Capital import neutrality, in which citizens are neutral between acquiring capital from abroad and from the home country, requires taxation at source only and exemptions for income that comes from abroad. Since the different tax systems’ requirements are conflicting, total export or import neutrality cannot be obtained simultaneously within a single jurisdiction. *Id.*

<sup>44</sup> Dagan, *supra* note 39, at 11 (pointing out that since tax treaties, including the OECD Model Convention, rely primarily on the residence principle of taxation, capital export neutrality seems to be the main focus when tax competition is discussed.)

<sup>45</sup> The aim of tax neutrality is to avoid causing inefficient investments because of tax laws. Tax competition can be avoided if investments cannot be made at a lower tax rates. Complete elimination of competition is impossible so long as black markets exist. Investors are never completely neutral between paying taxes and paying the price for doing deals under the table. Moreover, distortions exist both because tax rates are low and high. Where rates are high, investors may decide not to invest at all. This causes an inefficiency that is much harder to measure than that which occurs when capital moves from one country to the other as a result of changes in taxation but which is nonetheless potentially significant.

Moreover, tax policy is just one of many dimensions on which nations compete for economic activities. An educated workforce, widespread use of languages common in international trade, the size of a particular market, a common law legal system, being in the “right” time zone, and the presence of a “creative class” are all regularly linked to economic success.<sup>46</sup> Taxation is no different in principle from these other characteristics.

In a world in which differences in tax rules are inevitable, how should we evaluate the differences we observe? We argue that the appropriate lens is of the interest groups within countries that use their influence to shape tax laws domestically to their advantage.<sup>47</sup> We propose the following as the appropriate analytical framework for examining international tax and regulatory competition:

- States enter the competition with different endowments that affect their competitive abilities to attract investment. Large economies such as the United States are attractive destinations for investment and so have the opportunity to charge a relatively high price through the combination of taxes and regulatory costs in exchange for access to investment opportunities. Smaller economies that lack these advantages, such as Ireland, must compete on price. Treating taxation issues as different in kind from other international differences disadvantages smaller and less wealthy states relative to large, wealthy states.
- States differ in the degree to which their public finances depend on encouraging economic activity. For example, natural-resource-rich states can act as rentiers; natural-resource-poor states cannot. Thus a resource-rich state like Venezuela can better ‘afford’ a regime hostile to investors than a resource-poor state like Costa Rica. The degree to which particular states are subject to competition has differed as transportation and communications costs change, as international trade regimes change, and as the types of goods and services traded change.
- Within states, coalitions of interest groups determine policy positions. Some interest groups seek to maximize the state’s resources to fund their priorities, while other interest groups seek to maximize the resources focused on their particular priority. Others focus on expanding their power. For example, the French president would favor maximizing the resources at his disposal, French farmers want to maximize the resources available for subsidies, and the French tax authorities want to ensure that they have access to information on French taxpayers. All three groups might favor a high tax regime, but for different reasons.
- Interest groups may seek to influence their governments’ policies by forming alliances across national boundaries through international organizations and treaties. Different forums offer different opportunities for different interest groups. Diplomats have more influence over deliberations at the U.N. while central bankers dominate discussions at the Bank for International Settlements (BIS). Interest groups therefore seek to channel policy discussions into the forum in which their influence is greatest. The organizations also have interests, particularly in enhancing their authority, budget, and prestige.

In this framework, international organizations can play four different roles. First, they provide

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<sup>46</sup> See, e.g., N. Gregory Mankiw, David Romer and David N. Weil, *A Contribution to the Empirics of Economic Growth*, 107 THE QUARTERLY JOURNAL OF ECONOMICS 407 (1992), (On the importance of education for economic growth), Michael Kremer, *Population Growth and Technological Change: One Million B.C. to 1990*, 108 THE QUARTERLY JOURNAL OF ECONOMICS, 681 (1993), (for the importance of population size for technological progress); James C. Bennett, *The Anglosphere Challenge* (2007) (advantages of English speaking countries); Rafael La Porta, Florencio Lopez de Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008) (common law); Richard Florida, *THE RISE OF THE CREATIVE CLASS* (2002) (creative class).

<sup>47</sup> Randall G. Holcombe, *Tax Policy from a Public Choice Perspective*, 51(2) NATIONAL TAX J. 359, 368 (1998) (“No analysis of tax policy is complete unless it includes an explicit recognition of the public choice environment within which tax policy is made.”)

opportunities for cross-country interest groups to coordinate.<sup>48</sup> Second, they influence the domestic debates by changing the cost-benefit calculation for domestic groups through the creation of international “soft law” standards and best practices.<sup>49</sup> Third, they offer domestic interest groups opportunities to shift a debate to a forum where their relative strengths may be greater. Finally, they offer a means to enforce agreements and prevent cheating from undermining agreements to refrain from competitive steps.<sup>50</sup> To see how the OECD fits into this framework, we now turn to the evolution of its role in international tax cooperation.

## II. The Evolution of the International Tax Cooperation

The role played by international organizations in tax issues has changed substantially over time. Until quite recently, these efforts focused on finding resolutions of problems caused by differences in tax regimes. At least implicitly, the goal of such efforts was to attempt to increase international economic competition by eliminating differential burdens on entities operating across borders through the elimination of double taxation. However, since at least the early 1980s the OECD has embarked on an effort to influence national tax policies, including the policies of non-member states, on substantive matters including tax rates and the exchange of information in an effort to protect member states from competitive pressures. Moreover, the OECD has been working on containing tax competition from “tax havens” since at least the early 1970s.<sup>51</sup> In this section, we set this history in the context of the larger trends in the world economy over the twentieth century towards freer trade and freer movements of capital. Not only is this history critical to understanding the subsequent policy shifts, it also illustrates an alternative conception of the role of international organizations to the OECD’s current cartel-like focus in taxation.

### A. The Era of Technical Expertise

Tax laws differ across states in a wide variety of details, including in definitions of taxable events, rates of taxation, allowable deductions, and allocation of costs and earnings to particular jurisdictions. As an example, consider someone owning real estate in a foreign country. And indeed, that would be the case for a national of Britain, France, Netherlands or Germany who owned real estate in the United States (or vice versa); she would be covered by both countries’ estate taxes on this property at her death.<sup>52</sup> Compared to the estate of a taxpayer who owned real estate only within his home

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<sup>48</sup> The Commonwealth may be the best example of a “transnational” organization, which includes both governmental and nongovernmental networks. *See Slaughter supra* note 2, at 138. An example of a governmental international organization that engages non-governmental actors is Asia-Pacific Economic Cooperation (APEC), which makes deliberate efforts to reach out to non-governmental actors, primarily from the business community. *Id.* at 142. It may be in the interest of the decision makers of international organizations to give their otherwise technocratic decisions more legitimacy by engaging nongovernmental organizations in their decision making. *Id.* at 220-221.

<sup>49</sup> *See Slaughter supra* note 2, at 178 (when government agents converge in networks, establishing codes or best practices for instance, this constitutes what can be called “soft law”. Slaughter points out that “traditional international law-making had traditionally been hard law, but established by treaties, while soft law can be in the form of “international guidance”. The latter, she points out, is however emerging as a possibly more powerful form of law).

<sup>50</sup> Besides from binding agreements, the personal relationships of the networks they encapsulate help strengthen the compliance with international laws and regulations *See Slaughter supra* note 2, at 183.

<sup>51</sup> *See, e.g.*, 23 Aug 1974, letter from P.J. Weston, British National Archives, File PREM 16/8 (noting that “The UK is represented on working parties in both the EEC and the OECD which have been set up to combat the growing tax avoidance industry and the use of tax havens.”).

<sup>52</sup> Offshore tax expert Marshall Langer cited the problem of estate tax as a key reason for use of corporate entities for non-U.S. taxpayers to own U.S. real estate in testimony to a congressional hearing in 1983.

In fact, under existing law, I would consider it malpractice if I allowed a legitimate foreign investor to make large U.S. investments without using a foreign corporation. The reason for that is a very silly rule that has been part of the Internal Revenue Code for as many years as I can remember. It says that if the Washington Hilton Hotel is owned by someone who is a nonresident alien in his own name, and he dies owning that property, it is subject to estate tax in the United States. If he puts it into a domestic U.S. corporation and dies owning the shares of that domestic corporation, it is still subject to estate tax in the

jurisdiction, the estate of the cross-national property owner would be taxed twice. One of the most important set of problems the differences in tax laws pose for individuals and firms operating across jurisdictional boundaries is their creation of the possibility that the same event or revenue will be taxed by more than one jurisdiction, disadvantaging the individual or entity relative to an individual or entity not operating across boundaries. To avoid this double taxation with respect to estate taxes and real estate, the tax treaties between the United States and the four jurisdictions listed above provide a tax credit in the non-domiciliary country for the amount of tax paid in the domiciliary country.<sup>53</sup> These problems are not simple and for most of the twentieth century, international organizations working on international tax issues focused almost entirely on finding solutions to problems created by differences in tax laws across states like this estate tax example.

Differences can create opportunities for those individuals and entities, as well as problems, since differences create the possibility of arbitraging across jurisdictions to reduce total tax burdens. Prior to the widespread adoption of individual and business income taxation, these differences created relatively few problems or opportunities as most taxable events occurred within jurisdictional boundaries. Thus when governments depended primarily on tariffs and real property taxes as a means of raising revenues – as they did until the early twentieth century<sup>54</sup> – reducing an individual's tax burden required relocation to a state with a lower tariff<sup>55</sup> or selling real estate in a high tax jurisdiction and buying it in a low tax one (and, possibly, creating a taxable event through the sale). As a result, in a world dominated by indirect taxation, all individuals and businesses operating within any particular state generally faced equivalent tax environments within that jurisdiction<sup>56</sup> and the existence of differences in national tax regimes had relatively little impact on the cost of doing business internationally.<sup>57</sup>

Before the introduction of the income tax, international tax issues were few and far between and agreements on taxation between nations were mostly limited to dealing with the taxation of railway companies and international salesmen.<sup>58</sup> Not until governments began to impose direct taxes on larger

United States. But if he puts it into a foreign corporation, any foreign corporation, a Netherlands Antilles corporation, a Chinese corporation, or a Russian corporation, under the estate tax situs rules, he is deemed to own foreign property which is not subject to estate tax in the United States.

Statement of Marshall J. Langer, at 179, in "Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries", Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, April 12 and 13, 1983.

<sup>53</sup> This example is taken (in a simplified form) from *Making Sense of Four Transatlantic Tax Treaties: U.S.-Netherlands, U.S.-Germany, U.S.-France and U.S.-U.K.*, 17 SPG Int'l Practicum 47, 48 (2004).

<sup>54</sup> See Rixen, *supra* note 3, at 86 (pointing out that the most common revenue sources of governments except tariffs were primarily taxes on land and real estate) Britain imposed a peace time income tax already in the mid-19th century, with other nations following from the early 1890s. See Carolyn Webber and Aaron Wildavsky, A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD, 309-310 (1986). The size of Western governments was however still small. *Id.* at 310. In the United States, government revenues were raised after the election of Woodrow Wilson as President with the 16th Amendment in 1913, which allowed for a graduate income tax. *Id.* at 413.

<sup>55</sup> For example, retired British military officers moved to the Crown Dependencies Jersey and Guernsey after the Napoleonic Wars in part because lower tariffs on whiskey and tea lowered the cost of living. An estimated 3,000 British residents moved to the islands by 1834, three quarters of whom were military retirees and their families. Raoul Lemprière, HISTORY OF THE CHANNEL ISLANDS 156 (1974). The first double-tax agreement was that between Prussia and Austria-Hungary in 1899. See Rixen, *supra* note 3, at 87.

<sup>56</sup> A firm importing material from its operations elsewhere would, of course, be charged duties on the imports while a domestic firm making the same materials locally would not. But the international and national firms faced equivalent tax situations with respect to the decision of whether to source domestically or internationally.

<sup>57</sup> Tax rates, however varied, could not have skewed choices of business location much. Corporate income tax in the United States was introduced in 1909, and then at only 1 %. See Webber and Wildavsky *supra* note 54 at 523. In both England and the United States, the income tax was however as high as 10 % in some areas and in certain years. *Id.* at 344.

<sup>58</sup> See Rixen, *supra* note 3, at 87.

numbers of individuals and businesses during the twentieth century did the problems posed by differences begin to become more widespread.<sup>59</sup> By 1919, the International Chamber of Commerce (ICC) had formed a Committee on Double Taxation, which called for a multilateral solution to the problem and urged the newly formed League of Nations to eradicate the “evils of double taxation.”<sup>60</sup> The topic was important enough to be discussed at the 1922 International Economic Conference in Genoa that unsuccessfully wrestled with post-World War I international economic issues.<sup>61</sup>

Even under the relatively simple systems of direct taxation in use during the twentieth century prior to World War II, the problems posed by differences among tax systems were substantial enough that the League formed a committee to examine the problem. It is a testament to the complexity of the problems posed by even these relatively simple tax systems that the League committee abandoned its efforts in 1927 on the grounds that “[i]n the matter of double taxation in particular, the fiscal systems of various countries are so fundamentally different that it seems at present practically impossible to draft a collective convention, unless it was worded in such general terms as to be of no practical value.”<sup>62</sup> A 1928 League conference did provide three versions of a model convention on double taxation, although these still left many details for bilateral negotiations. It also created a permanent Fiscal Committee to address tax issues.<sup>63</sup> Despite the Depression and World War II, the League continued to focus attention on the issue and to involve highly regarded tax experts in crafting technical solutions to double taxation problems.<sup>64</sup> As with the 1928 models, the general frameworks designed by the experts left many details to further negotiations between states for inclusion in bilateral agreements.<sup>65</sup> By 1946, the League’s Fiscal Committee had published two different models on how to divide the tax base, recognizing the problem that each of the approaches favored a different set of countries.<sup>66</sup> The transition of discussions to the newly formed United Nations made solving double taxation issues still more complex, since the U.N. membership included both Soviet bloc and developing countries, whose tax systems differed from western developed economies’ tax laws in additional ways.<sup>67</sup> These complications soon brought the

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<sup>59</sup> Governments may have been motivated to address the problem because among the first to complain about double income taxation were diplomats taxed by both their home countries and their countries of residence. See Claudio M. Radaelli and Ulrike S. Kraemer, *The Rise and Fall of Governance’s Legitimacy: The Case of International Direct Taxation*, Paper prepared for the exploratory workshop on ‘Soft Law, New Policy Instruments, and Modes of Governance in the EU, University of Exeter, 28 January, 7 (2005), available at <https://eric.exeter.ac.uk/repository/bitstream/handle/10036/23834/RadaelliInformalGovernance.pdf?sequence=1> (last accessed Oct. 24, 2011)

<sup>60</sup> See Rixen, *supra* note 3, at 88.

<sup>61</sup> Kirsten Wandschneider, *The Stability of the Interwar Gold Exchange Standard: Did Politics Matter?*, 68 J. ECON. HIST. 151, \_\_ (2008) (citing the conference as an example of the lack of international coordination between the world wars); League of Nations, *Double Taxation and Tax Evasion*, Report presented by the Committee of Technical Experts on Double Taxation and Tax Evasion, Geneva, Publications of the League of Nations, ECONOMIC AND FINANCIAL 5 (1927) (referring to the International Economic Conference in Genoa in April 1922, which “recommended that the League of Nations should also examine the problem of the *flight of capital*”).

<sup>62</sup> League of Nations, *Double Taxation and Tax Evasion*, *supra* note 61, at 8.

<sup>63</sup> Double taxation can be handled unilaterally through tax exemptions, credits, and deductions. See Rixen, *supra* note 3, at 32-54 (discussing the choice between foreign tax credit, exemption and deductions). However, treaties may be preferred to unilateral measures as being in a ‘treaty club’ with rich countries, for instance, may offer other opportunities and advantages for developing nations. See Dagan, *supra* note 39, at 21.

<sup>64</sup> See Rixen, *supra* note 3, at 88-92; Allison Christians, *Networks, Norms, and National Tax Policy*, 9 WASHINGTON UNIVERSITY GLOBAL STUDIES L. Rev. 1, 10 (2010).

<sup>65</sup> Christians, *supra* note 64, at 13.

<sup>66</sup> See Rixen, *supra* note 3, at 96.

<sup>67</sup> In the Soviet Union, Premier Joseph Stalin had in 1928 abandoned the New Economic Policy, which had allowed for some free trade and taxation. The system in place was instead of the completely totalitarian kind. See Peter J. Boettke, *CALCULATION AND COORDINATION: ESSAYS ON SOCIALISM AND TRANSITIONAL POLITICAL ECONOMY* 162 (2001). Latin American countries that became members in 1945, such as Argentina, Brazil and Chile had customs as a share of government revenue of 24.7 %, 50.3 % and 41.1 % respectively, compared to 5.8 % in the United States. Taxes of income and wealth meanwhile, provided respectively 17.9 %, 10.2 % and 23.7 %, while the figure was 43.0 % in the United States.

discussions within the U.N. to an end.<sup>68</sup>

The problems remained, however, and the ICC turned to the newly-formed Organization for European Economic Co-operation (OEEC), the predecessor to the OECD, for a forum within which to craft solutions to double taxation problems.<sup>69</sup> Originally created in 1948 to coordinate American and Canadian Marshall Plan aid to Europe, the OEEC's objectives expanded in the late 1950s to "economic matters in a broad sense of the term."<sup>70</sup> In 1956, it organized its own Fiscal Committee to address double taxation issues.<sup>71</sup>

The OEEC's expanded mission also led to a broadening of its membership beyond Europe, and the organization was recreated as the OECD in 1961 with the addition of the United States and Canada as members.<sup>72</sup> The new organization described its goals in the 1960 Convention on the Organization for Economic Co-operation and Development as promoting policies designed to:

- a. achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus contribute to the development of the world economy;
- b. contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- c. contribute to the expansion of world trade on a multilateral non-discriminatory basis in accordance with international obligations.<sup>73</sup>

In addition to these substantive goals, individual members sought to accomplish their own goals with respect to the organization<sup>74</sup> and the organization's impact on them.<sup>75</sup> The OECD's initial role in tax measures were an effort to minimize the transactions costs of doing business across different tax

*See Inequality and the Evolution of Institutions of Taxation Evidence from the Economic History of the Americas in THE DECLINE OF LATIN AMERICAN ECONOMIES: GROWTH, INSTITUTIONS, AND CRISES (Sebastian Edwards, Gerardo Esquivel and Graciela Márquez ed.) 103 (2007).*

<sup>68</sup> See Rixen, *supra* note 3, at 91-97 (for an account of these events).

<sup>69</sup> The OEEC's more homogeneous membership made it possible to avoid some of the issues the more heterogeneous U.N. membership caused. Rixen points out, the Fiscal Committee's delegates were government officials, who would come to agree on an approach leaving them with much flexibility in their bilateral agreements. See Rixen, *supra* note 3, at 98.

<sup>70</sup> Hugo J. Hahn, *Continuity in the Law of International Organization*, 4 DUKE L. J. 522, 523 (1962).

<sup>71</sup> See Rixen, *supra* note 3, at 97.

<sup>72</sup> The 20 members in 1963 were Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Japan joined in 1964, Finland in 1969, Australia in 1971 and New Zealand in 1973. Later members are Mexico in 1994, the Czech Republic in 1995, Hungary, Korea and Poland in 1996, the Slovak Republic in 2000, and Chile, Estonia, Israel and Slovenia in 2010. Currently, there are 34 OECD member states, with Chile, Estonia, Israel and Slovenia having joined in 2010. By limiting membership, the OECD may have created an incentive for states to seek membership, a model that has been followed by other international organizations. See Bruno S. Frey, *The Public Choice View of International Political Economy* in *THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS* 7, 13-14 (Ronald Vaubel and Thomas D. Willett ed. 1991). The organization also grew substantially. Its budget in 1962 was US\$ \_\_\_\_. By 2011, the OECD had a budget of US\$ 491 million. Member states contributed proportionately to the size of their economy; the U.S. contributes almost 25% (US\$ 123 million). See OECD, About, Budget([http://www.oecd.org/document/8/0,3746,en\\_36734052\\_36761854\\_36951624\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/8/0,3746,en_36734052_36761854_36951624_1_1_1_1,00.html)) (Last accessed Oct. 02, 2011).

<sup>73</sup> Article 1 of the OECD Convention signed in Paris on 14th December 1960, which came into force on 30th September 1961.

<sup>74</sup> For example, the creation of the OECD involved negotiations over which countries would supply the deputy directors. Italy insisted that it be given a deputy directorship as a condition of membership, necessitating expansion of the number of deputy directors to five. See \_\_\_. Similarly, Britain expended considerable effort in retaining the chairmanship of the Economic Affairs Committee in the mid-1960s, despite pressure from the OECD Director to allow a country with fewer economic problems to hold the chair. See \_\_\_

<sup>75</sup> For example, during Britain's economic difficulties in the 1960s, British officials carefully negotiated changes in language to OECD documents discussing Britain's economy. See \_\_\_

systems by creating a framework that could help solve double taxation issues, an approach consistent with its formal goals of expanding economic development. This expressed itself in the 1963 *Draft Model Convention on Income and Capital*,<sup>76</sup> which established the OECD as the primary multilateral forum in international tax policy.<sup>77</sup>

The 1963 Model Convention provided nations with a framework upon which to negotiate but did not attempt to suggest how specific tax policy questions be answered. Resolving double tax issues to spur development was also a goal of the United States' broad extensions of its tax treaties with European nations to those nations' overseas territories and newly independent former colonies during the 1950s.<sup>78</sup>

Even though the OECD's more homogenous membership eliminated some of the conceptual conflicts that had prevented the U.N. from effectively addressing the double taxation problems, even the narrower set of tax issues the OECD addressed remained complex. Unlike the League of Nations, the OECD brought government officials (at least from a small group of governments) to the table as well as technical experts. And the OECD's focus on the problems its members had with the interactions of their tax systems narrowed the range of issues to be resolved. As a result, the Draft Model Convention was perceived as more politically feasible than its League-drafted predecessors.<sup>79</sup> Even after the 1963 Model Convention was published, efforts continued to refine the solution and to address additional issues and a revised Convention was published in 1977 by what was now called the Committee on Fiscal Affairs (CFA).<sup>80</sup>

Both the 1963 Draft and the 1977 Convention were flexible frameworks for resolving tax issues between developed country national systems.<sup>81</sup> In neither form did the OECD propose substantive policies on tax questions. By the end of the 1970s, the OECD model was "practically the infrastructure of the current bilateral treaty-based system"<sup>82</sup> and the OECD was the most important arena for international tax negotiations, a status that the organization continues to hold today.<sup>83</sup> The complexities

<sup>76</sup> OECD, *Draft Double Taxation Convention on Income and Capital* (1963) available at [http://faculty.law.wayne.edu/tad/Documents/Tax\\_treaties/oecd\\_1963.pdf](http://faculty.law.wayne.edu/tad/Documents/Tax_treaties/oecd_1963.pdf) (Last accessed on 2011-10-02).

