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Article 1

Who is Making International Tax Policy?: International Organizations as Power Players in a High Stakes World

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Abstract

This Article begins the process of mapping the inquiry into the role of international organizations in tax policy. It identifies four basic questions that must be addressed and specifies the more sophisticated inquiries that must then be undertaken. This Article commences the empirical examination through two case studies: one regarding inclusion of a mandatory arbitration clause in the Organization for Economic Co-Operation and Development (“OECD”) Model Tax Convention on Income and Capital, and one regarding recent international efforts to curb “harmful” tax competition. Part I outlines the rising importance of international tax matters and the reasons that international organizations are likely to be exerting some measure of influence on policy. Part II, drawing upon the current literature on international organizations and their operations, designs a research agenda to reveal the influence that international organizations hold over tax policy. As Part II discusses in greater detail, this inquiry is not monolithic. Instead it recognizes the multiplicity of forums for international tax discussions and the varying ways in which participants use them. Part III then turns to the two cases studies: one studying the OECD’s and the International Chamber of Commerce’s (“ICC”) role in the emerging global acceptance of mandatory arbitration provisions in tax treaties, and one following the efforts of the past decade to generate a response to harmful tax competition. Finally, the conclusion offers some preliminary observations about the involvement of international organizations in tax policy and important avenues for further research.

ARTICLES

WHO IS MAKING INTERNATIONAL TAX POLICY?: INTERNATIONAL ORGANIZATIONS AS POWER PLAYERS IN A HIGH STAKES WORLD

*Diane Ring**

INTRODUCTION

In a world in which international tax policy is no longer predominantly within the purview of the individual state, and the number of important international tax questions has grown dramatically, where is the locus of power? If there are many questions regarding international tax policy, and if they must be evaluated beyond the level of the individual state, where is the evaluation taking place? Who is directing it and what is the nature of their influence? These questions all point to the examination of international organizations in shaping tax policy. Certainly both state *and* nonstate actors, including international organizations, actively research, debate, and advocate for tax policy. Moreover, to the extent that states and others are coming together to discuss and contemplate questions of international tax, their conversations usually occur within the context of organizations. Such organizations, therefore, have the potential to wield influence and power over tax policy choices. Are these international organizations exercising influence? In what form and to what effect? Should we be concerned about their role?

Despite the importance of international organizations in tax policy, there has been relatively limited research devoted solely to

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this issue.¹ Extensive international relations (“IR”) literature contemplates international organizations from both a theoretical perspective and, in many cases, an empirical perspective with the study of specific bodies.² However, this literature devotes very little attention to evaluating how international organizations influence tax policy and what the implications of that influence might be.

This Article begins the process of mapping the inquiry into the role of international organizations in tax policy. It identifies four basic questions that must be addressed and specifies the more sophisticated inquiries that must then be undertaken. This Article commences the empirical examination through two case studies: one regarding inclusion of a mandatory arbitration clause in the Organisation for Economic Co-Operation and Development (“OECD”) Model Tax Convention on Income and Capital, and one regarding recent international efforts to curb “harmful” tax competition. Part I outlines the rising importance of international tax matters and the reasons that international organizations are likely to be exerting some measure of influence on policy. Part II, drawing upon the current literature on international organizations and their operations, designs a research agenda to reveal the influence that international organizations hold over tax policy. As Part II discusses in greater detail, this inquiry is not monolithic. Instead it recognizes the multiplicity of forums for international tax discussions and the varying ways in which participants use them. Part III then turns to the two cases studies: one studying the OECD’s and the International Chamber of Commerce’s (“ICC”) role in the

1. There is an emerging body of research in the tax field with interesting projects on related questions. See, e.g., Arthur Cockfield, *The Rise of the OECD as Informal “World Tax Organization” Through National Responses to E-Commerce Tax Challenges*, 8 *YALE J.L. & TECH.* 136 (2006) (addressing the shortcomings of the existing international regime for dealing with cross-border tax issues arising in electronic commerce); Allison Christians, *Networks, Norms, and National Tax Policy* (Univ. of Wis. Law Sch. Legal Research Paper Series, No. 1078, 2009), available at <http://ssrn.com/abstract=135861> (exploring the international channels used to develop norms regarding national tax policies).

2. See, e.g., ROBERT W. COX ET AL., *THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION* (1972); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); *GLOBAL INSTITUTIONS AND RESPONSIBILITIES: ACHIEVING GLOBAL JUSTICE* (Christian Barry & Thomas Pogge eds., 2005); *THE WTO AS AN INTERNATIONAL ORGANIZATION* (Anne O. Krueger ed., 1998); Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 *LAW & CONTEMP. PROBS.* 263 (2004–2005).

emerging global acceptance of mandatory arbitration provisions in tax treaties, and one following the efforts of the past decade to generate a response to harmful tax competition. Finally, the conclusion offers some preliminary observations about the involvement of international organizations in tax policy and important avenues for further research.