<sup>77</sup> See Rixen, *supra* note 3, at 98-99.

<sup>78</sup> The preamble stated that the purpose of the treaty was to avoid double taxation. See Elisabeth E. Owens, *United States Income Tax Treaties: Their Role in Relieving Double Taxation*, 17 RUTGERS L. REV. 428, 429 (1962). Since U.S. nationals were shielded from double taxation by tax credits of the U.S. government, the treaties did little for American nationals, except for those living abroad. *Id.* at 432-433, 445. Since several countries with which the United States had signed treaties in the beginning of the 1960s did not offer tax credits to their citizens to the same extent, they were also relieved from double taxation more significantly by signing the treaty. *Id.* at 445. The treaties also may have been aimed at encouraging U.S. investments in Western Europe. *Id.* at 446. The U.S. signed its first treaty with France in 1932, but had increased its number of treaties to 30 by 1973. See Rixen, *supra* note 3, at 109-111.

<sup>79</sup> See Rixen, *supra* note 3, at 99-100. For example, the draft convention was to be revised according to how bilateral double tax agreements diverged from it, but as they all conformed to it, this became unnecessary.

<sup>80</sup> C. Miller, *Alternatives to the OECD Model*, in TAXATION AND INTERNATIONAL CAPITAL FLOWS: A SYMPOSIUM OF OECD AND NON-OECD COUNTRIES 83, 83 (1990).

<sup>81</sup> Rixen describes the commentary section of the convention as "the most flexible instrument available to governments trying to induce changes to a series of bilateral treaties that cannot easily and quickly be negotiated." Rixen *supra* note 3, at 100. As a framework for addressing tax issues between developed economies, the OECD model proved unacceptable to developing countries and in 1967 they turned to the U.N. to create an alternative model. This work was done through its "ad hoc group of experts" containing mostly government appointed officials responsible for negotiating treaties for their countries. See Rixen, *supra* note 3, at 102. The U.N. published its own Model Convention in 1980, adapted from the OECD Model Convention but modified to address the unique tax issues that arise between developed and developing countries. See Rixen *supra* note 3, at 102-104. On the dominance of the OECD Model Treaty, see Diane Ring, *Who Is Making International Tax Policy?: International Organizations as Power Players in a High Stakes World*, 33 FORDHAM INT'L L. J. 649, 700 note 242 (2010) (noting that the UN is not a competitor to the OECD in international taxation issues). Yavrin notes that the UN Model Convention has practically vanished from influence. Brauner Yariv, *International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2002-2003).

<sup>82</sup> Yariv, *supra* note 81, at 310.

<sup>83</sup> The OECD Secretary General describes the organization as being "at the forefront of setting tax standards for the global

of resolving double taxation issues were still seen as something largely requiring individual negotiations between countries to handle substantive matters, as evidenced by a U.S. Treasury official's 1980 Congressional testimony that because of the "wide range of international economic relationships and the diversity of foreign tax systems, we must approach each treaty relationship separately" in designing the treaty terms.<sup>84</sup>

Thus the first way governments conceived of international tax issues was as a technical problem that required careful negotiations to ensure that international business activity was not unduly burdened by double taxation. This conceptualization of the problem as a technical one made it a natural one to shift into a multilateral forum. When the difficulties of reconciling all of the world's divergent tax systems overwhelmed the experts, the major trading countries shifted their efforts to the OEEC/OECD, where they could address the most critical problems affecting the largest volume of international business (which occurred between their members).

How the OECD handled tax issues evolved with the organization during this time as well. By the 1970s, three bodies within the organization were particularly important. First, the Committee on Fiscal Affairs (CFA), which meets twice a year, officially does the bulk of the OECD work on taxation.<sup>85</sup> Countries are represented in the CFA by senior tax officials and tax administrators. Second, the OECD staff that work on taxation belong to the Centre for Tax Policy and Administration (CTPA). In contrast to the delegates to the CFA, who represent their respective countries, businesses, and organizations, the staff consists of "international bureaucrats."<sup>86</sup> The work is divided between working parties, whose meeting agendas are usually prepared by a division of the CTPA connected to their field.<sup>87</sup> The agendas for CFA meetings are often prepared by the CFA Bureau, an executive committee appointed by the CFA.<sup>88</sup> Which countries are appointed to the bureau can therefore be significant in determining the direction of its work.<sup>89</sup> The various incentives, ideas and connections of these representatives will eventually form the basis for the consensus-based statements of the OECD.<sup>90</sup>

economy." OECD, *Current Tax Agenda* (2011) available at: [www.oecd.org/dataoecd/38/17/1909369.pdf](http://www.oecd.org/dataoecd/38/17/1909369.pdf) (last accessed 2011-10-02).

<sup>84</sup> Statement of John E. Chapoton, Asst. Sec. for Tax Policy, Dep't of Treasury, in "Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries", Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, April 12 and 13, 1983, at 261.

<sup>85</sup> The CTPA is a part of the 2,500 member OECD Secretariat that constitutes the organization's staff. OECD, *About*, available at: [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html) (last accessed 2011-10-03). Its members are the experts in their fields, many are tax economists with experience and knowledge of the latest developments in international taxation politics. Michael Webb, *Defining the boundaries of legitimate state practice: norms, transnational actors and the OECD's project on harmful tax competition*, 11 REV. OF INT'L POL. ECON. 787, 792 (2004). As "international bureaucrats," they are detached from the politics of their home country. Christians, *supra* note 64 at 19. They may previously have served as senior tax officials in their home country or represented their country in an OECD committee. More rarely, staff members have been recruited as young professionals. Interview 5 (We conducted 5 interviews with current and former OECD personnel in late spring and summer 2011. We agreed not to identify the individuals interviewed, which encouraged frank discussion of the agency and which shields our sources from retaliation); OECD Website, *Staff Categories*: [http://www.oecd.org/document/62/0,3746,en\\_21571361\\_45609340\\_40833406\\_1\\_1\\_1\\_1,00.html#agrades](http://www.oecd.org/document/62/0,3746,en_21571361_45609340_40833406_1_1_1_1,00.html#agrades) (last accessed 2011-10-03) ("[r]ecruitment of Young Professionals (grade A1) is extremely limited.").

<sup>86</sup> Christians, *supra* note 64 at 19.

<sup>87</sup> Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 BROOK. J. INT'L L. 757, 762 (2009).

<sup>88</sup> Ault, *supra* note 87, at 760.

<sup>89</sup> Interview 4. France, Japan, and Ireland were for instance elected to the new CFA Bureau that was set up for the work preparing the 1998 Report discussed below. Choosing Ireland to participate might have served to give legitimacy to the work. Interview 5.

<sup>90</sup> Christians, *supra* note 64, at 22 ("These tax policy groups form an intertwined epistemic community that holds an important and influential position in the law-making order."). Since the OECD is not a law-making body, there are not the official records and public scrutiny to which national law-making bodies are subjected. It is therefore inherently difficult to identify at which point and who makes decisions. Even if one could attend one of the high-level meetings at which may be

Finally, the OECD Council is the body with formal decision-making power to speak for the organization; its decisions are made by consensus. The Council consists of purely national representatives, who are high-level diplomats.<sup>91</sup> The council does however deal with all kinds of policy issues, and taxation is but one of them. It is more of a venue for channeling projects and decisions further down in the organization, then an arena where tax policies are formed.<sup>92</sup>

#### B. The Growth of Tax Competition

Tax competition has been an issue for governments for as long as they have taxed income. In 1934, Canadian mining millionaire Harry Oakes moved to the Bahamas to escape Canada's high taxes, complaining that 85 percent of his income was being taxed away. A Canadian newspaper headlined the story of Oakes' departure with: "MULTIMILLIONAIRE CHAMP TAX DODGER: Santa Claus to Bahamas. But Heart Like a Frigidaire to the Land that Gave Him Wealth."<sup>93</sup> Moves like Oakes' were relatively rare, both because of their high cost and because before World War II relatively few people regularly paid taxes at rates like those Oakes found excessive. Nonetheless, the transformation of corporate income taxes from taxes on shareholders into a separate tax on corporate entities (a post-World War I development in the United States and later in Britain),<sup>94</sup> the sharp rise in tax rates on both individual and corporate income used to fund World War I,<sup>95</sup> and the efforts to control businesses through taxation that began in the 1920s all educated a generation of tax lawyers and accountants in the need for innovation in financial structuring to reduce tax burdens.<sup>96</sup> Even before World War II, a growing industry of lawyers and other professionals were actively engaged in finding ways to use complex and often vague statutory and regulatory language to reduce individuals' and firms' tax bills.

After World War II – just as the OEEC/OECD was being organized and taking on tax issues – three important changes in the world economy further increased the importance of differences in tax regimes. First, as the European economies recovered from the devastation of World War II during the 1950s and technological developments continued to reduce the cost of doing business internationally,<sup>97</sup>

open, policy is often formed outside of the big venues, making it impossible for any student of decision to capture. See Christians, *supra* note 64, at 26-27.

<sup>91</sup> Christians, *supra* note 64, at 17.

<sup>92</sup> OECD Website, *Who Does What*,: [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761791\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html) (last accessed 2011-10-03). These Council ambassadors have many issues on their table, and what they may focus their discussions on varies. For instance, as the expansion of the OECD was high on the agenda with the entrance of Mexico in 1994, tax policy was not the main priority, and the Council would therefore endorse documents on taxation without discussing the topic much at its meetings. Interview 1. The Council directs projects to subcommittees of government officials at a lower level. Its statements are important, but at least in the area of tax policy, they are usually drafted by OECD staff members. Christians *supra* note 64, at 17-18. Thus, this is not where policy is formed, but rather where national policy is channeled into projects, where policy is mobilized by mandates to the OECD Secretariat, which may delegate further to subcommittees.

<sup>93</sup> Michael Craton, *A HISTORY OF THE BAHAMAS* 254-255 (3<sup>rd</sup> ed. 1986).

<sup>94</sup> Steven A. Bank, *FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT* 109-110 (2010) (noting that after World War I, "Congress transformed the corporate income tax from its original pass-through vision to a separate, and at least partially additional, tax at the entity level."); Daunton, *supra* note 29, at 94 (noting that separate corporate taxation did not develop in Britain until after World War II).

<sup>95</sup> Bank, *supra* note 94, at 89 (top surtax rate on individuals went from \$6,000 in 1913 to 50% in 1917); Daunton, *supra* note 29, at 74 ("At the end of [World War I], the proportion of people paying income tax was higher than ever before, and the rate was at an unprecedented level" in Britain).

<sup>96</sup> See, e.g., Bank, *supra* note 94, at 142 (describing 1920s tax structuring to make use of exemptions).

<sup>97</sup> For example, during the 1920s, transatlantic telephone calls were expensive and difficult and travel between Europe and North America required ocean liner voyages lasting four days or more. See Bob Dickinson & Andy Vladimir, *SELLING THE SEA: AN INSIDE LOOK AT THE CRUISE INDUSTRY* 19 (2<sup>nd</sup> ed. 2007). These transactions costs limited opportunities for transcontinental investments by raising their costs. After World War II, these costs fell dramatically. For example, the cost of a three-minute phone call between New York and London dropped from \$250 in 1930 to a few cents today. See Martin Wolf, *WHY GLOBALIZATION WORKS* 119-120 (2004). Similarly, transatlantic air travel became both possible and more affordable, cutting travel times from days to a matter of hours. and prices by a factor of 10 from 1949 to 2009. See Andrew Evans, *Super Colossal Transatlantic Travel, Circa 1949*, NATIONAL GEOGRAPHIC INTELLIGENT TRAVEL (August 20, 2009)

cross-border transactions expanded. The combination of the Depression and the war had dramatically reduced private trade, but once Europe began to recover from the devastation of the war cross-border transactions assumed a new importance. Trade barriers among developed economies fell as the result of increasing European economic integration and, more broadly, through the General Agreement on Tariffs and Trade (GATT).<sup>98</sup> Between 1950 and 1970, the world's high-income countries saw growth rates of an average 4.9 percent. This resulted in a rapid increase in global trade, which between 1948 and 1960 grew by just over 6 percent;<sup>99</sup> and 8 percent from 1960-1973.<sup>100</sup> Trade broadened as well as expanded. Thus, while Britain and the United States accounted for over half of world exports in 1950, by the 1970s, they lost some of this dominance to other European countries and Japan.<sup>101</sup> (The OECD members' share also increased as the organization expanded from 60% of merchandise exports in 1960 to 70% in 1973.)<sup>102</sup> Just as importantly, international financial transactions expanded beyond the trade in government bonds that had dominated early twentieth century international finance to include private financial transactions.<sup>103</sup> All these developments made solving double taxation problems a growing priority for businesses, financial services professionals, and financial institutions.

Second, the combination of the gradual weakening of capital controls and the rise of floating exchange rates expanded opportunities for cross-border economic activity while increasing the financial sophistication necessary to conduct it. Although many countries initially maintained their wartime capital controls after the end of World War II, these controls were progressively relaxed over the next thirty years and had almost completely vanished among developed economies by the 1980s.<sup>104</sup> The sophistication necessary to operate internationally increased as well with the collapse of the post-World War II Bretton Woods system of fixed exchange rates, which produced a world of largely floating exchange rates<sup>105</sup> creating both risks and opportunities for businesses operating internationally. This internationalization of capital markets was no accident. It partly developed as a result of policy

available at <http://blogs.nationalgeographic.com/blogs/intelligenttravel/2009/08/super-colossal-transatlantic-t.html>.

<sup>98</sup> The GATT was founded as an inter-governmental treaty in 1947, negotiated between 23 countries. *See* Bernard H. Hoekman and Michel M. Kosteci, *THE POLITICAL ECONOMY OF THE WORLD TRADE SYSTEM: THE WTO AND BEYOND*, 38 (2001). Although the GATT was not a very strong institution until the 1960s, (Id. at 38), it has been “the major focal point for industrialized country governments seeking to lower trade barriers. Id. at 9. *See also* Greg Buckman, *GLOBAL TRADE: PAST MISTAKES, FUTURE CHOICES*, 23, 31 (2005) (explaining that rapid economic growth was an important factor behind the trade increase. Integration was further boosted by technological advances in transportation, As jet-airplanes began flying non-stop between London and New York in 1957.) *See also* id. at 37 (explaining that although there were trade negotiations also before the Second World War, they were few and far between).

<sup>99</sup> Buckman, *supra* note 98 at 23.

<sup>100</sup> Buckman, *supra* note 98, at 23.

<sup>101</sup> Buckman, *supra* note 98, at 23.

<sup>102</sup> Statistics from World Trade Organization, *WORLD TRADE REPORT 2008* 16 (2008). Japan's membership was particularly important in increasing the OECD members' total share.

<sup>103</sup> R.C. MITCHIE, *THE GLOBAL SECURITIES MARKET: A HISTORY* 158 (2008) (describing pre-World War I market as “a pool of securities shared by the main markets and capable of moving easily, quickly, and cheaply between the different financial centers in response to minute variation in price”); Boise and Morriss, *supra* note 33, at 409-411 (discussing Eurobond market development).

<sup>104</sup> Manuel Guitián, *Capital Account Liberalization: Bringing policy in line with reality*, in *CAPITAL CONTROLS, EXCHANGE RATES, AND MONETARY POLICY IN THE WORLD ECONOMY* (Sebastian Edwards, ed. 1997) 71, 74 (“Perhaps the most critical feature of the recent evolution of capital movements has been the relaxation of capital controls, the bulk of which took place in the context of a broad liberalization and deregulation of domestic financial markets in industrial countries.”); Barry Eichengreen, *GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM* 1 (2<sup>nd</sup> ed. 2008) (“The three decades following World War II were then marked by the progressive relaxation of controls and the gradual recovery of international capital flows. The fourth quarter of the twentieth century was again one of significant capital mobility. And the period since the turn of the century has been one of very high capital mobility—in some sense even greater than that which prevailed before 1913.”).

<sup>105</sup> Eichengreen, *GLOBALIZING CAPITAL*, *supra* note 104, at 91-92 (summarizing Bretton Woods system); 134-36 (describing movement to floating exchange rates).

choices led largely by the developed countries and driven by western Europeans and U.S-trained economists working at the International Monetary Fund.<sup>106</sup> The dismantling of capital controls reflected a strong commitment by western European economies to a global financial system.<sup>107</sup> But financial liberalization was also due at least in part to the unique dynamics of finance. Unlike trade in physical goods, where agreement between both parties to liberalization is necessary, financial liberalization can be driven by unilateral efforts and both Britain and the United States pushed forward with liberalizing finance in pursuit of gaining market share in financial transactions for London and New York, respectively.<sup>108</sup> Thus important constituencies in both Britain and the United States were able to mobilize their governments at appropriate times to take liberalizing steps that benefited their financial industries.<sup>109</sup>

Third, the rise of the Eurocurrency market offered businesses opportunities to obtain financing internationally at lower costs than available domestically. For example, during the late 1960s and early 1970s, the cost of borrowing in the Eurodollar market (i.e. in dollars outside the United States) was significantly lower than borrowing in dollars within the United States.<sup>110</sup> As a result of federal government policies discouraging U.S. multinationals from borrowing in the United States to fund their international operations, those companies began to borrow outside the United States.<sup>111</sup> As domestic interest rates rose during the 1960s and 1970s, those same companies made extensive use of Eurodollar financing through the Netherlands Antilles, taking advantage of a quirk in the U.S.-Netherlands Antilles tax treaty that eliminated the U.S. withholding tax on payments made to Antilles entities.<sup>112</sup> This financing business was acquiesced in and approved of by the IRS at the time, although the use of conduit entities in this fashion later became known as “treaty abuse.”<sup>113</sup>

Use of international business structures to reduce regulatory and tax costs expanded as entrepreneurs in various jurisdictions had learned how to lower their costs through a wide variety of international business structures. For example, the Roosevelt Administration’s acquiescence in rise of flags of convenience as a means of allowing war supplies to be shipped to Britain prior to U.S. entry into World War II to evade the prohibitions on U.S. flagged ships’ sailing to belligerents under America’s pre-war neutrality legislation changed the face of shipping after the war as Liberian and Panamanian flagged ships appeared in greater numbers.<sup>114</sup> Shipping firms and their customers learned both scope of the benefits and the practical methods of international arbitrage from this experience. As we noted earlier, a Dutch entrepreneur’s realization that the U.S.-Netherlands tax treaty’s extension to Dutch Caribbean possessions allowed U.S. companies to access the Eurodollar market without the

<sup>106</sup> Rawi Abdelal, *CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE* 3 (2007) (“European policymakers conceived and promoted the liberal rules that compose the international financial architecture.”). Abdelal sees the role of the United States in liberalization as “ad hoc” rather than the result of a uniform policy, and emphasizes that the EU and OECD rules both developed without significant U.S. influence. *Id.*

<sup>107</sup> Abdelal, *supra* note 106, at 105 (noting that by late 1980s “capital account liberalization was becoming the usual behavior of OECD members” and that this was driven by Europeans).

<sup>108</sup> Helleiner, *supra* note 34, at 196 (“for an open financial order to emerge, it was not necessary for states collectively to obey liberal rules, as is assumed to be the case in the trade sector. An open order could be created if a single state or group of states unilaterally provided resourceful financial markets operators with a degree of freedom.”)

<sup>109</sup> Helleiner, *supra* note 34, at \_\_\_.

<sup>110</sup> See Heather D. Gibson, *THE EUROCURRENCY MARKETS, DOMESTIC FINANCIAL POLICY, AND INTERNATIONAL FINANCIAL INSTABILITY* 10-14 (1989) (describing growth of Eurodollar market). This was broadly true of currencies, such that the Eurocurrency market included trading in more than dollars. *Id.*

<sup>111</sup> Gibson, *supra* note 110, at \_\_\_.

<sup>112</sup> See Boise and Morriss, *supra* note 33, at 406-410.

<sup>113</sup> See Richard L. Reinhold, *What is Tax Treaty Abuse (Is Treaty Shopping an Outdated Concept)?* 53 *TAX LAWYER* 663 (Spring 2000) (discussing development of concept).

<sup>114</sup> See Boleslaw Adam Boczek, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY* (1962); Rodney P. Carlisle, *SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE* (1981).

costs of the U.S. withholding tax produced a multi-million dollar business on the island of Curacao in the 1960s.<sup>115</sup> The Eurocurrency markets themselves led American banks to open European branches.<sup>116</sup> The demands of the oil and *entrepôt* businesses in Kuwait and Hong Kong respectively resulted in their exemption from British currency controls for a time and created opportunities for currency transactions unavailable within the sterling area.<sup>117</sup>

As entrepreneurs learned the advantages of innovating business structures, those structures grew increasingly complex. For example, by the early 1960s the Anglo-Dutch multinational Royal Dutch/Shell had more than five hundred entities operating in ninety jurisdictions.<sup>118</sup> Even more than any specific arbitrage strategy, the development of London and New York as rival financial centers after World War II drove down the cost of international business structures.<sup>119</sup> Banks, lawyers, accountants, and other professionals in both cities aggressively competed for business both by pushing their national governments to lower regulatory costs and through innovation.<sup>120</sup>

During this period the OECD largely played the role of a pool of technicians able to provide the expertise and the contacts to help countries agree on the rules for taxation of activities that crossed borders. Through the 1970s, the OECD Model Convention served (and continues to serve today) as a framework on which countries could base bilateral treaties. Although the OECD sought agreement on the convention from government representatives rather than just technical experts, the Model Convention itself was not a policy product but a framework within which participating countries would settle politically the substantive issues necessary to complete a tax treaty. This approach left to the individual treaty talks the crucial questions necessary to set the boundaries for taxation between countries: Who has the right to tax which transactions? Where is the line drawn between what is mine and what is yours? Once those boundaries were agreed, the model convention also left each jurisdiction free to tax at whichever rates they pleased, while using whatever other provisions that they deemed to be in their individual interests.

This approach worked well for some transactions. If an American firm bought a British firm and operated it as a subsidiary, the framework created by the model convention plus the Anglo-American tax treaty could handle dividend or interest payments from the subsidiary to the parent and similar

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<sup>115</sup> Boise & Morriss, *supra* note 33, at 406-410.

<sup>116</sup> Robert Z. Aliber, *THE INTERNATIONAL MONEY GAME* 175-176 (5<sup>th</sup> ed. 1987) (“Participation in the Eurodollar market is the primary activity of most of the fifty branches of U.S. banks in London. In the absence of the ability to sell dollar deposits in | London, most of these banks would not have established London branches. Similarly, participation in the Eurodollar market is the primary activity of the German banks in Luxembourg.”).

<sup>117</sup> Catherine R. Schenk, *BRITAIN AND THE STERLING AREA: FROM DEVALUATION TO CONVERTIBILITY IN THE 1950s* 10 (1994) (“Due to Hong Kong’s *entrepôt* trade and Kuwait’s oil production, these two members of the sterling area operated free markets in sterling against dollars which were tolerated by the British authorities.”). This practice was ended in 1957. *Id.* See also from Catherine R. Schenk, *The Rise of Hong Kong and Tokyo as International Financial Centres after 1950*, in *CENTRES AND PERIPHERIES IN BANKING: THE HISTORICAL DEVELOPMENT OF FINANCIAL MARKETS* (Philip L. Cottrell, et al. eds., 2007) 81, 86 (“In the post-war period, the importance of Hong Kong as an international banking centre shifted to a new level. The absence of exchange control in the colony contrasted with a global environment of tight controls on capital-account convertibility and fixed exchange rates. . . . [T]he ‘window’ of opportunity that Hong Kong offered as a gap in sterling-area exchange control attracted substantial financial flows from North America and Europe as well as Asia.”)

<sup>118</sup> Profit Is Raised for Royal Dutch, *N.Y. TIMES*, March 3, 1962, at 25.

<sup>119</sup> Helleiner, *supra* note 34, at \_\_\_\_.

<sup>120</sup> One incident that illustrates the role of entrepreneurs in spreading policy ideas was the effort by Merrill Lynch to form an exclusive arrangement with Guam in 1982 to offer tax structures through the jurisdiction. See *Merrill Pioneering a New Tax-Free Route to Europe, As Old Haven Sinks*, *SECURITIES WEEK* (Dec. 6, 1982) reprinted in “Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries”, Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, April 12 and 13, 1983, at 742. More generally, law firms played major roles in developing captive insurance offshore. See *Industry Insider . . . Tom Jones and LJ Fallon*, *CAYMAN FINANCIAL REVIEW* (Fall 2011) available at <http://www.compasscayman.com/cfr/2011/10/05/Industry-Insider----Tom-Jones-and-LJ-Fallon> (describing origins of offshore captive industry).

transactions. The problem from the tax authorities' point of view was that entrepreneurial lawyers' and other professionals' creation of international business structures quickly outstripped national tax authorities' abilities to keep up with the varieties of transactions and their impacts on tax liabilities. Once the rules were set in a treaty, lawyers and others set to work to find structures that minimized the total tax bill. For example, the sale of goods and services between related parties, an issue since at least the 1930s and generally labeled "transfer pricing," posed serious problems as multinational enterprises expanded the scope of their operations since it could be used to shift profits from one jurisdiction to another.<sup>121</sup> As intangible property grew in importance, firms discovered they could use royalty payments to transfer profits to lower tax jurisdictions – and jurisdictions began to offer lower taxes on royalties to capture transactions. The spread of the ring-fenced tax regimes that reduced or eliminated taxes on entities not doing business within the jurisdiction as pioneered by the Netherlands Antilles in the 1950s also complicated the picture.<sup>122</sup>

Moreover, national tax authorities often lacked the information they needed to evaluate whether tax evasion was occurring. Even where one nation's tax authorities persuaded another's to share information, making use of the information often turned out to be impossible because the recipient lacked the capacity to process it. In the United States, the IRS simply warehoused foreign tax authorities' reports of payments to U.S. taxpayers for much of the 1970s because it was unable to match the foreign tax records to U.S. records as the foreign records did not include the taxpayers' U.S. social security numbers, the agency lacked the foreign language capacity to read the reports when they were not in English, and it was unable to determine how to make use of data reported in foreign currencies where exchange rates varied over time.<sup>123</sup> In one instance, after IRS field agents discovered

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<sup>121</sup> When assets are moved within a multinational enterprise (MNE) across state borders, there is no reason to believe that the enterprise would report the value of that transaction according to market principles. A MNE can also use a low-tax jurisdiction as the base of a part of the MNE that is on the receiving end, even if the company is not conducting any business activity there. Rather, there is an incentive to set prices to allocate profits depending on the different tax rates in its two locations. Thus the aim of an agreement is for each country to get its "fair share" of the tax. By pricing below market value, the tax authority in the receiving end gains, as it taxes according to profits, while the government from which the asset is transferred loses out. In the case of inaccurate pricing furthermore: "An MNE could suffer double taxation on the same profits without proper transfer pricing." Two administrative bodies are then involved in assessing the value of the transfer. While the revenue authority in the state to which the assets are transferred want to see to it that the value is not over-estimated for the sake of tax deductibles, the customs authority in the same country is keen to make sure that the value of the transaction is not under-estimated. There is a tension between these bureaucracies, both trying to value the transaction in a way that benefits them. Transfer pricing is in of itself only a natural part of an MNE. A price must be set on goods and services changing hands of the different parts of the enterprise. Inaccurate transfer pricing however, is brings with it two types of worries. On the one hand, there may be double taxation, in the case that an asset is priced too high, the tax base falls completely to the originating government. When the government in the other end discovers that lower profits are being reported than what is actually the case, they may want to levy a tax, which would lead to double taxation. On the other hand, a firm may be practicing income shifting by having its income under-reporting the income in the high-tax country, while over-reporting in the low-tax country, by claiming higher than market prices for the international shipping within the enterprise to the high-tax jurisdiction and lower than market prices in the other case. See Eric J. Bartelsman and Roel, M. W. J. Beetsma, *Why Pay More? Corporate Tax Avoidance Through Transfer Pricing in OECD Countries*, Working Paper 2543, CEPR 7 (2000). Although transfer pricing has been an issue for many decades, it is only with the proliferation of MNEs that it has become a serious concern. See John Neighbour, *Transfer pricing: Keeping it at arm's length*, (230) THE OECD OBSERVER (January 2002) available at [http://www.oecdobserver.org/news/printpage.php/aid/670/Transfer\\_pricing:\\_Keeping\\_it\\_at\\_arms\\_length.html](http://www.oecdobserver.org/news/printpage.php/aid/670/Transfer_pricing:_Keeping_it_at_arms_length.html) (last accessed 2011-10-02). The OECD issued a report in 1979 that set up guidelines for transfer pricing. Margaret Lamb, Andrew Lymer and Judith Freedman, *Taxation: An Interdisciplinary Approach to Research* 187-188 (2005). To obtain a fair allocation of tax revenues, the OECD adopted the "arm's length principle," by which it is meant that a firm market value is to be set on the asset being transferred. See Liu Ping and Caroline Silberstein, *Transfer Pricing, Customs Duties and VAT Rules: Can We Bridge the Gap?* 1 WORLD COMMERCE REV. 36, 36 (2007). This principle was originally established by the League of Nations in 1935. Rixen, *supra* note 3, at 95.

<sup>122</sup> Boise & Morriss, *supra* note 33, at 408-409.

<sup>123</sup> Statement of Jacob Kaufman and Dean Scott, Subcommittee Staff Investigators, on Detail from GAO in House of Representatives, Committee on Government Operations, Subcommittee on Commerce, Consumer and Monetary Affairs,

that they could not access the forms the Canadian tax authorities sent to the IRS because the forms “were not processed by the service and therefore were not retrievable,” the field agents worked out an arrangement with the Canadian tax authorities to obtain from the Canadians their own copies of the forms being sent to the IRS main office whenever the Canadians believed the forms “could be of significance” for the United States.<sup>124</sup> That “front line” American tax personnel were forced to rely on foreigners’ judgment of what was important by the inadequacies of their own agency to process paperwork from the United States’ closest neighbor suggests the magnitude of the problems less well funded tax authorities around the world faced.

In addition, legal arbitrage efforts had swiftly expanded beyond tax issues. The availability of bearer share corporations in the Netherlands Antilles attracted investors in U.S. real estate (possibly including some Americans) who valued both the anonymity that the bearer shares provided and, perhaps, that the shares could be transferred without U.S. tax authorities knowing the property had changed hands.<sup>125</sup> Individuals in civil law jurisdictions established trusts in common law jurisdictions to avoid forced heirship laws.<sup>126</sup> Captive insurers located in offshore jurisdictions offered firms a combination of deductible premiums, flexible coverage, and access to the global reinsurance market.<sup>127</sup> As the volume and size of international transactions grew, the scope of the problems they posed for national tax authorities increased as well. Other law enforcement interests, particularly within the United States, began to pay attention to the use of international business structures and to openly speculate that they were being used to launder criminal proceeds or to conceal criminal activities.<sup>128</sup>

States adopted a variety of counter-measures to thwart taxpayers’ efforts to lower their tax obligations through international transactions. In the United States, the adoption of Subpart F in 1962 escalated a long-running IRS’ campaign to restrict U.S. taxpayers’ abilities to use foreign entities to

Oversight Hearings into the Operations of the IRS (Income Information Document Matching Program), 1976, 94<sup>th</sup> Congress, 2d session, April 12, 1976 at 17 (“IRS agents had very little or no knowledge relating to the existence or use of the foreign income information documents. This is not surprising since all these documents simply arrive at the Philadelphia Service Center and then are shipped off without examination to a Federal records center.”); 50 (“To begin with, finding someone who knew anything about the forms was a big problem but after that the reasons provided, as quoted in our statement, were that they were in a foreign language, and there were no identifying numbers on them. Therefore, because of this, IRS said it could not use them in the matching program or for any other purpose for that matter.”); Statement of Donald C. Alexander, Commissioner, IRS in id. at 83 (IRS needs information in dollars at time paid, does not get it). It is easy to chuckle at the IRS’ problems, but it would have been virtually impossible to know what was meant in U.S. dollar terms when a form reported a 1976 payment in lira, when that currency fluctuated against the dollar from 681.20 to 917.43, a difference of over 30%, unless the day of the payment was also specified. Statistics from Federal Reserve Statistical Release H.10, *Foreign Exchange Rates, Italy Historical Rates*, available at [http://www.federalreserve.gov/releases/h10/hist/dat89\\_it.htm](http://www.federalreserve.gov/releases/h10/hist/dat89_it.htm) (Dec. 29, 1989).

<sup>124</sup> Prepared Statement of John J. Olszewski, Former Director, Intelligence Division, IRS, in House of Representatives, Committee on Government Operations, Subcommittee on Commerce, Consumer and Monetary Affairs, Oversight Hearings into the Operations of the IRS (Income Information Document Matching Program), 1976, 94<sup>th</sup> Congress, 2d session, April 12, 1976 at 4.

<sup>125</sup> Boise & Morriss, *supra* note 33, at 411-412. Somewhat ironically, U.S. jurisdictions like Nevada market themselves as providing secrecy. See Brian Grow and Kelly Carr, *Special Report: Nevada’s Big Bet on Secrecy*, REUTERS (Sept. 26, 2011) (describing state’s marketing of privacy in beneficial ownership).

<sup>126</sup> See, e.g., Walkers Global Legal and Management Solutions, *The Uses and Advantages of Jersey Trusts* 1-2 available at [http://www.walkersglobal.com/files/Publication/6c1c469a-0b6b-4a48-ba08-028c3fc48b04/Presentation/PublicationAttachment/d49597ec-c4f5-4765-bb3e-0523d743305b/\(Jersey\)%20The%20Uses%20and%20Advantages%20of%20Jersey%20Trusts.pdf](http://www.walkersglobal.com/files/Publication/6c1c469a-0b6b-4a48-ba08-028c3fc48b04/Presentation/PublicationAttachment/d49597ec-c4f5-4765-bb3e-0523d743305b/(Jersey)%20The%20Uses%20and%20Advantages%20of%20Jersey%20Trusts.pdf) (last accessed October 25, 2011) (discussing use of Jersey trusts to avoid forced heirship laws).

<sup>127</sup> See Morriss, *Role*, *supra* note 10, at \_\_\_.

<sup>128</sup> See Testimony of Irvin B. Nathan, Deputy Assistant Attorney General, Criminal Division, US DOJ, in *Illegal Narcotics Profits*, Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, US Senate, 96<sup>th</sup> Congress, 1<sup>st</sup> session (1979) (discussing law enforcement concerns about offshore transactions).

reduce or evade their U.S. taxes.<sup>129</sup> Law enforcement operations involving intercepting mail to U.S. taxpayers from Swiss addresses and arranging a Miami dinner date for a Bahamian banker to allow tax authorities access to the banker's briefcase while he was pursuing romance were among the more colorful ones discussed publicly.<sup>130</sup> In the U.K., the continuation of capital controls into the 1970s provided British authorities with important measures with which to prevent money from leaving the jurisdiction and so escaping taxes.<sup>131</sup> More generally among EU governments in the 1960s and 1970s, only Germany had somewhat liberal capital-account policies despite the commitment in the 1957 Treaty of Rome to move towards free movement of capital; this restricted most European taxpayers' ability to shift funds out of a jurisdiction to avoid or evade taxes.<sup>132</sup> This gradually began to change, and even France moved away from its policy of *dirigisme*, with state guaranteed finance until the 1980s.<sup>133</sup> As restrictions on capital flows declined, the impact of tax competition became more keenly felt.

Several factors restricted national tax authorities' abilities to control international businesses' and individuals' use of both legal arbitrage methods and illegal tax evasion. Important financial industry interests in both the United States and the United Kingdom sought to improve the competitive positions of the New York and London financial centers.<sup>134</sup> In the United States, the widespread use of Antillean finance subsidiaries by American businesses during the 1960s both cut borrowing costs for the U.S. companies and served American interests by easing the capital shortages produced by Lyndon Johnson's spending programs in support of his domestic agenda and the escalation of the Viet Nam War.<sup>135</sup> In addition, serious missteps by the IRS in the course of tax evasion investigations and the politicization of tax investigations by the Nixon Administration in the United States led to legal restrictions on the IRS that reduced its ability to investigate international financial affairs and reduced its credibility.<sup>136</sup> In Britain, decolonization raised concerns that British taxpayers were going to be saddled with financial responsibilities for overseas territories, bringing the Foreign and Colonial Office into policy debates on the side of encouraging, rather than restricting, British dependent territories to develop low tax and zero tax regimes to attract business.<sup>137</sup> So powerful were these pressures that the

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<sup>129</sup> See Office of Tax Policy, Department of the Treasury, *THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS: A POLICY STUDY* 101-163 (2000) (describing measures). Almost from the start of the modern income tax, the IRS had spent considerable effort attempting to prevent "personal holding companies" from being used to lower tax bills<sup>129</sup> and Subpart F represented an international extension of that campaign.

<sup>130</sup> Statement of William J. Anderson, Director, General Government Division, General Accounting Office, in "Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries", Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, April 12 and 13, 1983, at 3 (describing mail watch); *U.S. v. Payner*, 447 U.S. 727, 730-31 (1980) (describing briefcase incident).

<sup>131</sup> John Stopford & Louis Turner, *BRITAIN AND THE MULTATIONALS* 198 (1985) ("The 1947 Exchange Control Act put the Treasury firmly in the driving seat as far as control of outward investment was concerned.").

<sup>132</sup> Bongini, Paola *The EU Experience in Financial Service Liberalization: A Model for GATS Negotiations?* SUERF Studies, VIENNA SUERF – THE EUROPEAN MONEY AND FINANCE FORUM 18 (2003) available at [www.suerf.org/download/studies/study20032.pdf](http://www.suerf.org/download/studies/study20032.pdf) (accessed 2011-10-02).

<sup>133</sup> Vivien A. Schmitd, *The Untold Story: The Impact of European Integration on France in the Mitterrand Era (1981-1997)* 3, unpublished paper prepared for delivery at the European Community Studies Association Fifth Biennial International Conference (1997), available at <http://aei.pitt.edu/2720> (last accessed 2011-10-02).

<sup>134</sup> Helleiner, *supra* note 34, at \_\_\_.

<sup>135</sup> See STUART W. ROBINSON, JR., *MULTINATIONAL BANKING* 278 (1972).

<sup>136</sup> Testimony of Irvin B. Nathan, Deputy Assistant Attorney General, Criminal Division, US DOJ, in *Illegal Narcotics Profits*, Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, US Senate, 96<sup>th</sup> Congress, 1<sup>st</sup> session (1979) at 23 (Tax Reform Act of 1976 "minimized, if not eliminated, [IRS'] role in nontax law enforcement and devotes itself almost exclusively to the voluntary tax collection system.")

<sup>137</sup> For example, in the debate over the Australian response to the New Hebrides' tax haven activities, the FCO noted in an internal memorandum that

Whatever the merits of Mr Whitlam's argument that most of the benefits of the tax haven activities go to people escaping tax and those assisting them to do so, and not the New Hebrides or its residents, it must

Foreign and Colonial Office (FCO) was able to insist that British Labour Party Prime Minister Harold Wilson complain to Australian Liberal Party Prime Minister Gough Whitlam in a 1974 exchange of letters about Australia's restrictions of communications with the New Hebrides as part of Australia's efforts to combat the use of New Hebridean entities to reduce Australian taxpayers' tax bills.<sup>138</sup> Thus from the mid-1960s to the late 1970s, in both Britain and the United States the interests which would have sought to restrict legal arbitrage and rewrite tax policies to reduce taxpayers' abilities to use international structures to lower their taxes legally or illegally were operating at a disadvantage. By the end of the 1970s, however, U.S. tax authorities were beginning to regain policy ground on international transactions, as we describe below.

Although during the 1970s, the role of the OECD in international tax issues was primarily as a respected source of technical competence able to aid in the resolution of difficult problems caused by differences in national tax regimes, interest in using the organization to address tax competition began to appear. For example, in the internal debate over Britain's response to Australia's measures against the New Hebrides, one summary FCO memo noted that there were "legitimate grounds for concern" by Australia and suggested that Britain tell the Australians to focus their efforts on the OECD working party on tax to create a means to address the problem that avoided the limitations of the British constitutional structure and Britain's need to promote its territories' economic development.<sup>139</sup> In

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be borne in mind that the trust companies established in the New Hebrides have contributed well over \$A1 million to British National Service revenue in four years. There have been other tangible but unquantifiable benefits, eg activities by investment companies in the development of meat production. A territory's resort to an offshore finance industry reflects the lack of any alternative scope for economic development to improve its own prosperity. Experience has shown that in the absence of natural resources a well managed finance industry can work a dramatic and very beneficial change on the economy of a small and undeveloped territory.

New Hebrides "Tax Haven", 21 Aug 1974, British National Archives File PREM 16/8 at 4.

<sup>138</sup> Letter from Harold Wilson to Gough Whitlam, 30 August 1974, British National Archives File PREM 16/8. In a memo a few days earlier, Pacific Dependent Territories Department of the Foreign and Colonial Office noted

On the one hand neither this nor any previous United Kingdom government has actively encouraged the growth of an offshore finance centre in a British dependent territory, and the initiative for the relevant legislation comes from the territories themselves. On the other hand, no UK Government has ever taken direct action against an established finance industry in a dependent territory, and it would certainly be inequitable for HMG now to discriminate by insisting on the scrapping of one territory's advantageous legislation while continuing to tolerate similar legislation in other territories.

New Hebrides "Tax Haven", 21 Aug 1974, British National Archives File PREM 16/8 at 3. That a socialist British prime minister was defending a low tax jurisdiction against a (at least nominally) market-oriented Australian prime minister indicates the degree to which the British establishment saw the importance of encouraging development in the overseas territories even at the expense of tax collections by allies. Britain was similarly unconcerned about the impact of its Caribbean possessions' tax policies on American tax collections. [Archives cite].

<sup>139</sup> 23 Aug 1974, letter from P.J. Weston, British National Archives File PREM 16/8. The letter noted:

The UK is represented on working parties in both the EEC and the OECD which have been set up to combat the growing tax avoidance industry and the use of tax havens. Australia is in fact also a member of the OECD working party. (The problem of tax havens also arises in connection with the examination of the impact of multi-national companies which is being carried out under the auspices of the United Nations ECOSOC.) We are, moreover, often under pressure from other countries to do what we can to put down the tax havens which have grown up in our dependencies and ex-dependencies in the Caribbean and in the Channel Islands and the Isle of Man. While we are obliged to explain that our powers to intervene are limited either by the constitutional independence of the territories concerned or the practical difficulty of acting against what seem to the inhabitants of such territories to be their interests, we are also bound to do what we can by way of international cooperation to find ways of minimizing the damage they do.

general, however, by offering frameworks for resolving disputes over the details of taxation, the OECD avoided infringing on national sovereignty while reducing the transactions costs of states reaching agreements on how to handle differences in taxation.

### C. Changing the Agenda

By the early 1980s, a number of important financial and political changes changed the competitive picture for the developed economies. Private entities and individuals were using increasingly sophisticated financial transactions to challenge states' ability to continue to extract revenue from economic activities as it became increasingly clear that a result of tax treaties was to facilitate "double non-taxation."<sup>140</sup> In particular, by the late 1970s and early 1980s the world's growing numbers of "tax havens" were evolving from places where shady characters delivered suitcases of cash for concealment into jurisdictions offering increasingly sophisticated financial, accounting, and legal services. For example, the Cayman Islands' initial success was in attracting banking business from the Bahamas after the post-independence Pindling government demanded 'Bahamianization' of the financial services sector workforce.<sup>141</sup> By the early 1980s, the islands had expanded into offering a location for captive insurance companies, including the Harvard medical entities' first offshore captive.<sup>142</sup> Law firms in Cayman were staffed by counsel with Oxbridge degrees and significant experience in London's financial industry.<sup>143</sup> Just a short flight from New York, with no capital controls, and with excellent communications infrastructure (built deliberately to foster the finance industry),<sup>144</sup> the growth of a sophisticated financial industry in Cayman and elsewhere in the Caribbean and Bermuda made offshore transactions available to a much broader swath of American businesses and individuals. Similarly, the growth of European offshore financial centers in Switzerland, Liechtenstein, the Channel Islands, and the Isle of Man also brought sophisticated financial transactions within the reach of more European businesses and individuals. Even countries like the Netherlands – not normally referred to as an "offshore jurisdiction" – began to expand the opportunities they offered outsiders to reduce taxes and "Dutch sandwich" entered the U.S. tax-planning lexicon.<sup>145</sup> As a result, the large developed economies found themselves in a position similar to that of the rest of the world's economies: having to compete for investment. Behaving as monopolists traditionally do when forced into a more competitive marketplace, these states sought to erect barriers to such competition.