I. WHY DOES THE SOURCE OF TAX POLICY MATTER?

Neither the existence of international tax problems nor the existence of international tax organizations is new. As early as the 1920s, countries found the need to consult with each other on pressing matters of international tax, especially the question of double taxation. Countries pursued these interactions through forums—first the ICC, and then the League of Nations.³ Why should we now address how international organizations may influence or shape tax policy? Escalation in the volume and significance of cross-border business and its taxation has enhanced the need for settings in which to resolve tax matters of this kind. International flows now total US\$1.9 trillion *per day*.⁴ The increasing amounts of money at stake in business transactions, and inevitably in the tax system, heighten the likelihood of clashes between and among states and taxpayers, as seen in the growing tensions over tax competition, transfer pricing, and thresholds for taxing nonresident businesses. Even the popular press followed the unfolding story in 2008 and 2009 involving the United States, Switzerland, and UBS.⁵ U.S. taxpayers had sought to hide their income offshore with the assistance of certain banks, including UBS, that helped the taxpayers disguise their ownership of their funds.⁶ As part of the ongoing saga, the United States sought to compel UBS to

3. See Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1066–77 (1997).

4. JAMES K. JACKSON, CONG. RESEARCH SERV., THE OECD INITIATIVE ON TAX HAVENS 1 (2009), available at http://assets.opencrs.com/rpts/R40114_20081202.pdf.

5. See, e.g., Lynnley Browning, *Deal on Names Cracks Swiss Banks*, N.Y. TIMES, Aug. 20, 2009, at A1; Lynnley Browning, *U.S. Asks Court to Force UBS to Provide Names*, N.Y. TIMES, July 1, 2008, at C3; David S. Hilzenrath, *IRS, Justice Target Undisclosed Assets in Swiss Accounts*, WASH. POST, Nov. 1, 2008, at D01.

6. See Browning, *supra* note 5.

disclose certain client records.⁷ Ultimately, UBS agreed to pay the United States US\$780 million in fines.⁸

Although “hard” law,⁹ including international tax law, remains the formal province of the state, or two states in the case of tax treaties, such unilateral or bilateral exercises of tax policy are inadequate. Some questions can be settled through the bilateral treaty process, but many more benefit from the input and interaction of more than two states. This interaction is often prompted, facilitated, or structured by at least one international organization. Thus, despite the formal, hard law power of the state over international tax policy, international organizations influence the actual design of international tax policy and tax rules in a variety of ways, up to and including the creation or exercise of “soft law” power.¹⁰

For many years, a large portion of the tax work with which international organizations became involved centered on model treaties—the traditional output of the League of Nations, the Organisation for European Economic Co-operation (predecessor to the OECD), and the United Nations (“U.N.”).¹¹ Today,

7. As of the end of July 2009, the United States and UBS reached an agreement in principal regarding the request of the United States for the names of 52,000 U.S. taxpayers holding offshore accounts through the bank. See J.P. Finet et al., *U.S., UBS Reach Deal on John Doe Summons; Practitioners Discuss Potential Ramifications*, 146 Daily Tax Rep. (BNA) K-2 (Aug. 3, 2009).

8. See JACKSON, *supra* note 4, at 3.

9. See Gregory C. Shaffer & Mark A. Pollack, *How Hard vs. Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707 (2008) (defining hard law as “legal obligations of a formally binding nature,” such as legislation, treaties, executive orders, and judicial decisions); see also Allison Christians, *Hard Law & Soft Law in International Taxation*, 25 WIS. INT’L L.J. 325, 326 nn.5–6 (2007) (contrasting the types of hard and soft law in the international arena).

10. International relations (“IR”) scholars use the term “soft law” to refer to an organization’s ability to create norms and guidelines that do not carry the force of law, but nevertheless create a sense of obligation to which states may conform. In the world of international tax policy, the Organisation for Economic Co-operation and Development (“OECD”) is a primary proponent of soft law power, establishing model tax treaties, which are then widely adopted by member states. See, e.g., Christians, *supra* note 9, at 331–32; Cockfield, *supra* note 1, at 167; see also Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 497–500 (2004) (characterizing some OECD standards as customary international law); David R. Tillinghast, *Commentaries to the OECD Model Convention: Ubiquitous, Often Controversial, but Could They Possibly Be Legally Binding?*, 35 Tax Mgmt. Int’l J. (BNA) 580 (2006) (describing the force of the rules promulgated by the OECD).