In the United States, concern over the impact of international financial structuring on tax laws came to the fore in the early 1980s. In 1981, the IRS issued a report by its general counsel, Richard A. Gordon,<sup>146</sup> entitled *Tax Havens and their Use by U.S. Taxpayers* (which became known as the "Gordon

Id. at 2. It further noted that this response "has the concurrence at official level of the Treasury and the Board of Inland Revenue." Id. at 3.

<sup>140</sup> See Thomas Rixen, *supra* note 3, at 13. As the right to tax is divided between the residence and source country of income, the residence country is no longer allowing merely for a tax credit or deduction. The tax imposed on its residence business or individual does no longer depend on the tax imposed by the source country. In order to attract capital and economic activity, countries therefore have an incentive to lower the tax rate to attract more investments. If, according to a tax treaty, a certain stream of income is to be only taxed at source, a zero tax rate in the source country means that no tax is paid to any jurisdiction. Id.

<sup>141</sup> Letter from T. Russel to D F S Le Breton, Commissioner in Anguilla 21 May 1975, British National Archives File FCO 44/1181 at 1-2 (after threats to offshore sector, Bahamas "rapidly lost a great deal of off-shore business and the big bank operations normally have branches in several tax havens so that at the least whiff of trouble in the wind they can transfer business to another haven that seems more settled.")

<sup>142</sup> See *Industry Insider*, *supra* note 120, at \_\_.

<sup>143</sup> Morriss, *supra* note 33, at \_\_.

<sup>144</sup> Morriss, *supra* note 33, at \_\_.

<sup>145</sup> See Jesse Drucker, 'Dutch Sandwich' saves Google billions in taxes, BLOOMBERG BUSINESS WEEK (Oct. 22, 2010) available at [http://www.msnbc.msn.com/id/39784907/ns/business-us\\_business/t/dutch-sandwich-saves-google-billions-taxes/#.Tqce22CfG3w](http://www.msnbc.msn.com/id/39784907/ns/business-us_business/t/dutch-sandwich-saves-google-billions-taxes/#.Tqce22CfG3w).

<sup>146</sup> Richard A. Gordon must be distinguished from Richard K. Gordon, an American law professor and former IMF staff

Report”), focusing official attention on revenue losses while conceding that another state’s choice of tax rates (including zero rates for specific transactions) was “a legitimate policy decision.”<sup>147</sup> The report explicitly called for coordinated action against tax havens.<sup>148</sup> Demonstrating that the issue had caught official attention, the United States canceled the relatively unimportant tax treaty with the British Virgin Islands in 1982<sup>149</sup> and the much more significant tax treaty with the Netherlands Antilles in 1987.<sup>150</sup> In 1982, Congress granted the IRS the power to order a taxpayer or the holder of the taxpayer's records to produce any books and records that are relevant to the taxpayer's return<sup>151</sup> and U.S. corporations were required to have books and records of their foreign corporations ready for IRS examination.<sup>152</sup> In 1983, the Reagan administration launched its Caribbean Basin Initiative (CBI), which subsidized American business conventions in Caribbean jurisdictions agreeing to information exchanges with the United States to aid in U.S. tax enforcement.<sup>153</sup> The Deficit Reduction Act of 1984 also abolished the withholding tax on interest paid to foreign corporations and nonresident aliens, marking the end of the “Antilles Window” through which a reduced withholding tax treatment could be obtained through use of Netherlands Antilles entities.<sup>154</sup> The same year saw an amendment to the Bank Secrecy Act of 1970<sup>155</sup> requiring that banks and other financial institutions report to the IRS any deposit or withdrawal of currency in excess of US\$10,000 and requiring that anyone traveling into the United States carrying over US\$5,000 report it to the Customs Service.<sup>156</sup> The penalty for failing to report these transactions was raised from US\$1,000 to US\$50,000, and the maximum jail sentence from one to five years.<sup>157</sup> Subsequently, the 1985 Money Laundering Act amended the post-Nixon 1978 Right to Financial Privacy Act to expand extraterritorial application of American laws in pursuit of drug money.<sup>158</sup> Despite all these measures, the IRS continued to estimate losses due to tax evasion to offshore jurisdictions in 1985 to be several billion dollars<sup>159</sup> and in 1985, the Senate Permanent Subcommittee on Investigations concluded an investigation of money laundering and came out with recommendations to Congress and the Administration to impose sanctions on non-cooperative tax

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member, who writes on offshore issues as well.

<sup>147</sup> Richard A. Gordon, *Tax Havens and Their Use by United States Taxpayers: An Overview*. Report to the Commissioner of Internal Revenue. Washington, D.C.: Books for Business. IRS Publication 1150 (4-81) 4 (1981).

<sup>148</sup> Gordon *Supra* note 147 at 9. (“The United States alone cannot deal with tax havens. The policy must be an international one by the countries that are not tax havens to isolate the abusive tax havens. The United States should take the lead in encouraging tax havens to provide information to enable other countries to enforce their laws.”).

<sup>149</sup> See Boise & Morriss, *supra* note 33, at \_\_\_. One reason for the cancellation was that the growth in payments from the US to the British Virgin Island BVI was increasing beyond the size expected for a jurisdiction with British Virgin Island’s population. According to the Gordon Report, the total payments from the British Virgin Island to people who officially were residents for instance, had increased from 1 million to 8 million between 1975 and 1978. Meanwhile the number of British Virgin Island firms in which United States citizens had interest increased between 1970 and 1979 from 53 to 678. Gordon *Supra* note 147, at 149,-150.

<sup>150</sup> See Boise & Morriss, *supra* note 33, at \_\_\_.

<sup>151</sup> Gregory P. Crinion, *Information Gathering on Tax Evasion in Tax Havens Countries*, 20 *The Int’l TAX LAWYER*, 1209, 1215 (1986).

<sup>152</sup> The exception was if there were third parties with interest in the record that would reject to the disclosure. (Crinion *Supra* note 151, at 1219.)

<sup>153</sup> Barbados, Costa Rica and Dominican Republic entered that agreement with the United States in 1984. (Crinion *Supra* note 151, at 1236.)

<sup>154</sup> See S. Cass Weiland, *Congress and the Transnational Crime Problem*, 20 *THE INT’L LAEYER* 1025, 1037 (1986); Deficit Reduction Act of 1984, Pub. L. No. 98–369 § 127(a), 98 Stat. 494, 648–50 (“Repeal of the 30 Percent Tax on Interest Received by Foreigners on Certain Portfolio Investments.”).

<sup>155</sup> See *The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970*, (31 U.S.C. 1051 et seq.). See also Weiland, *supra* note 154 at 1039.

<sup>156</sup> See , H.J. Res. 648, 98th Cong. 2d Sess., § 901(g) (1984).

<sup>157</sup> Weiland, *supra* note 154 at 1039-1040.

<sup>158</sup> Money Laundering Act, P. L. 99-570.

<sup>159</sup> Crinion, *supra* note 151, at 1211.

havens.<sup>160</sup>

Several key European states were also forced to confront the constraints of the more globalized financial economy during the early 1980s. In France, the election of Socialist President Francois Mitterrand brought an initial sharp left turn in economic policy.<sup>161</sup> Soon after taking office, Mitterrand nationalized twelve major industrial groups and forty-one financial institutions.<sup>162</sup> The economic pressures created by these actions together with the remainder of the government's "social growth" agenda slowed economic growth and increased unemployment.<sup>163</sup> Exchange rate pressures forced two devaluations of the franc within the European Monetary System ("EMS") of pegged exchange rates through 1982.<sup>164</sup> Amid speculation that France would be forced out of the EMS entirely,<sup>165</sup> Mitterrand devalued the franc a third time in 1983 and then initiated his "u-turn" in macroeconomic policies. By 1986 Mitterrand was arguing that "our greatest worry is inflation" and seeking to reduce the public deficit despite high unemployment, a startling change for a French Socialist.<sup>166</sup> The u-turn also affected banking, and the 1984 Banking Act produced a revolution in French banking.<sup>167</sup> Credit controls were first relaxed in 1985 and then completely eliminated in 1987.<sup>168</sup> The right-wing Rally for the Republic government that took office in 1986 continued these monetary and macroeconomic policies, accentuating deregulation, and initiated a massive privatization program.<sup>169</sup> The French left drew an important lesson relevant to our analysis from experience of the u-turn: they realized that single-country financial controls were unworkable within a global financial system.<sup>170</sup> This pushed them toward multilateral solutions to financial problems.<sup>171</sup> At the same time, Germany was struggling with

<sup>160</sup> The report focused on the offshore banks problem, and was released the day after a record fine of US\$2.25 million had been announced for Crocker National Bank of San Francisco for unreported currency transactions. CITE Chairman Sen. William V. Roth Jr. (D. Del.) stated "It's time to get tough with the tax havens that insist on playing Pontius Pilate while the drug pushers and other criminals exploit their banking systems to the detriment of our citizens." See Jerry Estill, *Senate Panel Urges Crackdown on Bank Reporting*, THE MIAMI NEWS, August 28, 1985, 9A, available at <http://news.google.com/newspapers?nid=2206&dat=19850828&id=uKAmAAAAIABAJ&sjid=xwEGAAAABAJ&pg=4502,3372564> (last accessed Oct. 25, 2011); Cheryl Arvidson, *Fed Called Lax in Fight on Money Laundering*, THE MIAMI NEWS, August 28, 1985, 3A; Douglas Jehl, *Panel Urges Tough Sanctions Against Foreign Tax Havens*, Los Angeles Times, available at [http://articles.latimes.com/1985-08-29/news/mn-23687\\_1\\_tax-havens](http://articles.latimes.com/1985-08-29/news/mn-23687_1_tax-havens), (last accessed Oct. 7, 2011). There is some irony in Roth's position, given that he later cowrote a book attacking the IRS. See William V. Roth, Jr. & William H. Nixon, THE POWER TO DESTROY: HOW THE IRS BECAME AMERICA'S MOST POWERFUL AGENCY, HOW CONGRESS IS TAKING CONTROL, AND WHAT YOU CAN DO TO PROTECT YOURSELF UNDER THE NEW LAW (1999).

<sup>161</sup> David R. Cameron, *Exchange Rate Politics in France 1981-1983: The Regime-Defining Choices of the Mitterrand Presidency*, in THE MITTERRAND ERA: POLICY ALTERNATIVES AND POLITICAL MOBILIZATION IN FRANCE (Anthony Daley and Melanie Nolan, eds.) 56, 56 (1996).

<sup>162</sup> Henrik Uterwedde, *Mitterrands' Economic and Social Policy in Perspective*, in THE MITTERRAND YEARS, (Maclean ed.) 133, 134-135 (1998); Serge Halimi, *Less Exceptionalism than Meets the Eye*, in THE MITTERRAND ERA, *supra* note 161, at 83.

<sup>163</sup> See Uterwedde, *supra* note 162, at 135.

<sup>164</sup> Despite heavy speculation about a devaluation of the franc, and rapid capital flight in May, soon after his inauguration, President Mitterrand chose to defend the franc's value and not to devalue it at that point, but went through with it later that year nevertheless. Cameron, *supra* note 161, at 59-61. The adjustments were smaller than the French politicians wanted, and negotiated with the ERM and attached to contractionary fiscal and monetary policy. Cameron, *supra* note 161, at 58-59.

<sup>165</sup> Vivien A. Schmidt, *An End of French Exceptionalism? The Transformation of Business under Mitterrand*, in THE MITTERRAND ERA, *supra* note 161, at 117, 134-135; Cameron, *supra* note 161, at 57.

<sup>166</sup> Halimi, *supra* note 162, at 90. The reforms partly also came about because the government wanted to see Paris as a financial center to compete with London. See Jonathan Story and Ingo Walter, POLITICAL ECONOMY OF FISCAL INTEGRATION IN EUROPE 200 (1997).

<sup>167</sup> Story and Walter, *supra* note 166, at 197.

<sup>168</sup> Michel Boutillier and Jean Cordier, *A Look at the Way the French Financial System has Adapted to the New Monetary Policy Regime*, in ECONOMIC MODELLING AT THE BANQUE DE FRANCE: FINANCIAL DEREGULATION AND ECONOMIC PERFORMANCE IN FRANCE (Michel Boutillier and Jean Cordier eds.) 178, 180 (1996).

<sup>169</sup> Uterwedde, *supra* note 162, at 136.

<sup>170</sup> Rawi Abdeli, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE 57-65 (2007).

<sup>171</sup> Abdeli, *supra* note 170, at 71.

an outflow of capital to the United States, where the combination of pro-growth policies under the Reagan administration and the abolition of the U.S. withholding tax on securities in 1984.<sup>172</sup> Germany was one of the toughest adversaries to tax havens in continental Europe in the 1980s, when it passed laws with the objective to quell the flight of capital from Germany, much of it also flowing into Switzerland and Luxembourg.<sup>173</sup> The Germans were also seeking to go beyond single country measures and were focused on finding multilateral solutions.<sup>174</sup>

Moreover, the deregulation of financial markets in Europe created opportunities for countries to attract capital using business-friendly tax and other laws. This led to an increase in special ‘preferential tax regimes’ (“PTR”) throughout Europe, with the countries competing for the transnational corporations’ headquarters through tax breaks. By the beginning of the 1990s, surging global economic integration had economists arguing that the future of capital taxation was bleak.<sup>175</sup> Globalization and the mobility of capital would cause investments to flow to wherever taxation was the lowest.<sup>176</sup> This would distort investment decisions.<sup>177</sup> A decline in revenues from corporate income taxes as a share of GDP in the OECD countries as a result of the worldwide economic downturn in the beginning of the 1990s gave support to these fears.<sup>178</sup> (As the economies recovered towards the middle of the decade the trend reversed and corporate tax revenues rose to record levels.<sup>179</sup>) The Asian crisis in 1997 may have further triggered the demand for more transparency in the belief that tax havens were causing financial instability.<sup>180</sup> Other changes in the international economic climate, such as the end of the cold war, European integration and surging e-commerce also contributed to the demand by policy makers for more control over capital flows.<sup>181</sup> In Europe, countries were struggling within these issues within the broader context of the European Union’s general moves towards greater financial integration in the 1980s and 1990s.<sup>182</sup> The European Commission had issued a communiqué in 1974 addressing the problem with tax avoidance and evasion. It was followed in 1975 by a Council resolution recommending member states to exchange information in the cases where money is channeled through a third country for tax purposes.<sup>183</sup> A European Commission’s May 1986 proposal for a European

<sup>172</sup> Story and Walter, *supra* note 166, at 177.

<sup>173</sup> See Ronen Palan, Richard Murphy and Christian Chavagneux, *TAX HAVENS: HOW GLOBALIZATION REALLY WORKS* 200 (2010).

<sup>174</sup> Ironically, having abolished their withholding tax in 1984 to compete with the United States, Germany reintroduced the tax in 1989 as part of negotiations with the EU to harmonize tax on capital. The result was an increase in capital outflow from Germany. Story and Walter, *supra* note 166, at 178.

<sup>175</sup> Webb, *supra* note 85, at 795.

<sup>176</sup> See generally OECD *Taxing Profits in a Global Economy: Domestic and International Issues* (Paris: OECD) (1991) for an OECD publication confirming the view that taxing corporations, without distorting investments was becoming increasingly harder.

<sup>177</sup> See Vito Tanzi, *TAXATION IN AN INTEGRATED WORLD* 119 (1995) (stressing that greater inefficiencies will result from investments conducted as a result of taxation and therefore not predicting that efforts towards tax harmonization to be politically successful).

<sup>178</sup>

<sup>179</sup> Kenneth G. Stewart and Michael C. Webb, *Capital taxation, Globalization, and International Tax Competition*, Working Paper EWP0301, Dep. of Economics at University of Victoria (2003) available at <http://web.uvic.ca/econ/research/papers/ewp0301.pdf> (last accessed Oct. 25, 2011) (Figure 2 in the appendix illustrates corporate income tax revenue as a share of GDP in the OECD and in Europe respectively. Rather than comparing countries by their statutory income tax rates or marginal effective tax rates, Webb and Stewart focus on the corporate income taxes actually paid.)

<sup>180</sup> Robert T. Kurdle and Lorraine Eden, *The Campaign Against Tax Havens: Will It Last? Will It Work?*, 37 *STAN. J. L. BUS. & FIN.* 37, 50-51 (2003-2004).

<sup>181</sup> Kurdle and Eden, *supra* note 180, at 51.

<sup>182</sup> See e.g. Ray Barrell and Nigel Pain, *Foreign Direct Investment, Technological Change, and Economic Growth within Europe*, 107 *ECONOMIC J.* 1770, 1771 (1997).

<sup>183</sup> See Craig M. Boise, *Regulating Tax Competition in Offshore Financial Centers* in *REGULATORY COMPETITION AND OFFSHORE FINANCE* (Andrew P. Morriss, ed.) 50, 56 (2010).

financial area sought a gradual end to capital controls as a step toward establishing the internal market.<sup>184</sup> While willing to free financial markets from a degree of national controls in pursuit of the wider single market,<sup>185</sup> the goal was a *broader* market *not* a less regulated or taxed one and so many EU members sought to create substitute regulatory and tax measures at the EU level or coordinated national measures to replace those reduced at the national level.<sup>186</sup> Similarly, to safeguard domestic tax collections, France and Italy insisted that the EU combine liberalization with measures to align fiscal regimes and increase information transmission between the EU members' financial institutions and tax authorities.<sup>187</sup> In particular, despite resistance from some members and only weak backing from others, France persuaded the European Commission to propose in 1989 that withholding and corporate taxes be aligned.<sup>188</sup>

By the mid 1980s, it was thus apparent that there had been a significant shift in a number of developed economies on the utility of offshore financial centers. In both Europe and the United States, liberalization of finance had exposed governments to competition that they did not like from offshore jurisdictions and from each other. Increasingly, tax authorities saw the offshore jurisdictions as facilitating both tax avoidance and tax evasion despite the general lack of information about the transactions using offshore jurisdictions.<sup>189</sup> Law enforcement authorities worried that the impenetrability of offshore entities would conceal criminal activities.<sup>190</sup>

As both European governments and the United States were committed to further financial liberalization internationally, both were beginning to search for ways to insulate themselves from this competition. In particular, the Gordon Report helped push the OECD to work on the matter by making clear the inability of a single jurisdiction to address the problem effectively.<sup>191</sup> In response, the OECD produced two 1987 reports, *Tax Havens: Measures to Prevent Abuse by Taxpayers* and *Taxation and the Abuse of Bank Secrecy* on the issues.<sup>192</sup> In the former, the OECD spelled out somewhat contorted criteria for tax havens that excluded its own members, even while acknowledging the reality that “any country might be a tax haven to a certain extent.”<sup>193</sup> In addition to discussing possible remedies that

<sup>184</sup> Story and Walter, *supra* note 166, at 254.

<sup>185</sup> The EU directive of 1988 confirmed the principles of “complete, unconditional and free movement of capital” and non-discrimination by nationality. Story and Walter, *supra* note 166, at 256.

<sup>186</sup> For example, the mutual funds directive of 1985 promoted the liberalization of capital movements in the EU. Luxembourg now became attractive for fund management. France and the Commission reacted by promoting a 15 percent withholding tax across the EU, while Germany imposed its own such tax of 10 percent. This resulted in D-Marks flooding into Luxembourg until the policy was repealed in 1989.

<sup>187</sup> See Story and Walter, *supra* note 166, at 255. Also in 1989, the issue of tax neutrality was brought up again as the then Commissioner Christiane Sclereder proposed policies aimed to achieve neutrality in direct taxation as a “natural” part of the single market. See Claudio M. Radaelli, Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions, 37 J. COMMON MARKET STUD. 661, 667 (1999).

<sup>188</sup> Story and Walter, *supra* note 166, at 256.

<sup>189</sup> See, e.g., “Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries”, Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, April 12 and 13, 1983 1 (opening statement of Subcommittee Chairman Douglas Barnard that “Offshore tax evasion schemes—which appear to have reached epidemic proportions—result in the loss to our Treasury of hundreds of millions and very likely billions of dollars annually. They also threaten the integrity of our tax system, increase the tax burden on the vast majority of hard-pressed Americans who are honest taxpayers, and even undermine the Nation’s efforts to get at the profits of organized crimes, drug trafficking, and other criminal activities.”).

<sup>190</sup> See, e.g., Statement of Robert Edwards, Deputy Commissioner, Florida Department Of Law Enforcement, in “Tax Evasion through the Netherlands Antilles and Other Tax Haven Countries”, Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, April 12 and 13, 1983 97 (claiming “widespread” money laundering in Netherlands Antilles).

<sup>191</sup> Interview 5.

<sup>192</sup> OECD, *Tax Havens: Measures to Prevent Abuse by Taxpayers*, 20, and *Taxation and the Abuse of Bank Secrecy*, 107, in INTERNATIONAL TAX AVOIDANCE AND EVASION: FOUR RELATED STUDIES (1987).

<sup>193</sup> OECD, *Tax Havens: Measures to Prevent Abuse by Taxpayers*, *supra* note 192, at 21.

may be adopted against tax evasion and avoidance by state authorities, *Measures to Prevent Abuse by Taxpayers* also argued that Model Convention Article 26 was insufficient to force jurisdictions to share the information necessary to prevent tax evasion. Noting that there were few multilateral agreements, the *Measures to Prevent Abuse* suggested that “[p]ooling and sharing of relevant information at an international level ... could constitute a new form of co-operation.”<sup>194</sup> These initial steps staked out a position for the OECD that aligned with its member states. It had articulated an intellectual argument, albeit a weak one, that its members’ competition for assets through tax competition was conceptually different from the behavior of its members’ competitors. Further, it had set forth an agenda for reforms, focusing on enhancing information sharing.

#### D. Policy Entrepreneurship and Cartelization

With staff within the OECD having identified tax competition as an issue the organization could address, the next step was building support within member governments.<sup>195</sup> Aside from Switzerland, Luxembourg, and Liechtenstein, Continental European governments were already sympathetic to the need to reign in tax competition; the stumbling blocks were the United States and United Kingdom. With the arrival of the Clinton Administration in the in January 1993 and the Blair government in May 1997, tax authorities gained powerful allies in seeking to restrict offshore activities. In his first state of the union address, President Clinton proclaimed: “Our plan attacks tax subsidies that reward companies that ship jobs overseas. And we will ensure that, through effective tax enforcement, foreign corporations who make money in America pay the taxes they owe to America.”<sup>196</sup> Regulations by the Clinton administration concerning the disclosure of transfer pricing saw a reduction of the \$10 million threshold for misstatement subject to a 20 percent penalty to \$5 million.<sup>197</sup> Lawrence Summers, appointed Deputy Secretary of the Treasury in 1995 and Secretary of the Treasury in 1999, also was a strong supporter of the OECD’s project against “harmful tax competition.”<sup>198</sup> Similarly, in the UK, the Labour government elected in 1997 made clear in their election manifesto that they would take a hard stance towards tax avoidance “since we owe it to the tax payer”, announcing this under the headline “Fraud”.<sup>199</sup> After a landslide victory in May 1997, Labour Party leader Tony Blair became British prime minister and Gordon Brown Chancellor of the Exchequer.<sup>200</sup>

<sup>194</sup> See OECD, *Tax Havens: Measures to Prevent Abuse by Taxpayers*, *supra* note 192 at 48. The report concludes with suggestions to tax authorities in matters of information sharing, but with no suggestion for any multilateral cooperation for information exchange (Id., at 47-48).

<sup>195</sup> Interview 5.

<sup>196</sup> Bill Clinton, *1993 State of The Union Address*, Feb. 17, 1993, available at <http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou93.htm> (last accessed Oct. 22, 2011).

<sup>197</sup> Richard G. Minor, *Tax Conferences: Euromoney Conference Focuses on EC Tax Policy, Eastern Europe, and Transfer Pricing Developments*, TAX NOTES INTERNATIONAL MAGAZINE 1548, 1550 (1993).

<sup>198</sup> See e.g. Lawrence Summers, *Tax Administration in a Global Era*, remarks to the 34<sup>th</sup> General Assembly of the Inter-American Center of Tax Administrators, Washington DC, July 10, 2000. Summers argued in the speech that the first steps in ensuring that the administration can realize their policy objectives without risking eroding the tax base are the OECD’s work and the administration’s own unilateral initiatives. See also J. C. Sharman, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION, 36 (2006). (providing interview material that it was under Summers as Secretary that the U.S. treasury was the most supportive for the OECD project against harmful tax competition.)

<sup>199</sup> The Labour Party Manifesto 1997, *New Labour because Britain deserves better/ Britain will be better with new Labour* available at <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> (last accessed Oct. 22, 2011). The Tories did not mention cracking down on evasion or avoidance in their manifesto in 1997, instead acknowledging “prosperity cannot be taken for granted. We have to compete to win. That means a constant fight to keep tight control over public spending and enable Britain to remain the lowest taxed major economy in Europe. It means a continuing fight to keep burdens off business.” The Conservative Party General Election Manifesto 1997, *You can only be sure with the Conservatives*, available at <http://www.conservative-party.net/manifestos/1997/1997-conservative-manifesto.shtml> (last accessed Oct. 22, 2011).

<sup>200</sup> Labour’s win was largely seen as inevitable as the Conservative government staggered on during the mid-1990s. Tim Bale, *The Conservative Party: From Thatcher to Cameron* 65-66 (2010). Anyone anticipating future British policy would

With the U.S. and U.K. changing sides during the decade, a more favorable climate for promoting substantive tax co-ordination was developing. Under the leadership of Jeffrey Owens, the OECD “Project on Fiscal Degradation” was launched in 1994, with a mandate,<sup>201</sup> to scrutinize all economies of Europe for signs of “degradation.”<sup>202</sup> A Working Group on Fiscal Degradation was created and met for the first time in September 1994 with the aim of establishing a “Code of Good Conduct” that would discourage countries from continuing or creating PTRs.<sup>203</sup> The Group set up criteria for “acceptable” tax regimes, with proposals to policy makers on how these could be designed.<sup>204</sup> Ultimately, the project was ignored by many OECD members, and in the end, the OECD Ministerial Council did not endorse the report.<sup>205</sup> The CFA decided that the report would be given wide distribution but would not be officially published, suggesting that the report could serve as useful input in its work.<sup>206</sup> This project thus did not become the great leap forward in international tax-cooperation that the CTPA staff sought. Apparently, launching such a project at the committee level did not give it enough status as a project has that is approved on a higher level. Owens would not repeat this mistake. The next time he would seek support for the project at the ministerial level for the project.<sup>207</sup>

After the Code of Good Conduct fizzled out, Owens and his supporters crafted two measures to restore the initiative to life: A ministerial communiqué by the OECD Council and an endorsement from the Group of 7 (G7). At its ministerial level meeting of finance ministers and others, the OECD Secretariat<sup>208</sup> delivered the Ministerial Communiqué, asking the OECD 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, and report back in 1998.”<sup>209</sup> It would be easy to underestimate the impact of this communiqué. As with many documents issued at this level, the wording was prepared in advance as a draft that the gathering would sign at the meeting. That meeting, which included top officials of national tax authorities, has been described as “chaotic” with the delegates screaming at each other, suggesting the absence of a consensus.<sup>210</sup> Those opposed called the proposed text “[a] fire that needs to be put out” and claimed that it contradicted the basic principles of

have foreseen the shift well before 1997.

<sup>201</sup> See OECD Working Party No. 8 on Tax Avoidance and Evasion, *Future work Programme and Proposed Mandate* DAFFE-CFA-WP8(95)9-REV2-ENG, 3 (1995), and OECD, *Report on Fiscal Degradation*, DAFFE-CFA(95)38-REV1, (Dist. February 6) 41 (1996) (giving a mandate to Working Party No. 8 in 1993 by the CFA to broaden its responsibilities to include fiscal degradation, whereas the mandate for the project on fiscal degradation was issued in 1994. The Working Party’s mandate had previously been updated and broadened in 1984 and 1989 respectively.)

<sup>202</sup> Interview 5.

<sup>203</sup> See OECD, *Report on Fiscal Degradation*, *supra* note 201, at 7. The aim of the project is described as to “avoid unfair tax competition for commercial and financial activities and to avoid the spread of tax regimes which undermine the revenue base and open up new avenues for tax avoidance and evasion”. A note from Jeffrey Owens, on page 42 describes the aim of the project as to “establish Code of Good Conduct which would discourage countries from maintaining and adopting preferential tax regimes which undermine the tax base of their treaty partner.”)

<sup>204</sup> See OECD, *Report on Fiscal Degradation*, *supra* note 201, at 9.

<sup>205</sup> See Sharman, *supra* note 198, at 41.

<sup>206</sup> See OECD Working Party No. 8 on Tax Avoidance and Evasion, *Future work Programme and Proposed Mandate*, *supra* note 201, at 3-5 (1995).

<sup>207</sup> Interview 5.

<sup>208</sup> Present at the OECD meeting were ministers and other representatives from Germany, Australia, Austria, Belgium, Canada, Denmark, Spain, United States, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Norway, New Zealand, The Netherlands, Portugal, Czech Republic, United Kingdom, Sweden, Switzerland and Turkey. Also at the meeting were representatives of The European Commission, World Bank, European Free Trade Association (EFTA), Bank for International Settlements (BIS), The International Monetary Fund (IMF), The International Labour Organization (ILO) and The World Trade Organization (WTO). (OECD Council, 1996b. *Council at Ministerial Level: List of Countries' representatives and Observers*, C/MIN(96)7, OECD Archives.)

<sup>209</sup> OECD Council, 1996a, *Council at Ministerial Level: Draft Communiqué*, C/MIN(96)3/REV1, OECD Archives.

<sup>210</sup> Interview 5

the OECD.<sup>211</sup> A month later, the G7 endorsed the communiqué, arguing that “harmful tax competition” distorted trade and investment.<sup>212</sup> The G7 further “strongly urge[d] the OECD to vigorously pursue its work in this field, aimed at establishing a multilateral approach under which countries could operate individually and collectively to limit the extent of these practices.”<sup>213</sup> This endorsement was a result of skilful diplomacy by Owens and his supporters<sup>214</sup> and enhanced the project’s political clout.<sup>215</sup>

The G7 has a history of influencing the OECD’s direction through the communiqués that the group issues after its yearly summits.<sup>216</sup> The G7 was particularly sympathetic to the cause of regulating capital flows. Primarily, it was active in controlling money laundering through its founding of the Financial Action Task Force (FATF).<sup>217</sup> In addition, the EU regulators were increasingly critical of Ireland for its low tax policies.<sup>218</sup> Ireland cut taxes dramatically in 1989 in a bid to solve persistent

<sup>211</sup> Interview 5.

<sup>212</sup> OECD, *Harmful Tax Competition: An Emerging Global Issue 5* (1998). Available at: <http://www.oecd.org/dataoecd/33/0/1904176.pdf> (last accessed Oct. 3, 2011).

<sup>213</sup> OECD *supra* note 212, at 7.

<sup>214</sup> Interview 5.

<sup>215</sup> It is important to put the role of the G7 into context to understand the dynamics of the debate. After gaining an inadequate support from OECD to win an endorsement in the Ministerial Council, Owens wanted to ensure that he had solid support from the onset of the project from another powerful body. He secured support from the G7, an organization with an almost identical membership but whose agenda and actions were set by a quite different group of people from the member states: prime ministers and presidents rather than finance, foreign and other ministers who were present at the meeting of the Council at Ministerial Level. The G7 consists of France, Germany, Italy, Japan, United Kingdom, United States and Canada. It was created as the Group of Six in 1975 before adding Canada to its list in 1976. It would later form the Group of Eight in 1997 as Russia joined, while still also meeting as the G7. Meetings are at the level of executive heads of member countries. (The president of the European Commission present, although the EU is not formally a member.) They are thus not the same people as those of the OECD meeting on a ministerial level, but the same countries and The European Commission that attended the 1996 G7 meeting were represented also at the OECD meeting of the Secretariat. It may then come as no surprise that they would be supporters of the OECD Secretariat agenda. Initially, the relationship between the OECD Secretariat and the newly formed G7 was stained with rivalry. The OECD Secretary General later wrote that “The harm done to the OECD by the increasing institutionalization of the Seven has proved even more serious than I feared at the time. The OECD Secretariat is not present at the G7 meetings and is not even informed about them: the best way to undermine the power of an international organization.” Richard Eccleston, Peter Carroll and Aynsle Kellow, *Handmaiden to the G20? The OECD's evolving role in global economic governance*, paper presented to the 2010 Australian Political Studies Association Conference, Melbourne 4 (2010) available at [http://apsa2010.com.au/full-papers/pdf/APSA2010\\_0228.pdf](http://apsa2010.com.au/full-papers/pdf/APSA2010_0228.pdf) (last accessed Oct. 25, 2011). Although securing an endorsement from the G7 may not have been necessary to pull the project through once it had a mandate from the Ministerial Council, it did certainly give more clout to the project. Interview 5.

<sup>216</sup> For example, in 1979 for instance, they addressed the OECD in connection to the work on oil and energy consumption following the rise in oil prices. Eccleston, Carroll and Kellow, *supra* note 215.

<sup>217</sup> FATF is described on its homepage as “an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF is therefore a ‘policy-making body’ that works to generate the necessary political will to bring about legislative and regulatory reforms in these areas.” See FATF homepage [http://www.fatf-gafi.org/pages/0,2987,en\\_32250379\\_32235720\\_1\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html). In 1989, with the United States as the driving party, the G7 established FATF at its Paris summit. As money laundering was discussed referring to the “war on drugs” of the United States, the G7 decided to convene “a financial action task force from Summit participants and other countries interested in these problems. Its mandate is to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance.” See generally Amandine Scherrer, *Explaining Compliance with International Commitments to Combat Financial Crime FATF and the G7*, Paper presented at the 2006 Convention of the International Studies Association. San Diego, California, March 22–25, 2006. Housed at the OECD headquarters in Paris and concerning its scope of responsibility, it is not hard to confuse FATF with an OECD department. As will be seen, they have also adopted similar methods in their pursuit. On its homepage, FATF does see the need to point out that “The FATF and the OECD are separate organizations.” According to Sharman, FATF also uses OECD business cards and OECD stationary, hardly alleviating the confusion. See Sharman, *supra* note 198, at 32.

<sup>218</sup> See Mark C. White, *Assessing the Role of the International Financial Services in Irish Regional Development*, 13 EUROPEAN PLANNING STUDIES 387, 392 (2005).

unemployment.<sup>219</sup> One of its initiatives was the 1987 creation of the “International Financial Service Center,” where firms enjoyed a corporate tax of 10%.<sup>220</sup> Initially tolerated by the other EU members because of Ireland’s moribund economy, as Irish unemployment rates fell in the 1990s the IFSC came under increased EU scrutiny.<sup>221</sup> Having cut its corporate tax rate from 50% in 1988 to 12.5% over time, Ireland’s economy was drawing considerable outside investment during the 1990s as non-European firms looking to expand in Europe established operations there.<sup>222</sup> EU efforts to force Ireland to abandon its ring-fenced 10% rate for international financial operations backfired when Ireland cut its corporate rate generally to 12.5% in 2004.<sup>223</sup> Moreover, Ireland’s aggressive marketing of Dublin as an international financial center threatened further competition within the EU on tax and regulatory matters.<sup>224</sup> France was particularly concerned about the kind of low, across-the-board corporate taxes that Ireland was now offering, and in 1997 began to actively to call for harmonizing corporate tax rates.<sup>225</sup> Consensus within the EU would be blocked by Belgium, Ireland, and Luxembourg.<sup>226</sup> Shifting the discussion to the G7 cut out the disharmonious voices of lower tax European jurisdictions.

With this fresh mandate, Owens and his colleagues resumed their work on tax competition issues. Over the next two years, they worked rapidly to prepare a thorough indictment of low tax jurisdictions,<sup>227</sup> culminating in the 1998 report *Harmful Tax Competition: An Emerging Global Issue*.<sup>228</sup> The report was a product of skilful political maneuvering.<sup>229</sup> One strategy was to keep the Business and Industry Advisory Committee to the OECD (BIAC), out of the discussion, in order to eliminate a critical voice in the debates.<sup>230</sup> The BIAC had been continuously involved in much earlier OECD work on taxation but had no role in the 1998 report.<sup>231</sup> The report again attempted to define the “problem of

<sup>219</sup> See Paul Sweeney, THE CELTIC TIGER: IRELAND’S ECONOMIC MIRACLE EXPLAINED 173 (1998) (top tax rates cut from 50% in 1988 to 36% in 1996 on companies; 65% to 48% on individual income).

<sup>220</sup> See White, *supra* note 218, at 391.

<sup>221</sup> White, *supra* note 218, at 392.

<sup>222</sup> Sweeney, *supra* note 219, at 173 (1998) (tax rates).

<sup>223</sup> See *Financial Centre of Gravity*, Business & Finance (July 15, 2004) available at

<http://www.businessandfinance.ie/index.jsp?p=450&n=466&a=1765> (discussing end of 10% ring fenced regime); John Deacon, GLOBAL SECURITIZATION AND CDOS 312-314 (2004) (discussing role of Irish tax rates in luring financial industry to Ireland). See also *Government Confident on Tax Rate*, IRISH TIMES (Oct. 4, 2011) available at

<http://www.irishtimes.com/newspaper/breaking/2011/0916/breaking34.html> (discussing efforts to preserve 12.5% regime).

<sup>224</sup> The hostility towards Ireland’s success has dampened however, as the Iris economy crashed in the midst of the global financial crisis. After a period of great expansions in the housing sector between 2003 and 2007, the housing bubble burst in 2008, leaving the country in a dire fiscal situation, and with an unemployment rate of above 14 %. See Constantin Gurdgiv, Brian M Lucey, Ciaran MacAnBhaird and Lorcan Roche-Kelly, *The Irish Economy: Three Strikes and You’re Out?* available at <http://ssrn.com/abstract=1776190> (last accessed Oct. 5, 2011);

The Economist, *Output, prices and jobs*, Oct 22nd 2011, available at <http://www.economist.com/node/21533447> last accessed Oct. 25, 2011).

<sup>225</sup> See Sharman, *supra* note 198, at 29.

<sup>226</sup> The EU had formed a tax policy group, composed of EU ministers of finance and their representatives, where much attention was paid to issues of “unfair” tax practices. See Commission of the European Communities, *Taxation in the European Union, Report on the Development of tax Systems*, COM (96) 549 final, Brussels Oct. 22, 1996, for the recommendation of the Commission of the European Communities of the formation of the policy group. Its work illustrated the diversity of opinion among member states, with Ireland and Belgium offering lower corporate taxation, and Luxembourg attracting savings. Claudio M. Radaelli, *Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions*, 37 J. COMMON MARKET STUD. 661, 672-673 (1999). The European Council on Economic Policy called for enhanced policy coordination in the Euro zone, including “the discouragement of harmful tax competition.” *Id.* at 675. Germany, which had much to gain from tax coordination, put a lot of political capital into the EU policy group. *Id.* at 673.

<sup>227</sup> Interview 5.

<sup>228</sup> See generally OECD *supra* note 212.

<sup>229</sup> Interview 5.

<sup>230</sup> See Webb, *supra* note 85, at 811-812.

<sup>231</sup> See Sharman, *supra* note 198, at 41.

harmful tax competition” in a fashion that would not limit the major industrialized economies and promote an international consensus around that definition.<sup>232</sup> While tax avoidance and evasion has been a part of the OECD work on taxation for decades, the 1998 report marked a distinct shift away from the past practice of articulating problems and recommending general solutions to pursuing a coordinated and active effort to counteract tax avoidance and evasion, to reduce financial privacy, and to influence states to end “unfair” tax competition.

The report changed the debate over tax competition. The anti-tax competition argument had a serious problem in that the low tax states could make a legitimate claim to autonomy in designing their tax regimes that was at least as strong as the developed countries’ claim to set their own rates. As Kaemer points out, the term “harmful tax competition” is not an economic but a political one.<sup>233</sup> It was therefore necessary to delegitimize the low tax jurisdictions’ policy choices through the creation of a “standard” that they failed to meet. The OECD offered a perfect forum within which to do so. As the OECD’s 1998 report on “harmful tax competition” noted, while it was true that “[c]ountries should remain free to design their own tax systems” this was true only “as long as they abide by internationally accepted standards in doing so.”<sup>234</sup> While no one country could unilaterally create “internationally accepted standards” in tax, the OECD with its long history of leadership on double taxation might be able to do so. The introduction of the idea of international standards defined by a small group of countries with a particular set of interests was a brilliant effort to redefine the debate.

Moreover, the OECD faced the problem that its own members were engaged in the same behaviors it criticized in others. For example, an American Assistant Secretary of the Treasury was quoted by *Euromoney* magazine in the 1970s that “We are not in the business of enforcing the tax laws of other countries, just our own.”<sup>235</sup> And the United States had encouraged the use of Netherlands

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<sup>232</sup> OECD *supra* note 212, at 23, 27. (“Tax Havens” are identified by the criteria a. “No or only nominal taxes”, b. “Lack of effective exchange of information”, c. “Lack of transparency”, d. “No substantial activities” (“The absence of a requirement that the activity be substantial is important since it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax driven”). “Harmful tax regimes” are defined by the criteria a. “No or low effective tax rates”, b. “Ring fencing” (“Ring-fencing may take a number of forms, including

- a regime may explicitly or implicitly exclude resident taxpayers from taking advantage of its benefits.
- enterprises which benefit from the regime may be explicitly or implicitly prohibited from operating in the domestic market. of regimes,”) c. “Lack of transparency”, d. “Lack of effective exchange of information”, In order to estimate a regime’s “potential harmfulness”, three questions are laid out in the report: “1. Does the tax regime shift activity from one country to the country providing the preferential tax regime, rather than generate significant new activity?”, “2. “Is the presence and level of activities in the host country commensurate with the amount of investment or income?”, “3. Is the preferential tax regime the primary motivation for the location of an activity?”)

The difference between a tax haven and a harmful preferential tax regime is thus that the latter has the “ring-fencing” criteria, while tax havens have “no substantial activities”. A jurisdiction was assessed as a preferential tax regime if it fulfilled the “ring-fencing” criteria in combination with either having low tax rates *or* a lack of transparency. *See* Ault, *supra* note 87, at 769. These definitions thus include both those jurisdictions that offer lower tax rates for foreigners, who may not be in the business of financial services, and those jurisdictions without any special treatment that attract corporations in the financial business. As Webb points out, part of the tactics in forming the needed consensus around these definitions was to keep the critical voice of the BIAC away from the discussion, for them not to encourage national lobbies to raise objection against the OECD approach on the national arena. *See* Webb, *supra* note 85, at 812.

<sup>233</sup> Radaelli and Kraemer, *supra* note 59, at 16.

<sup>234</sup> OECD, *Harmful Tax Competition*, *supra* note 212, at 15.

<sup>235</sup> Donald Lubick, quoted in Statement by Public Citizen on June 19, 1980, at 334 in *Improper Use of Foreign Addresses to Evade U.S. Taxes*, Hearing Before a Subcommittee of the Committee on Government Operations, House of Representatives, 97<sup>th</sup> Cong. 2<sup>nd</sup> sess. (June 10, 1982). A Ford Foundation report in 1980 noted that “‘Offshore’ or ‘haven’ facilities also include the U.S. and England, where favorable statutes protect foreign investors and externally-originating funds flows.”, *Offshore Banking: Issues with Respect to Criminal Use* (1979), reprinted in *Illegal Narcotics Profits*, Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, US Senate, 96<sup>th</sup> Congress, 1<sup>st</sup> session (1979) at 473, 474.

Antilles entities to allow U.S. companies access to the Eurodollar market in the 1960s and 1970s through what an IRS Commissioner described as “almost routine” revenue rulings approving transactions no different in form the United States later would criticize as “treaty abuse.”<sup>236</sup> Indeed, the United States itself has been described as a tax haven, with special tax breaks for foreign investments.<sup>237</sup> Manhattan may be seen as the most important tax haven in this regard. Foreign persons pay no tax in the United States on their interest rate,<sup>238</sup> and state such as Delaware, Nevada and Wyoming are offer such secrecy services as minimal information requirements and limited oversight for companies registering there.<sup>239</sup> The standard would therefore was carefully written to not delegitimize measures being used by OECD members as they were unlikely to welcome suggestions that they give up competitions they were winning.

The report began by explaining that globalization not only had induced tax reforms and promoted economic development and a more efficient allocation of resources (all things the OECD traditionally promoted) but also opened up doors to tax avoidance by multinational enterprises (MNEs). The pressure to attract employment lead countries into changing their tax structures as policies in one country have repercussions in others. The report labeled a practice as “harmful” when a country was “poaching” by using tax policies to attract capital from another country, as such practices “do not reflect different judgments about the appropriate level of taxes and public outlays or the appropriate mix of taxes in a particular economy.”<sup>240</sup> Thus central to the OECD critique of tax competition was the claim that attracting investment was an illegitimate criterion for evaluating tax policy,<sup>241</sup> even though creating an attractive investment climate was often treated as a legitimate goal in other policy areas by the OECD.<sup>242</sup>

Moreover, what was needed was a way to both ensure that OECD members toed the line and restrained their competition against one another and to control the independent exercise of sovereignty among non-members. The problem was that exhortation was insufficient to expand the OECD’s 1998 report beyond the OECD’s membership. The organization could make a policy case against tax competition but such a statement would lack teeth as the OECD would just be issuing voluntary

<sup>236</sup> Statement of Roscoe L. Egger, Jr., Commissioner Internal Revenue Service, at 236, in 1980 Improper Use Hearing.

<sup>237</sup> See e.g. Belotsky, Jr, Vincent P. *The Prevention of Tax Havens via Income Tax Treaties*, 17 CAL. W. INT’L L.J. 59 (1987).

<sup>238</sup> Marshall J. Langer, *Harmful Tax Competition: Who are the Real Tax Havens?*, TAX NOTES INTERNATIONAL MAGAZINE, December 18, 2000, 2831, 2832 (2000). Langer further argued in a published speech that “The United States, the United Kingdom, and many other OECD countries have local laws and practices that are at least as abusive as those of the so-called tax havens [...] U.S. bank have paid tax-free interest rates to foreign persons for nearly 80 years. Hundreds of billions of dollars of U.S. bank deposits are held in the United States by nonresident aliens and foreign corporations. If the U.S. Congress ever seriously tried to tax the interest paid on these deposits, that money would immediately disappear from U.S. banks and probably move to other OECD countries.” Id.

<sup>239</sup> i U.S. Treasury Department, *U.S. Money Laundering Threat Assessment*, December 2005, 47-48(2005) available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mlta.pdf> (Last accessed 2011-10-03).

<sup>240</sup> OECD, *Harmful Tax Competition*, *supra* note 212, at 16.

<sup>241</sup> Judging by the tone at some places in the report, the response to this harm would also be firm. The chapter on measures against harmful tax competition begins: “Governments cannot stand back while their tax bases are eroded through the actions of countries which offer taxpayers ways to exploit tax havens and preferential regimes to reduce the tax that would otherwise be payable to them.” OECD, *Harmful Tax Competition*, *supra* note 212, at t 37.

<sup>242</sup> See generally OECD, *Policy Framework for Investment* (2006), available at <http://www.oecd.org/dataoecd/1/31/36671400.pdf> (last visited Oct. 7, 2011), for a comprehensive and updated work on different policy area’s impact n the investment climate. The report states that “Countries’ continuous efforts to strengthen national policies and public institutions, and international co-operation, to create sound investment environments matter most.” (page 7). Competition is emphasized in the report: “Effective competition and tax policies are important to ensure that investment, in particular in small businesses, is not deterred by unnecessary barriers to entry, dissuasive taxation, and poor legal compliance” (page 11); See also; OECD Global Forum on International Investment, *Enhancing the Investment Climate: the Case of Infrastructure*, Istanbul Nov. 6-7, 2006, available at <http://www.oecd.org/dataoecd/50/7/37785076.pdf> (last accessed Oct.07, 2011) for discussions on related issues.

guidelines which non-members could ignore.<sup>243</sup> The innovation that transformed *Harmful Tax Competition* from the merely a meaningless international report gathering dust on library shelves into an effective policy tool was its creation of an international cartel. First, to solve the internal coordination problem the report called for an explicit deadline for regimes to “remove, before the end of 5 years starting from the date on which the Guidelines are approved by the OECD Council, the harmful features of their preferential tax regimes identified in the list.”<sup>244</sup> Second, to induce non-members to comply, a new “Forum on Harmful Tax Practices” was established, with the mandate to intensify the dialogue with non-member countries but with a “priority task” of issuing a list of tax havens.<sup>245</sup> The list would be ready within two years, giving tax havens an additional three years to comply with the guidelines in the 1998 report.<sup>246</sup> Jurisdictions on the list would face coordinated sanctions from OECD members.<sup>247</sup> But even an OECD blacklist would not carry enough weight to establish international standards, since the organization’s members’ self-interest in preventing competition was obvious. Fortunately, the OECD members had more than one hat they could wear in issuing blacklists and soon both the EU and the FATF were at work on blacklists of their own.<sup>248</sup> FATF published its first list of “Non-Co-operative Countries and Territories” (NCCT) in June 2000, the same month as the OECD.<sup>249</sup> The Financial Stability Forum (FSF), founded in 1999 by the G7 Finance Ministers and Central Bank Governors to study methods of reducing global financial volatility,<sup>250</sup> issued a report on non-cooperative financial centers in May 2000, with material based on a survey that the organization had sent to OFCs.<sup>251</sup> The EU launched a Code of Conduct for Business Taxation with a list of 66 “harmful” tax regimes in 13 EU-member countries and their offshore affiliation.<sup>252</sup> Both the EU and the OECD were extending the informal boundaries of tax governance into the formal sphere.<sup>253</sup>

By the November 1999 OECD Forum, the organization had identified and evaluated numerous

<sup>243</sup> See Webb *supra* note 85, at 803, 809.

<sup>244</sup> See OECD, *Harmful Tax Competition*, *supra* note 212, at 56. The initial strategy for filling this list was a self-review process that the member countries agreed to carry out. They were to make an evaluation of whether they hosted any PTR, as defined by the report. At the end of that reporting period, not a single country would admit to it. Naturally, no jurisdiction wanted to come out first as the “bad guy”. The next step was to initiate a system of informing, asking countries to report their observations of PTRs in other member countries. In three months time, this resulted in over a 100 such reports.

Interview 5, See also: Ault, *supra* note 232, at 767, (describing the self review process as a “classic prisoners’ dilemma”).

<sup>245</sup> OECD, *Harmful Tax Competition*, *supra* note 212, at 51-52.

<sup>246</sup> OECD, *Harmful Tax Competition*, *supra* note 212, at 54.

<sup>247</sup> OECD, *Harmful Tax Competition*, *supra* note 212, at 66-67.

<sup>248</sup> Issuing blacklists proved so attractive that some governments simply copied existing blacklists and reissued them as their own. Where they lacked institutions to update the blacklists, this created problems as countries were removed from the source blacklist but not the copies. See Sharman, *The Bark is the Bite: International Organizations and Blacklisting*, 16 REV. INT’L POL. ECON. 573, 581-582 (2009). (He also points out the costs incurred as OFCs are listed on private anti-money laundering software, generating red flags and hence raising costs of transactions, after once being black-listed by an international organization.) See also Gordon, *The International Monetary Fund*, *supra* note 10, at \_\_\_.

<sup>249</sup> See FATF, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Anti-Money Laundering Measures*, June 2000, available at <http://www.oecd.int/fatf> (last accessed Oct. 22, 2011).

<sup>250</sup> See FSB, Financial Stability Board, 2011, Website: <http://www.financialstabilityboard.org/about/history.htm> (Last accessed 2011-10-03).

<sup>251</sup> See Financial Stability Forum, *Press Release: Financial Stability Forum Releases Grouping of Offshore Financial Centres (OFCs) to Assist in Setting Priorities for Assessment*, (Ref. No.: 15/2000E) (May 25, 2000). They divided them into three groups according to their “perceived quality of supervision and perceived degree of co-operation”. In the least cooperative group were jurisdictions Anguilla, Antigua and Barbuda, Aruba, Belize, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Cyprus, Lebanon, Liechtenstein, Marshall Islands, Mauritius, Nauru, Netherlands Antilles, Niue, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, Seychelles, The Bahamas, Turks and Caicos, and Vanuatu.

<sup>252</sup> Primarolo Group. *Code of Conduct (Business Taxation) / Primarolo Group*, Press Release: Brussels (29-02-2000) - Nr: 4901/99 (2000).

<sup>253</sup> Kraemer, *supra* note 59, at 16.

PTRs.<sup>254</sup> Reports were sent to the states for comments, and after some initial panic among non-OECD states, the offshore jurisdictions organized themselves and began meeting with the OECD both collectively and individually.<sup>255</sup> In 1998 and 1999, it seemed to the Forum on Harmful Tax Practices that there was a great willingness among the offshore regimes to co-operate to avoid being listed on the forthcoming blacklist.<sup>256</sup> Before the final report came out in June 2000, six jurisdictions (Bermuda, the Cayman Islands, Cyprus, Malta, Mauritius and San Marino) made commitments that saved them from being blacklisted.<sup>257</sup> They had all pledged to eliminate the tax practices that were deemed harmful according to the *Harmful Tax Competition* report.<sup>258</sup> As the list was released in June 2000, 35 jurisdictions were labeled as tax havens, and 47 as “potentially harmful tax regimes” among OECD members.<sup>259</sup> Furthermore, agreements progressed with the Seychelles and the Netherlands Antilles in the spring of 2001.<sup>260</sup> The agreements with offshore jurisdictions were a visible sign of the project's success and its growing significance within the OECD. This created the opportunity for Jeffrey Owens, its Director, to upgrade the status of his office by forming the directorate CTPA in 2001, shifting the tax competition work out of the DAF.<sup>261</sup> Upgrading the division to a directorate was an important accomplishment. To become an OECD directorate means much more clout to the unit's work and its future importance and funding.<sup>262</sup> It was also beneficial for Owens personally.<sup>263</sup>

One puzzle remains - the OECD is built on decision making by consensus and two members in particular (Switzerland and Luxembourg) would be disadvantaged by the anti-tax competition efforts. Switzerland and Luxembourg have for decades built their reputation on confidentiality, something that clearly would be threatened if they committed to the OECD project. In its statement on the report *Harmful Tax Competition*, the Swiss delegation stressed that they objected to the OECD's view that information exchange was the only remedy to the tax competition problem.<sup>264</sup> They pointed out that Switzerland was currently pursuing its withholding system, which they asserted was a less costly and fully viable alternative. The Swiss delegation stressed that they found it necessary to protect personal data and thus could not support the OECD approach. Luxembourg expressed similar views as a basis for not supporting the report.<sup>265</sup>

The new efforts had real costs for them, since under the OECD Convention mutual agreements can lead to binding requirements for the members.<sup>266</sup> Since members have the right to veto an action

<sup>254</sup> OECD, *Towards Global Tax Co-operation. Progress in Identifying and Eliminating Harmful Tax Practices*, Paris: OECD, 11 (2000), available at: <http://www.oecd.org/dataoecd/9/61/2090192.pdf>. (last accessed Oct. 3, 2011).

<sup>255</sup> OECD, *Towards Global Tax Co-operation*, *supra* note 254, at 10. Interview 5.

<sup>256</sup> Interview 5.

<sup>257</sup> OECD, *Towards Global Tax Co-operation*, *supra* note 254, at 29.

<sup>258</sup> Richard M. Hammer and Jeffrey Owens, *Promoting Tax Competition* 3 (2001), available at <http://www.oecd.org/dataoecd/63/11/1915964.pdf> (last accessed 2011-10-03).

<sup>259</sup> OECD, *Towards Global Tax Co-operation*, *supra* note 254, at 12-14, 17.

<sup>260</sup> Interview 5.

<sup>261</sup> Interviews 3 and 5. DAF currently deals with anti-corruption, corporate governance, competition law and policy, investment, financial markets, insurance, private pensions, public debt management and private sector development. See Website: [http://www.oecd.org/about/0,3347,en\\_2649\\_33725\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,3347,en_2649_33725_1_1_1_1_1,00.html) (last accessed 2011-10-03).

<sup>262</sup> Interviews 3 and 5.

<sup>263</sup> Owens benefited in terms of his influence within the organization. A division Head reports to the Director of the directorate. A director on the other hand, reports directly to the deputy Secretary-General of the OECD Secretariat. The informal link to the Secretary-General is also strong. In addition, Owens gained direct access to opportunities to lobby the members of the G7/8 and G20. (Interview 5). A Head of Division, moreover, currently has a salary of 8,725 euro per month, while a Director earns 11,287 euro. This implies a pay rise of almost 30% for someone advancing from heading a division to a directorate. See OECD website: *Salaries and Benefits*: [http://www.oecd.org/document/30/0,3746,en\\_21571361\\_45609340\\_40803550\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,3746,en_21571361_45609340_40803550_1_1_1_1,00.html) (last accessed 2011-10-03.)

<sup>264</sup> OECD, *Harmful Tax Competition* *supra* note 212, at 77.

<sup>265</sup> OECD, *Harmful Tax Competition* *supra* note 212, at 77-78.

<sup>266</sup> OECD Convention, “Convention on the Organisation for Economic Co-operation and Development”, 12/14/60, art. 6 (,

that the Council proposes,<sup>267</sup> why did Switzerland and Luxembourg abstain from *Harmful Tax Competition* rather than vetoing it? Had either done so, the report would have been much less effective. There are two possible explanations. First, OECD members interact on many issues and compromise is necessary. Setting oneself against other nations' projects may cost a country future influence.<sup>268</sup> Since both countries were successful in operating within the existing constraints, they may have believed that the report would ultimately do them little harm while impeding their competition outside the OECD. Second, they may have made a mistake and not appreciated the full extent to which *Harmful Tax Competition* would succeed in changing the terms of debate over tax competition.

#### E. The Impact of Cartelization

Soon after the success of *Harmful Tax Competition*, the effort to restrict tax competition suffered a significant setback with the diminution of U.S. support after the election of George W. Bush.<sup>269</sup> Indeed, even prior to the election, Barbados used the possible shift in U.S. policy after the election to seek concessions at a fall 2000 meeting with the OECD and was sufficiently emboldened by the results to walk out of a meeting with the OECD in January 2001.<sup>270</sup> While Bush's stance on tax competition was initially unclear<sup>271</sup> – and the anti-tax competition interests may have consoled themselves over the election results with the thought that it was the conservative Reagan administration that had cancelled the BVI and Netherlands Antilles tax treaties – in May 2001, Secretary of the Treasury Paul O'Neill made it clear that the new U.S. administration would not support efforts to restrict tax competition:

I am troubled by the underlying premise that low tax rates are somehow suspect and by the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system. I also am concerned about the potentially unfair treatment of some non- OECD countries. The United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems. . . . In its current form, the project is too broad and it is not in line with this Administration's tax and economic priorities.<sup>272</sup>

Prior to 1998, a change in U.S. priorities like this would likely have simply derailed efforts at restricting tax competition. The difference was that there was now at least the beginning of international commitments to address the issue. Thus the change in U.S. position had a different impact

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1960) available at: [http://www.oecd.org/document/7/0,3746,en\\_2649\\_201185\\_1915847\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,3746,en_2649_201185_1915847_1_1_1_1,00.html) (last accessed 2011-10-03). Usually however, the OECD Council instead issues recommendations, which represent a "strong political commitment" of a country. These would still be costly for non-compliant members.

<sup>267</sup> Ault *supra* note 87, at 758.

<sup>268</sup> Interview 4.

<sup>269</sup> The OFCs recognized that the U.S. was a weak link in the OECD campaign and lobbied the U.S. Congress to undermine support for the OECD project. (See also Sharman, *supra* note 198, at 17.. Another problem concerned the British overseas territory of Gibraltar, the status of which has since long been a dispute between the U.K. and Spain. In July 2001, Spain refused to endorse the report unless the U.K. took action over Gibraltar's fiscal policies. Allowing it instead to negotiate for itself, the argument went, would allow the territory too much international recognition. This quarrel would halt the release of the 2001 Progress Report, with an updated version of the blacklist, which was initially due to be published in July 2001. Gavin Hinks, *Gibraltar row halts OECD tax purge*, ACCOUNTANCY AGE, available at <http://www.accountancyage.com/aa/news/1753426/gibraltar-row-halts-oecd-tax-purge> (last accessed Oct. 7, 2011.)

<sup>270</sup> Interview 5.

<sup>271</sup> An indication of this was that the usually influential American delegation, present at the January 2001 meeting, did not speak out much. Interview 5.

<sup>272</sup> Paul O'Neill, *Confronting OECD's 'Harmful' Tax Approach*, Commentary in THE WASHINGTON TIMES Edition 2, May 11, A17 (2001).

now that the tax competition efforts were established within the OECD than it would have had before 1998.<sup>273</sup> Rather than abandoning the effort, the OECD tax group shifted its focus to promoting information exchange and bank transparency, a topic on which O'Neill had signaled a willingness to move ahead, noting that while the U.S. would “guard against overbroad information exchanges in which foreign governments seek information for improper purposes or without proper safeguards. We cannot tolerate those who cheat on their U.S. taxes by hiding behind a cloak of secrecy.”<sup>274</sup> The terrorist attacks on the United States on September 11, 2001 changed the political dynamic once again. After 9/11, the United States increased its focus on terrorism finance, which yielded increased backing for efforts to increase financial transparency.<sup>275</sup>

Although the OECD's tax competition initiative had slowed after O'Neill's speech, after 9/11 the pace of work again increased and the delayed 2001 Progress Report could be released in November 2001.<sup>276</sup> This time, tax rates took a back seat to transparency and reporting issues. In particular, the OECD softened several important components of the original proposals, agreeing that defensive measures would not apply to the listed non-cooperative tax havens before OECD member states had themselves complied with the requirements they sought to impose on others. Furthermore, as the commitments that they were now seeking from tax havens concerned transparency and exchange of information rather than tax rates, issues such as ring-fencing and “no substantial practices” were removed from the analysis and the OECD changed the expressions “harmful tax competition” and “unfair tax competition” to “harmful tax practices.”<sup>277</sup> Many offshore jurisdictions were more ready to comply with demands for transparency than with ones that they adopt higher tax rates. Especially under the condition that Switzerland and Luxemburg would first need to agree to information exchange, the promise of future openness in the seemingly unlikely case that those two did became less of a commitment.<sup>278</sup> As a result, the OECD reported in 2004 “an overwhelming majority of countries and jurisdictions identified in 2000 have agreed to work toward transparency and effective exchange of information.”<sup>279</sup>

The loss of U.S. support weakened the anti-tax competition efforts. This weakness can be seen in the OECD's abandonment of its aggressive efforts to coerce the OFCs to conform to its substantive tax standards through the blacklist.<sup>280</sup> Negotiations between the OECD and OFCs began to be held on a multilateral basis and to be described as “a co-operative process”<sup>281</sup> rather than in the context of the

<sup>273</sup> CTPA Senior Advisor Hugh Ault has argued that the O'Neill announcement did not have the much impact on the project. The “no substantial activities” criteria had been of little significance, and the promise to deal with member countries first did no harm, as they had already announced to make the required changes. *See* Ault *supra* note 87, at 770. Others point out that the OECD had already seen a victory with so many regimes conceding to concessions, that concentrating on transparency was in any case the next natural step. Interviews 3, 4.

<sup>274</sup> O'Neill, *supra* note 272.

<sup>275</sup> Interview 5.

<sup>276</sup> OECD, *The OECD'S Projection on Harmful Tax Practices: The 2001 Progress Report* (2001), available at <http://www.oecd.org/dataoecd/60/28/2664438.pdf> (last accessed Oct. 8, 2011); Interview 5.

<sup>277</sup> *See generally* OECD *supra* note 276.

<sup>278</sup> Sharman *supra* note 198, at 153, OECD, *supra* note 276, at 10. Only seven jurisdictions (Andorra, Liberia, Liechtenstein, the Marshall Islands, Monaco, the Republic of Nauru, and Vanuatu) remained on the blacklist in its updated version in April 2002. *See* OECD *List of Uncooperative Tax Havens*, CTPA homepage at [http://www.oecd.org/document/57/0,3746,en\\_2649\\_33745\\_30578809\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/57/0,3746,en_2649_33745_30578809_1_1_1_1,00.html) (last accessed Oct. 12, 2011). The last two were removed by the OECD in 2003. OECD, *The OECD'S Projection on Harmful Tax Practices: The 2004 Progress Report*, 11 (2004), available at <http://www.oecd.org/dataoecd/60/33/30901115.pdf> (last accessed Oct. 8, 2011). The 2004 Progress Report announced that 22 offshore jurisdictions had complied with the OECD transparency standards and exchange of information since 2001. OECD, *Id.* at 11.

<sup>279</sup> OECD, *Towards a Playing Field*, Paris: OECD 4 (2006) available at [http://www.oecd.org/document/60/0,3746,en\\_2649\\_33745\\_36791868\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,3746,en_2649_33745_36791868_1_1_1_1,00.html) (last accessed Oct. 25, 2011).

<sup>280</sup> *See* Boise *supra* note 183, at 68.

<sup>281</sup> OECD, *The OECD'S Projection on Harmful Tax Practices: The 2001 Progress Report* (2001), *supra* note 276, at 9.

OFCs individually attempting to clear their blacklisting. To prevent sanctions breaching the level-playing-field objective, the OECD agreed that no non-member would be targeted with “co-ordinated defensive measures” until OECD members themselves were in compliance with the standards.<sup>282</sup> Since this never happened, the commitments made after these adjustments cannot be interpreted as the same kind of surrender that the Cayman Islands engaged in after the release of *Harmful Tax Competition* in 1998.<sup>283</sup> The application of slightly softer approach seems mainly to have come as a response to overwhelming criticism by OFCs and their backers of *Harmful Tax Competition* and the published blacklist in 2000. The OECD was accused of double standard, when Switzerland and Lichtenstein as two of its members could abstain from the recommendations about transparency and non-“harmful” tax practices, while non-members were being targeted.<sup>284</sup> This was indeed in contradiction to the organization’s claim to be promoting a “level playing-field.”<sup>285</sup> The targeted jurisdictions themselves expressed discontent with the report and the business community at large was critical. For example, the Prime Minister of St. Vincent and the Grenadines that “[t]he international financial community urges competition and open markets but when we succeed they declare it unfair.”<sup>286</sup> The OECD’s own Business Industry Advisory Committee (BIAC) was launched harsh criticism in 1999 to the OECD project as a whole.<sup>287</sup> Among many critical voices, Miami based international relations expert Anthony Bryan, commented that, “Caribbean countries with offshore jurisdictions fear that, as earnings from traditional industries such as banana and sugar exports fall, the crackdown on tax havens will hinder their efforts to develop new businesses.”<sup>288</sup> In particular, part of the failure of *Harmful Tax Competition* stemmed from the OFCs’ effort to push back on the intellectual front through the 2006 report *Towards a Level Playing Field*,<sup>289</sup> issued with the support of the Commonwealth Secretariat.<sup>290</sup> Much as Owens had used the G7 when his initial push at the OECD had failed, the OFCs successfully brought the Commonwealth into the debate on their side, using a forum in which a number of small OFCs were members and in which Britain would find it harder to obstruct their efforts since it would not have its European allies to support it. The report poked significant holes in the OECD’s arguments on substantive tax issues and undercut the effort to build an international consensus around the OECD’s proposed standards.

At a meeting in 2004, the Global Forum decided to conduct a review of over 80 countries to survey them on whether they lived up to the OECD standards of transparency and information exchange.<sup>291</sup> Meanwhile, bilateral efforts were undermining the multilateral project, as the United States

<sup>282</sup> OECD, *The OECD’S Projection on Harmful Tax Practices: The 2001 Progress Report (2001)*, *supra* note 276, at 10. In light of this, the deadline for commitments of July 2001 was postponed until February 2002. *Id.*

<sup>283</sup> See Sharman, *supra* note 198, at 153.

<sup>284</sup> See Sharman, *supra* note 198, at 90.

<sup>285</sup> See Sharman, *supra* note 198, at 90.

<sup>286</sup> See Sharman, *supra* note 198, at 88.

<sup>287</sup> See Sharman, *supra* note 198, at 72.

<sup>288</sup> Wesley Gibbings, *Economy-Caribbean: Region Unites Behind Offshore Banks*, *Economy-Caribbean*, June 9, 2000, available at <http://ipsnews.net/news.asp?idnews=84548> (last accessed Oct. 25, 2011).

<sup>289</sup> See generally OECD *Tax Co-operation: Towards a Level Playing Field* (2006) Assessment by the Global Forum on Taxation. For a description of the standards, available at <http://www.oecd.org/dataoecd/25/28/44430286.pdf> .

<sup>290</sup> The Commonwealth consists of 54 member countries, and has currently as its main pillars to work peace, democracy, pro-poor growth and sustainable development. They are financed by separate budget funds of government contributions, but for one area that the Commonwealth works on, they inform that the largest shares came from member-countries Australia, Botswana, Brunei Darussalam, Canada, India, New Zealand, Nigeria and the UK. See The Commonwealth homepage at [http://www.thecommonwealth.org/Internal/190957/what\\_we\\_do/](http://www.thecommonwealth.org/Internal/190957/what_we_do/) ; <http://www.thecommonwealth.org/Internal/190945/34492/funding/> (last accessed Oct. 25, 2011).

<sup>291</sup> See OECD, *supra* note 289, at 14, for a description of the standards, available at <http://www.oecd.org/dataoecd/25/28/44430286.pdf> (last accessed Oct. 25, 2011) The standards of transparency and information exchange are summed up thus:

“ Summary of Part II: Key Principles of Transparency and Information Exchange for Tax Purposes:

and EU signed individual accords with other nations.<sup>292</sup> By 2005, the project against “harmful tax competition” was barely alive.<sup>293</sup> The OECD even stopped referring to jurisdictions as tax havens, instead terming them “participating partners.”<sup>294</sup> Whereas previous meetings have been described as somewhat “chaotic,”<sup>295</sup> a meeting in 2005 has been described as “polite” and “calm.”<sup>296</sup> The outcome of the review project was published in the report *Tax Cooperation: Towards a Level Playing Field*<sup>297</sup> in 2006, and would be updated on a yearly basis in reports with the same name. The reports do not list countries as black or grey, but instead describe thorough examinations of the countries, concerning a variety of issues of transparency and financial services.<sup>298</sup> The black and grey lists of 2000 are mentioned in the reports only in a way that diminishes their importance: the “2000 OECD list should be seen in its historical context [...] More than five years have passed since the publication of the OECD list and positive changes have occurred in individual countries’ transparency and exchange of information laws and practices since that time.”<sup>299</sup> Moreover, the OFCs successfully made the case that they were a well-regulated set of jurisdictions, undercutting the OECD’s arguments.<sup>300</sup>

Outside events once again changed the debate, however. The tax competition efforts revived after the global financial crisis – which some attempted to blame on OFCs<sup>301</sup> – and the 2008 election of Barack Obama. Although the financial crisis had no connection to either OFCs or tax rates, political leaders were quick to use it to assert a need for restrictions on financial competition.<sup>302</sup> Obama was an

Existence of mechanisms for exchange of information upon request.

Exchange of information for purposes of domestic tax law in both criminal and civil matters.

No restrictions of information exchange caused by application of dual criminality principle or domestic tax interest requirement.

Respect for safeguards and limitations.

Strict confidentiality rules for information exchanged.

Availability of reliable information (in particular bank, ownership, identity and accounting information) and powers to obtain and provide such information in response to a specific request.”

Id.

<sup>292</sup> Interview 5, and Sharman, *supra* note 198, at 74. The deal-makers with the US were: the Bahamas, the Netherlands Antilles, the Cayman Islands and Panama. Their agreement on tax information exchange included a clause that information would not be passed further, in effect shielding them from the OECD project. Id. Also in 2005, the EU allowed for Austria, Luxembourg and Belgium to be exempted from the requirement that all member countries exchange information with other, relevant, national authorities. . See Palan, Murphy and Chavagneux *supra* note 173, at 223.

<sup>293</sup> Interview 5.

<sup>294</sup> Sharman, *supra* note 198, at 151.

<sup>295</sup> Interview 5.

<sup>296</sup> See Sharman, *supra* note 198, at 149. No deadline was however set this time, but “all countries are strongly encouraged to take the necessary steps towards a level playing field.” See OECD, *supra* note 291, at 49.

<sup>297</sup> See generally OECD, *supra* note 289.

<sup>298</sup> See generally OECD, *supra* note 289.

<sup>299</sup> See OECD, *supra* note 289, at 53.

<sup>300</sup> See Andrew P. Morriss & Clifford C. Henson, *Regulatory Intensity & Offshore Financial Centers*, Working Paper (November 2011).

<sup>301</sup> Jean Eaglesham and Alex Barker, “UK Premier Calls for Crackdown on Tax Havens,” *Financial Times*, February 19, 2009; Alex Barker, “Brown Warns Tax Havens to Comply,” *Financial Times*, April 10, 2009; Robert M. Morgenthau, “Too Much Money Is Beyond Legal Reach,” *Wall Street Journal*, September 30, 2008; Grant McCool, “More Offshore Tax Probes in the Works: NY’s Morgenthau,” Reuters, April 24, 2009.

<sup>302</sup> See e.g. Robert M. Morgenthau, *Too Much Money is Beyond Legal Reach*, W.S.J. (Sept. 30, 2008) available at <http://online.wsj.com/article/SB122273062657688131.html>. The New York City District Attorney lamented that “vast sums of money ... lie outside the jurisdiction of U.S. regulators and other supervisory authorities.”; Nigel Morris, *Brown leads global drive to close down tax havens*, THE SUNDAY INDEPENDENT (February 19, 2009) available at <http://www.independent.co.uk/news/uk/politics/brown-leads-global-drive-to-close-down-tax-havens-1625959.html>, quoting the British Prime Minister Gordon Brown as calling on “the whole of the world to take action. That will mean action against regulatory and tax havens in parts of the world which have escaped the regulatory attention they need.”; Tax Justice Network, *Sarkozy on Tax Havens, and more*, (August 28, 2008) available at <http://taxjustice.blogspot.com/2008/08/sarkozy-on-tax-havens.html>, original speech, XVIeme Conference Des Ambassadeurs Discours Du President De La Republique, M.

ally of Sen. Carl Levin (D. Mich.), the main force behind the proposed Stop Tax Haven Abuse Act (a version of which Obama co-sponsored while he was in the Senate.)<sup>303</sup> In addition, Obama's ambitious agenda needed revenue, and cracking down on OFCs promised revenue (or, at least, promised the promise of revenue that could be spent if projected under U.S. budget rules even if it was never collected.)<sup>304</sup> Further bolstering the attractiveness of attacks on OFCs, aggressive tax planning efforts by Liechtenstein and Swiss banks came to light, with the Swiss bank UBS revealed as having violated U.S. law<sup>305</sup> and several EU governments purchasing stolen account data from a rogue Lichtenstein banker that revealed widespread tax evasion by their citizens.<sup>306</sup> With €4 billion allegedly channeled through Lichtenstein by hundreds of German business people to evade (rather than avoid) taxes,<sup>307</sup> onshore government interest in limiting access to such opportunities increased and made the arguments in favor of controls more compelling.<sup>308</sup> Domestic politics in several EU nations also increased interest in demonstrating that governments were "tough" on tax evasion.<sup>309</sup> For example, France's newly elected president Nicholas Sarkozy had campaigned as an unusually free-market (for France) politician.<sup>310</sup> After his proposed reforms of the French university and health systems were met with widespread protests,<sup>311</sup> the campaign against tax havens may have served as a counterweight, to

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Nicolas Sarkozy available at <http://www.ambafrance-uk.org/XVIeme-conference-des-Ambassadeurs.html>, quoting the French President denouncing "the excesses of financial capitalism which has experienced serious abuses: concealment of risks, uncontrolled sophistication of financial instruments, gaps in regulation and persistence of tax havens capturing a part of global savings that would be more justly employed financing investment and growth.": Lucia Kubosova, *EU states crack down on tax evasion*, EU OBSERVER, October 22, 2008 (2008), available at: <http://euobserver.com/9/26976> (last accessed Oct. 8, 2011). In an meeting in Paris in October 2008, calls were made on the OECD to curb European tax havens. The article point out the increased urgency of European capitals to clamp down on tax havens globally, in light of the recent financial crisis.

<sup>303</sup> Gordon, *The International Monetary Fund*, *supra* note 10, at 99.

<sup>304</sup> See Center on Budget and Policy Priorities, *Policy Basics: Congress's 'Pay-As-You-Go' Budget Rule*, available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=2704> (last visited October 25, 2011).

<sup>305</sup> See United States Department of Justice, *United States Asks Court to Enforce Summons for UBS Swiss Bank Account Records*, available at <http://www.justice.gov/tax/txdv09139.htm> (last accessed Oct. 22, 2011) (describing the lawsuit).

<sup>306</sup> *The Liechtenstein Connection*, Feb. 16, 2008, Spiegel Online International (available at <http://www.spiegel.de/international/business/0,1518,535768,00.html>), last visited October 25, 2011.

<sup>307</sup> Economist, *Not so fine in Liechtenstein*, Feb. 22, 2008, available at: [http://www.economist.com/node/10750259?story\\_id=10750259](http://www.economist.com/node/10750259?story_id=10750259) (last accessed 2011-10-03).

<sup>308</sup> The G7 expanded to the G20 in 2007, and at their April 2009 summit, tax havens were high on the agenda. See Dries Lesage, *The G20 and Tax Havens: Maintaining the Momentum?*, Prepared for the conference "Governing the Global Economy: The Role of the G20" University of Toronto – Munk School of Global Affairs, June 18, 2010, 3 (2010). A press-conference in connection to the meeting focused much concern on regulations to prevent a future financial crisis. See e.g. Ben Hall, *Stage set for tax havens battle*, The Financial Times, (Apr. 1, 2009), available at <http://www.ft.com/cms/s/0/8439875c-1f00-11de-a748-00144feabdc0.html#axzz1aCeScy4D> (last accessed Oct. 8, 2011). France and Germany were actively pushing for a tougher stance on the issue. Lichtenstein, Andorra, Switzerland, Austria and Luxembourg all announced that they would relax their bank secrecy laws. See Andrew Willis, *Switzerland, Austria and Luxembourg relax Banking Secrecy*, EU OBSERVER, [www.euobserver.com](http://www.euobserver.com), Mar. 13, 2009; available at: <http://euobserver.com/?aid=27775>. (last accessed: Oct. 10, 2011).

<sup>309</sup> See Kubosova, *supra* note 302. In the October meeting, convened by France and Germany, the delegates lamented the slowly pace of the OECD's efforts, and called for a new list from the organization, which they claimed that Switzerland should be included in. The OECD promised to deliver one by mid-2009.

<sup>310</sup> See e.g. Anna Willard, *France's Sarkozy turns to forming govt, next polls*, REUTERS, May 7, 2007, available at [http://www.reuters.com/article/2007/05/07/us-france-election-idUSL0663346820070507?src=050707\\_0810\\_TOPSTORY\\_sarkozy\\_plans\\_reform&pageNumber=1](http://www.reuters.com/article/2007/05/07/us-france-election-idUSL0663346820070507?src=050707_0810_TOPSTORY_sarkozy_plans_reform&pageNumber=1) (last accessed Oct 8, 2011).

<sup>311</sup> See e.g. James Joyner, *Sarkozy Delays University Reforms, Feared Greek-Style Riots December, Atlanticist Policy and Analysis Blog*, Oct. 16, 2008, available at [http://www.acus.org/new\\_atlanticist/sarkozy-delays-university-reforms-feared-greek-style-riots](http://www.acus.org/new_atlanticist/sarkozy-delays-university-reforms-feared-greek-style-riots) (last accessed Oct 8, 2011). Anna Willard, *French workers strike against Sarkozy's reforms*, REUTERS, Nov. 14, 2007, available at <http://uk.reuters.com/article/2007/11/14/uk-france-strike-idUKL126064620071114> (last accessed Oct 8, 2011).

demonstrate firmness against the wealthy.<sup>312</sup> In Britain, Gordon Brown needed to mobilize the left in preparation for an upcoming difficult election campaign.<sup>313</sup>

There was one important development that slowed the anti-OFC campaign's progress. The G7's expansion to the G20 meant China now had an important voice there.<sup>314</sup> Its relatively strong economy also made China an important player in world financial affairs and its need for both vehicles for inward and outward investment gave it an interest in OFCs.<sup>315</sup> The OECD had previously threatened to place the Chinese Special Administrative Regions of Hong Kong and Macau on the blacklist.<sup>316</sup> Not being an OECD-member, China did not want discussions conducted in a forum where it had no influence and sought to ensure that any multilateral transparency deal be pursued at the United Nations, where it would be able to influence the process. A compromise was reached that eased China's fears: Hong Kong and Macao would not be black-listed, a new Global Forum on Transparency and Exchange of Information for Tax Purposes would not be within the OECD structure, would be funded independently of the OECD, and would allow membership by non-OECD-countries.<sup>317</sup> This left the Chinese with influence over the work both by means of its presence and its budget contributions.<sup>318</sup> It also seems to have relieved the burden from the G20 of the political implications of confronting China when endorsing continued efforts for transparency and sanctions on tax havens.<sup>319</sup>

The Global Forum set to work on new "transparency standards" for participating states, prohibiting secrecy and demanding information exchange "where it is 'foreseeably relevant' to the administration of domestic laws" of the treaty partner, with the level of exchange described by the OECD as "full exchange of information on request in all tax matters without regard to a domestic tax interest requirement or bank secrecy for tax purposes."<sup>320</sup> The group published a new list of non-cooperative jurisdictions in 2009. While only Costa Rica, Malaysia, the Philippines, and Uruguay were listed as not having made any commitments, 38 other jurisdictions which had committed to fulfilling the standard, but had not yet fully implemented it were listed in an intermediate "gray list."<sup>321</sup> By the third meeting of the Global Forum in June 2011, the organization could announce a membership of

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<sup>312</sup> Interview 5.

<sup>313</sup> See e.g. The Guardian Editorial, *Gordon Brown: Labour's dilemma*, THE GUARDIAN Jun. 2, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/jun/02/editorial-gordon-brown-labour> (last accessed Oct 8, 2011).

<sup>314</sup> John Kirton, *From G7 to G20: Capacity, Leadership and Normative Diffusion in Global Financial Governance* ( Paper prepared for a panel on "Expanding Capacity and Leadership in Global Financial Governance: From G7 to G20," University of Toronto (2005); Geoffrey Garrett, *G2 in G20: China, the United States and the World after the Global Financial Crisis, 1 Global Policy (2010)* (discussing China's entrance in the G20 and its place among world leaders.)

<sup>315</sup> Richard Woodward, *From Boom to Doom to Boom. Offshore Financial Centres and Development in Small States*, July 5, 2011, 23-24, available at SSRN: <http://ssrn.com/abstract=1879298> (last accessed Oct. 8. 2011).

<sup>316</sup> Interview 5.

<sup>317</sup> The OECD claims that Hong Kong and Macau do not meet the definitions of a tax haven. OECD, *Countering Offshore Tax Evasion: Some Questions and Answers on the Project*, 12 (2009), available at: <http://www.oecd.org/dataoecd/23/13/42469606.pdf> (last accessed Oct. 3, 2011).

<sup>318</sup> Interview 5.

<sup>319</sup> The G20 officially declared from the 2009 summit: "We stand ready to take agreed action against those jurisdictions which do not meet international standards in relation to tax transparency." In its communiqué from the meeting, "The Global Plan for Recovery and Reform" on 2 April 2009, they announced "we agree...to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over." Their full support and readiness to take measures against tax havens have been echoed in later meetings since. OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes, Information Brief*, July, 6, 2011, Paris: OECD, 9-10(2010).

<sup>320</sup> OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes, Information Brief*, July, 29, 2011, Paris: OECD.

<sup>321</sup> See OECD, *A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard, Progress Made as at 2<sup>nd</sup> April 2009*, available at <http://www.oecd.org/dataoecd/38/14/42497950.pdf> (last accessed Oct. 30, 2011).

over 100 jurisdictions.<sup>322</sup> Even Switzerland had declared in February 2011 that it would comply with all the Global Forum's standards on full exchange of information.<sup>323</sup> Non-members are also to be reviewed, a process that began in June 2011 with an assessment of Botswana and Trinidad and Tobago.<sup>324</sup> By the G20 summit in November 2011, almost 60 peer-review reports on the transparency of different jurisdictions were to be published.<sup>325</sup> In addition, the 1988 OECD Convention on Mutual Administrative Assistance in Tax Matters, was amended with a new protocol in May 2010<sup>326</sup> to control the use of tax information exchange agreements, with 21 countries signing on to it thus far.<sup>327</sup> Under the 2009 criteria of the Global Forum, a jurisdiction had to have signed 12 bilateral agreements on information exchange ("Tax Information Exchange Agreements", or TIEAs) to be white listed,<sup>328</sup> a somewhat meaningless numerical quota that encouraged agreements between some odd couple jurisdictions.<sup>329</sup>

Although the OECD counted over 600 such agreements signed since 2009,<sup>330</sup> the new Convention provided a new framework that goes further than simply encouraging TIEAs. Because it is multilateral, jurisdictions do not negotiate over adapting the provisions to the particulars of their circumstances but can only make reservations, which can be withdrawn later.<sup>331</sup> Moreover, as a country enters the convention, it enters an agreement with all prior signatories.<sup>332</sup> The question that the economists of the League of Nations struggled with in the 1920s may be approaching an answer: Can a multilateral agreement on taxation be created? As we have previously discussed, differences in tax codes make it inherently difficult to impose general rules for many countries that would serve as a tax treaty for all countries. The updated Convention may be limited to issues of disclosure and transparency, but it is a large step to reaching the goal of a tax agreement including all countries of the

<sup>322</sup> See OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, *supra* note 320, at 2.

<sup>323</sup> See OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, *supra* note 320, at 3.

<sup>324</sup> See OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, *supra* note 320, at 15.

<sup>325</sup> See OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, *supra* note 319, at 16.

In these, jurisdictions are assessed in two phases: "Phase 1 reviews will include a determination of whether each element is "in place", "in place, but certain aspects of the legal implementation of the element need improvement", or "not in place". Phase 2 and combined reviews will include a rating as to whether the jurisdiction is "compliant", "largely compliant", "partially compliant", or "not compliant" with each of these elements in practice." (OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, *supra* note 319, at 14.)

<sup>326</sup> See OECD and Council of Europe, Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, provisional edition available at <http://www.oecd.org/dataoecd/48/11/45037332.pdf> (last accessed Oct. 8, 2011).

<sup>327</sup> OECD, *TAX: Updated multilateral tax convention now open to all countries*, OECD NEWSROOM, available at: [http://www.oecd.org/document/19/0,3746,en\\_21571361\\_44315115\\_48093843\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48093843_1_1_1_1,00.html) (Last accessed Oct. 3, 2011). "The Convention was amended to open it to all countries, at the request of the G20, which is now encouraging jurisdictions to join," said Jeffrey Owens, director of the OECD Centre for Tax Policy and Administration. "We look forward to wide-ranging accession to the Convention, which will turn it into a truly global instrument for international co-operation in tax matters", (OECD Newsroom: *Tax: Ireland signs Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, available at: [http://www.oecd.org/document/30/0,3746,en\\_21571361\\_44315115\\_48317022\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,3746,en_21571361_44315115_48317022_1_1_1_1,00.html) (last accessed Oct. 3, 2011)).

<sup>328</sup> See OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, *supra* note 320, at 25-26, 31.

<sup>329</sup> The Cayman Islands' agreement with the Faroe Islands seems an unlikely policy goal for enhancing international tax cooperation. See Cayman Islands Financial Services, *Cayman Continues to Demonstrate Transparency*, March 25, 2010, available at [http://www.caymanfinance.gov.ky/portal/page?\\_pageid=1902,4851553&\\_dad=portal&\\_schema=PORTAL](http://www.caymanfinance.gov.ky/portal/page?_pageid=1902,4851553&_dad=portal&_schema=PORTAL) (last visited Oct. 25, 2011).

<sup>330</sup> See OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, *supra* note 320, at 3.

<sup>331</sup> See OECD, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters 3* (May 27-28, 2010) available at : [http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters\\_9789264115606-en](http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en) (last accessed Oct. 8, 2011).

<sup>332</sup> See generally OECD, *The Convention on Mutual Administrative Assistance in Tax Matters, A Brief Overview*, Last updated on 12 September 2011, available at <http://www.oecd.org/dataoecd/58/51/47690147.pdf> (last accessed Oct. 8, 2011).

world.

Five things stand out in this account. First, the OECD's (and Jeffrey Owens') entrepreneurial behavior in creating a role for the organization in a new area is an impressive example of how institutions can develop a life of their own. Second, for the interests within the industrialized nations threatened by the increased competition for economic activity brought on by globalization, *Harmful Tax Competition* offered both a mechanism through which to enforce their preferences on jurisdictions unable to participate directly in the policymaking. This is a problematic development. Third, ideas do matter. *Harmful Tax Competition's* naked assertions of self-interest, as revealed by its clever definition of "harmful tax competition" to exclude the behavior of OECD members, were revealed as just that by the OFC's successful invocation of more coherent ideas in *Towards a Level Playing Field*. Fourth, the forum matters. Just as Owens was able to use the G7 to outmaneuver opponents within the OECD, the OFCs were able to use the Commonwealth Secretariat and G20 to fight back. Finally, China's role is critical, in ways that might surprise those accustomed to think China only in the context of international debates over human rights.

### III. Cartelization and Competition

In this section we offer three alternative explanations for the OECD's shift in its tax policy activities. We explore the history of this shift in the OECD's role and sketch the institutional setting between the OECD and governments as well as within the OECD itself, to compare the alternative explanations. We call these (1) the public interest explanation; (2) the cartel explanation; and (3) the bureaucratic incentive explanation.

**The public interest explanation:** The OECD can be seen as a benevolent organization dedicated to improving the world, staffed by publicly-spirited individuals without personal stakes in the outcomes of its efforts, and funded and organized by governments that desire nothing more than to promote global economic cooperation and development. The shift of the OECD from promoting competition in the international economy to helping large economies limit competition in finance from smaller jurisdictions is simply an expression of its effort to develop "rules of the game" that ensure that financial competition promotes overall economic welfare.

This is in line with the classical public finance models reviewed briefly in Part I. The OECD solves a prisoner's dilemma between states by allowing them to sign a contract not to poach on each other's mobile tax bases by lowering tax rates of favoring foreign businesses. Without the OECD, all countries know that global welfare would be higher if only tax rates would be set at the optimal level, which would maximize the welfare of all people on earth. However, since every country will gain much for its own sake by lowering tax rates, a race to the bottom is inevitable without an international auditor, judge, and policy maker. Governments know that they should not cheat on the others by lowering taxes. Realizing that cooperation through the OECD creates more welfare for all, they are therefore happy to be "tied to the mast" and restrict competition. To some extent this is exactly the role the OECD played with respect to economic policies, using its country reports to hold member governments to their commitments to economic liberalization.

**The cartel explanation:** The people in the governments that act on behalf of the OECD have their own incentives, and are at times well placed to pursue them. The OECD provides a forum in which member governments can help establish "best practices", which in many cases are a means to win political battles at home and influence domestic policies. The OECD becomes a new arena for the political process and the struggle to win votes by gaining support for policies interests favor. Aware of the organization's importance in this respect, interest groups do their best to influence politicians to act on the OECD arena and may also seek allies for international cooperation through the OECD.

Increasing tax competition poses many threats. Tax bases are eroded, depriving domestic

interests of the opportunities that large state coffers provide, while their status may be tarnished if they are forced to adjust domestic policies to the actions of small jurisdictions that should be their inferiors. Politicians that fear losing control of their own tax base are faced with a choice. The new competition can be met by policies designed to meet the competition, offering a more welcoming environment for businesses and foreign investments and promoting the economic strength of their countries, whether it be a secure and stable environment or good legal institutions. Alternatively, they can seek to limit the competition. The former is not only hard work but may expose a politician both as a weak global actor and as inconsistent ideologically. If the opportunity is provided, it may be better from a politician's point of view to form a cartel on taxation as a protection. With a cartel, there are fewer constraints on domestic policy, improving the politicians' welfare by increasing the degrees of freedom available to satisfy domestic constituents and win re-election.

**The bureaucratic explanation:** Focusing on the inner workings of organizations allows us to consider incentives of the staff to expand their mission.<sup>333</sup> This may be an expansion of the magnitude of the organization's responsibilities in their area of expertise as well as the range of areas over which it has jurisdiction, and the size of the bureaucracy in general.<sup>334</sup> The incentive for the staff of such an organization is to explore opportunities to further broaden their roles by expanding the scope and scale of their unit, while maximizing the opportunities for their future careers. Entrepreneurial minds within the staff will be active in this pursuit. They have the wits and opportunities to expand the resources at their disposal in search of prestige, power, and compensation.

It may be hard for a bureaucracy itself to push for new policies to expand their mission. The best strategy is to offer policy makers their services when it is most likely that their suggestions may gain hearing. The bureaucrats of the OECD would therefore not be immune from changes in the global economy and opinion climate towards tax harmonization. The bureaucratic explanation does thus not imply that the OECD bureaucrats are particularly vocal proponents of global strategies. With few exceptions, like Jeffrey Owens as the Director of the OECD tax unit, bureaucrats are not in a position to personally engage in the debate. Rather, they will address policy makers when they see signs that their interests align, thus capturing the opportunities when they present themselves. However, OECD postings are excellent jobs, with tax free salaries (except for Americans) and substantial benefits plus a head quarters in Paris.

How well does each of these models fit the OECD's behavior? Any account of an organization's actions that does not include the interests of the governments that fund the organization or the people who on a daily basis act within the organization would not be credible. We are therefore skeptical of the public interest explanation as a stand alone explanation. However, there is one key element from this model that is important to acknowledge. The OECD as an organization has, over time, promoted economic liberalization. In their Economic Surveys, the organization provides policy recommendation to countries, which traditionally have focused on increasing competition, work incentives and fiscal discipline. Other recommendations include monetary reforms and promoting labor market flexibility.<sup>335</sup> As the organization has generally been supportive of the opening of markets and the expansion of

<sup>333</sup> See William A. Niskanen, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (his models show how a bureaucracy can expand its services thanks to its special place in the economy.) See also Gordon Tullock, *THE POLITICS OF BUREAUCRACY* (1965) (analyzing the incentive structures within a bureaucracy and the managerial dilemmas of a politician).

<sup>334</sup> See e.g. Gordon Tullock, *supra* note 333, at 134 (1965) (explaining the desire of a politician to have as many subordinates as possible).

<sup>335</sup> See Andreas Bergh and Margareta Dackehag, *OECD recommends: A consensus for or against welfare states? Evidence from a new database*, Ratio Working Papers, No. 159, 4 (2010).

competition as a means for economic development, the OECD might be seen as a “tie me to the mast” effort by member states to assist them in resisting domestic political pressures to restrict the growth of markets. The tax harmonization efforts appear on the surface to be similar – as with competition-expanding measures, there is an element of “tie me to the mast” restrictions being used to prevent defections. The similarity is only on the surface, however, as the tax harmonization efforts are primarily aimed at non-members – thus rather than “tie me to the mast” they appear to be more “tie you to the mast”.

The OECD developed from its founding as an arena for international agreements on taxation and the prominent body of experts on tax treaties. It gained prominence as its Model Tax Convention came to serve as a blueprint for bilateral tax treaties, as countries tried their best to avoid double taxation between countries in order not to lose out on business and economic growth. The project that the organization launched as part of their work on taxation and against “harmful tax competition” in the 1990 broke with tradition of enhancing the global business climate to influence the national tax policies of non-compliant countries. Those describing the OECD project against “harmful tax competition” with sympathy for their view on the issue hold that the OECD consist of self sacrificing souls pursuing the global good. Tax avoiders and tax planner are sinister misers draining the common resources by enjoying public goods while not contributing to them. Critics to the OECD project may describe governments as evil socialists trying to quash small island jurisdiction, remorselessly draining them of their own income and forming the international tax cartel that they need to tax their own citizens as much as possible. We take the view that bureaucrats and politicians are not more or less sinister than anyone else, a view that allows us to analyze the incentives of the actors as being quite rational.

How did this mission creep come about? Considering the bureaucratic and cartel explanations help us understand the development of the OECD’s tax efforts. Given the organization’s focus, the original mandate was to coordinate the North American funding of efforts to rebuild Europe’s economies after the devastation of World War II. As that goal was accomplished, the organization turned to expanding markets and reducing the transactions costs of doing business across members’ borders. This served as a winning strategy in national politics, while benefitting growth in a world that was becoming increasingly tied together. Politicians could show that they were promoting trade and therefore prosperity by unilateral or bilateral commitments and treaties. Others could use the OECD to make shared commitments. Since the interest in reaping the benefits from global integration and trade was shared among most countries, interests groups seeking to further economic liberalization were able to coordinate with similar interests elsewhere.

As people within leading European governments grew worried about the impact of unbridled “Anglo-Saxon capitalism” on their social systems,<sup>336</sup> they became more interested in seeking cooperation on issues like taxation and financial regulation. As international financial competition grew, these interests sought to use the existing structure that the OECD provided to coordinate measures to advance their agendas. The politically costlier and less attractive option, to alter domestic policies and institutions, were set aside in favor of inducing others to change by invoking international agreements and standards to restrain competition.

National government delegates to the CFA are expected to pursue the line of their nation’s or group’s interests. On the other hand, they are also driven by the incentives of prestige, salary and a relatively conflict-free life.<sup>337</sup> They are most likely to sympathize with the aim of limiting tax competition, as it disrupts existing arrangements.<sup>338</sup> Further, for many delegates, the OECD is a possible

<sup>336</sup> See John Thornhill, *France Reforms its Anglo-Saxon Attitudes*, Financial Times (Sept. 22, 2008) (“For many years French politicians poured scorn on “Anglo-Saxon” capitalism.”).

<sup>337</sup> Even those delegate who are initially skeptical may find the work most rewarding and in line with their governments interest if they can justify the project to themselves.

<sup>338</sup> See J.R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 *ECONOMETRICA* 1, 8 (1935) (“the best of all monopoly profits is a quiet life.”).

future employer, offering rewarding and stimulating jobs in the secretariat for people who have proved to be competent, in line with the project and who are familiar with the organization. These bodies may therefore be a channel for governments in which to pursue policies, but only if those policies are not too strongly in contradiction to the organization's agenda over all, as their delegates will likely be reluctant to confront the general agenda too sharply.<sup>339</sup>

Politics play into the workings of the OECD in many ways, and it is hard to evaluate the importance of the CFA. If politicians were unable to affect the OECD agenda and its actions based solely on analyses by impartial experts, it is unlikely that politicians would agree on contributing significant tax money to its budget. The OECD would in such case truly be a "public good," that would benefit everyone while not be of use to any individual government in pursuit of its interests. The OECD, rather than being an isolated body with a phone line to various governments, is a network with tight connections to national and global political conflicts and cooperative efforts. People in governments enter the OECD, and people from the OECD enter into politics and bureaucracies at home, in other countries and international organizations. The OECD civil servants have an average seniority of only four years,<sup>340</sup> so experts rarely stay at the OECD for long. It seems fair to say therefore, that the report *Harmful Tax Competition* was a political product much more than it was a technical or politically neutral one. The conundrum enters when we ask how exactly politics in fact do play into the work leading up to it. The CTPA staff participates in conferences and meetings, and meets with other professionals from governmental and other organizations, as well as individual country representatives.<sup>341</sup> The CFA includes representatives from organizations not tied to any national government as well and is thus influenced by more than just the political agendas of their respective governments.<sup>342</sup>

Disentangling the complex social networks that are in the background of forming tax policy within the OECD is, if possible at all, not a goal of this paper.<sup>343</sup> Rather the question we set out to ask was why the OECD made its shift toward establishing substantive standards and coercing non-member states. In other words, the question is why politicians trying to promote certain policies pursue cooperation through the OECD. It is rational for them to tie themselves to the mast and lose some freedom of action, if they gain on other fronts. An international relations explanation of the willingness of political leaders to co-operate is that they gain more national sovereignty than they lose through such cooperation.<sup>344</sup> In a world of mobile capital and people, where territorial borders become porous under the pressure of globalization and a booming development in information technologies, *de jure* sovereignty means less in terms of *de facto* have sovereign power than it did fifty years ago.<sup>345</sup> Taxation policy is one such power. Where international organizations offer them a better position to obtain their goals, promoting certain policies through these organizations may in the end yield the results interest

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<sup>339</sup> The delegates are somewhat constrained by politics of their home country. They would not like to be seen as giving up too much sovereignty or working to a large extent against the political program of the politicians that may be appointing them. Bruno S. Frey and Beat Gygi, *ch. 4. International Organizations from the Constitutional Point of View* in *THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS: A PUBLIC CHOICE APPROACH* (Ronald Vaubel and Thomas D. Willett ed.) 58, 66 (1991).

<sup>340</sup> Jarle Trondal, Martin Marcussen and Frode Veggeland, *International Executives: Transformative Bureaucracies or Westphalian Orders?*, Working paper no. 2 at the Centre for European Studies (CES) 24 (2004).

<sup>341</sup> Christians, *supra* note 64, at 20.

<sup>342</sup> Christians, *supra* note 64, at 21-22.

<sup>343</sup> Christians, *supra* note 64, at 21-22 (describing in detail the connections between OECD entities and stressing that disentangling them and understanding how tax policy is formed is virtually impossible for an outside observer.).

<sup>344</sup> Allison Christians *Sovereignty, Taxation and Social Contract*, 18 *MINN. J. INT'L L.* 99 (2009); Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 *International Organization*, 151 (2002); Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, *School Faculty Papers. Paper 219. At Boston College Law (2008)* (all discussing the issue of sovereignty in the context of taxation).

<sup>345</sup> See Christians *supra* note 344, at 104-114.

groups desire more effectively than doing so through domestic means. Here it becomes important to ask which international organization, for all such bodies are not equal in terms of serving an interest group's agenda.

Further, our account supports an important role for the bureaucratic explanation as well. While tax experts within the OECD were well established to claim global prominence in technical tax issues, expanding into a broader issues on taxation such as to tax competition allowed for more responsibilities and funding. The OECD staff enjoys excellent jobs for academics, with high salaries and benefits. The organization offers enjoyable work, opportunities to participate in important international venues while obtaining the merit of having held a prestigious appointment at one of the world's top organizations.

"International bureaucrats" are generally portrayed as impartial concerning the policies of their home country government. If those bureaucrats have a background of serving their country on tax matters, they may however have a bias in favor of their home country that will reflect on their work. If they in addition perceive a possibility for future employment for their home governments, this would further increase their incentive not to work against the policies of their home country and risk losing out on future appointments at home.<sup>346</sup> (The work of the CFA is supported by the Center for Tax Policy and Administration (CTPA), which since 2001 has been a separate directorate within the OECD Secretariat.<sup>347</sup>)

The CTPA forms an arena for a possible explanation of the OECD project from the bureaucratic point of view. Both the Director and the CTPA staff can be entrepreneurial by looking for new possibilities to expand the CTPA's mandate. The political discussion in any member country can open such windows of opportunity. Thus if a politician shows interest in fighting tax evasion, the OECD may step in and offer its services.<sup>348</sup> If a country finds national regulations to fight tax evasion and avoidance inadequate, the OECD staff has good arguments for why dealing with the issue through the OECD is a good idea. Whatever the problem may be, international co-operation, they can argue, is needed to deal with it constructively. Before taking any steps on the issue, the proper measures must be carefully considered. This requires expertise and experience, and this is precisely what the OECD has to offer (along with trips to Paris).<sup>349</sup> If a politician has already suggested a willingness to pursue a goal and OECD representatives announce themselves ready to work on the issue, a natural alliance emerges.

The person with the biggest incentive to expand and drive a project forward is its leader. The founding CTPA Director Jeffrey Owens is arguably the person who has been the driving force behind the project on "harmful tax competition." Beside professional expertise and experience,<sup>350</sup> Owens is a highly skilled negotiator and lobbyist and a brilliant policy entrepreneur. Without him as a driving force, the CTPA would have been unlikely to become its own directorate in 2001. Not only did he have the personal motivation based on salary, prestige, and position, but he has also proven keen on stepping

<sup>346</sup> A former CTPA official pointed out that one does not sit secure on the job at the OECD, especially not when involved in such a volatile and insecure projects as that on harmful tax competition. Interview 5.

<sup>347</sup> The OECD Council is formally the body with decision-making power, where decisions are made by consensus. (OECD Website, *Who Does What*,: [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761791\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html) (last accessed 2011-10-03) It consists of high-level diplomats, representing their own countries. These ambassadors have many issues on their table, and what they may focus their discussions on varies. For instance, as the expansion of the OECD was high on the agenda with the entrance of Mexico in 1994, tax policy was not the main priority, and the Council would therefore endorse documents on taxation without discussing the topic much at its meetings. Interview 1. The Council directs projects to subcommittees of government officials at a lower level. Its statements are important, but at least in the area of tax policy, they are usually drafted by OECD staff members. Christians, *supra* note 64, at 17-18. Thus, this is not where policy is formed, but rather where national policy is channeled into projects, where policy is mobilized by mandates to the OECD Secretariat, which may delegate further to subcommittees.

<sup>348</sup> Interview 3.

<sup>349</sup> Interview 3.

<sup>350</sup> Owens earned his doctorate from Cambridge in 1973 and has 30 years of experience as an "international civil servant." OECD website: *Jeffrey Owens, Director - Centre for Tax Policy and Administration*: [http://www.oecd.org/document/10/0,3746,en\\_2649\\_34897\\_39363018\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/10/0,3746,en_2649_34897_39363018_1_1_1_1,00.html), (last accessed 2011-10-03.).

into the spotlight to take credit for these successes.<sup>351</sup>

The CTPA staff also has incentives to help expand their portion of the organization. With more tasks and more people needed in the office, there may be better chances for promotion. Moving up from an “Economist” to a “Senior Economist” for instance, means a rise in pay from 5,254 to 7,534 euro (not including allowances for family, children and other allowances) per month.<sup>352</sup> These incentives are likely weaker than those for leaders as many in the senior staff do not stay at the OECD for long enough to reap the rewards. A large share of the Secretariat are seconded, and as many as 70-80 % have time-limited employments in the OECD.<sup>353</sup> There are some bureaucrats within the OECD who stay there for decades; these are not representative of the majority of the Secretariat’s bureaucracy. Even short-timers have a motive to support innovations, however. Staff also has an incentive among the staff to accomplish changes, to be an active part in various projects and to develop new ones. If members of the CTPA staff are not counting on, or even pursuing, longer term OECD employment, they may rather seek projects which they can lead or in other ways make a mark while working on them while at the OECD, than to merely do what is required from them to stay at the office.

This is not to say that all arguments for and against tax competition are solely tools for obtaining personal wealth, status and fame. Politicians and bureaucrats maintain ideas of what rules and principles make the world a better place and may act based on those beliefs regardless of their personal incentives. The CTPA staff would more likely than not believe that tax competition actually is harmful the way it is defined by them and the CFA.<sup>354</sup> It would remain more pleasant to pursue goals one approved of if they also resulted in personal benefits, however. The bureaucratic explanation of the changes in OECD tax policy adds value as well.

What larger lessons might we draw from the OECD’s mission creep from technical expertise used to reduce friction in trade among its members to efforts to coerce substantive changes in non-members’ tax laws? First, the force behind this change in OECD policy seems to be that of political national agendas and international bureaucrats in tandem. The project against “harmful tax competition” had its ups and downs. It has been pursued and opposed at different times by some of the world’s most influential governments. The director and staff of the CTPA innovated and met a previously unmet demand by actively seeking new opportunities to expand and pursue their project. The organization cannot act without support from its members, but it makes it easier for interests within the membership to form an effective cartel. Reducing the autonomy of an organization’s staff and requiring unanimous votes to approve new initiatives are ways to limit mission creep.

Second, the choice of forum makes a difference. Shifting the debate to the OECD and G7 made it easier for the high tax interests to shape the debate; invoking the Commonwealth Secretariat and G20 made it harder for them to do so. Paying attention to how and where issues are debated is thus important.

Finally, and somewhat ironically, what the OECD’s expansion of its mission on tax issues suggests most is that developing international law standards for evaluating when an organization is experiencing mission creep may be necessary. The most objectionable feature of the OECD’s expansion of its mission was its effort to impose its standards on jurisdictions that had no voice in the

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<sup>351</sup> Interview 5. Owens also had some experienced tax experts working with the project. As it became clear to his colleagues that Owens would not let his staff take the credit for the work that they believed that they deserved, some of them would end up leaving the project. Interview 5.

<sup>352</sup> See OECD website: *Salaries and Benefits*:

[http://www.oecd.org/document/30/0,3746,en\\_21571361\\_45609340\\_40803550\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,3746,en_21571361_45609340_40803550_1_1_1_1,00.html), (last accessed Oct. 3, 2011) Salaries and allowances are tax free for all except for OECD official who are liable to pay income tax in the United States. Id.

<sup>353</sup> Trondal, Marcussen & Veggeland, *supra* note 340, at 12.

<sup>354</sup> It would be difficult for any person to perform a task contrary to one's belief and so those believing in tax competition are likely to seek alternative employment either with the OECD or elsewhere.

creation of the standards through the blacklist. This seems to us to be an area in which international standards could play a role.

The OECD has evolved to a convenient vehicle for many policies. The organization offers an arena for networking and informal opportunities for changing sentiments without media scrutiny. It is also convenient as having developed an image as a benign organization of technocrats not under the political influences which many of their peers in other organizations are. The OECD is clean and rich. As long as politicians show a willingness to pursue policies through the OECD, the people of the organization will seek to expand the mission of the organization and form it to an even more attractive arena for making policies. There is thus little to suggest that there will not be more efforts to harmonize previously national policies on a global scale, through recommendations, blacklists and sanctions. Further there is every reason to believe that the proliferation of new international networking opportunities will be developed. The continuing fight against “harmful tax competition” serves as a good example of how politicians’ pursuit of their interests can be enhanced by the willingness of an international organization to take on more tasks. Considering issues now exploding into public consciousness like public pensions, healthcare funding, and the environment, there are more potential areas in which politicians will find useful the role of organizations like the OECD. Perhaps the OECD itself will be there to help.