11. See, e.g., Graetz & O’Hear, *supra* note 3, 1066–77.

international organizations of varying size, scope, composition, and mission consider questions of transfer pricing, electronic commerce, financial instruments, and business restructurings, just to identify a few. In some cases, this work ultimately emerges in the form of a treaty, but the manifestation of these efforts has expanded far beyond the treaty format to include guidelines, recommendations, and topical reviews.¹²

II. FRAMEWORK FOR ASSESSING INTERNATIONAL ORGANIZATIONS

The widely shared view that international tax policy constitutes a significant dimension of contemporary global economic, political, and social policy¹³ renders a comprehensive and systematic inquiry into tax policy formation essential—with particular attention to the role of international organizations. Drawing upon IR theory's work in international organizations, Part II begins this process by developing a framework for examining the role of international organizations in tax policy.

A. Defining International Organizations

Before contemplating the influence and power of international organizations, it is essential to define the object of inquiry. IR literature has defined international organizations as

12. For a listing of guidelines promulgated by the OECD, for instance, see OECD Guidelines, http://www.oecd.org/findDocument/0,3354,en_2649_37427_1_119820_1_1_37427,00.html (last visited April 3, 2010).

13. See, e.g., Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000) (examining the broad social and economic implications of U.S. responses to tax competition); Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 MINN. J. INT'L L. 99 (2009) (discussing the development of global norms that may constrain national tax policy bargaining); Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000) (offering a critique of tax treaties and their impact on developing countries); Steven A. Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 HASTINGS L.J. 911 (2007) (arguing that a sophisticated vision of a national tax policy and the measure of gross domestic product might lead the United States to pay tax havens to help enforce U.S. tax laws); Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540 (2009) (noting the distortional labor effects of the disconnect between countries that provide social welfare benefits through taxation and countries that consider the worker a resident); Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. REV. 1 (2010) (considering the meaning and plausible application of equity concepts in international tax).

“purposive entities, with bureaucratic structures and leadership, permitting them to respond to events.”¹⁴ Clearly such a broad conception sweeps under its mantle many different types of organizations in terms of membership, power, function, and mission.

In many cases, “international organization” is used almost synonymously with “governmental international organization”; that is, an entity whose members are states or their representatives. The U.N.¹⁵ is a prototypical example of such an entity—a formal organization, with structure and leadership, whose members are states. The European Union (“EU”),¹⁶ though markedly different, would also satisfy this broad definition.

Where this conception of “international organization” predominates, the analysis often turns to considerations of sovereignty and whether, how, and to what degree the international organization is usurping the traditional sovereign powers of its member states. Although sovereignty questions are

14. Robert O. Keohane, *The Analysis of International Regimes: Towards A European-American Research Programme*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 28 (Volker Rittberger ed., 1993). As this Author has noted elsewhere, it can be useful to differentiate international organizations, international regimes, and international institutions. The terms can, in some contexts, be used in an overlapping and generalized manner, but the IR literature generally envisions a distinct meaning for each term. See Diane Ring, *International Tax Relations: Theory and Implications*, 60 *TAX L. REV.* 83, 96 (2007). The broadest category, international institutions, constitute “persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations . . . includ[ing] formal intergovernmental or transnational organizations, international regimes, and conventions.” Robert O. Keohane, *The Analysis of International Regimes*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 23, 28 (Volker Rittberger ed., 1993) [hereinafter Keohane, *International Regimes*]. Thus, international institutions include both international organizations as defined above in the text, and international regimes, which are generally understood as “implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Robert O. Keohane, *Cooperation and International Regimes*, in *PERSPECTIVES ON WORLD POLITICS* 85 (Richard Little & Michael Smith eds., 1980); see also Keohane, *International Regimes*, *supra* (“Regimes are institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations.”).

15. See generally UN at a Glance, <http://www.un.org/en/aboutun/index.shtml> (last visited Apr. 3, 2010).

16. See generally Basic Information on the European Union, http://europa.eu/about-eu/basic-information/index_en.htm (last visited Apr. 3, 2010).

important,¹⁷ the sovereignty question is less relevant in this examination of power and influence for two reasons.

First, although state-based international organizations play a pervasive and significant role in international tax policy, their position is not exclusive. Other kinds of international organizations with *nonstate* members¹⁸ are on the international scene and exert influence, as discussed below. It is improbable that any one organization would fully occupy the field of tax policy, especially where organizations may have competing agendas, and where states still serve as *the* source of hard law in international tax. Thus, the multiplicity of active organizations, only some of which have state-based membership, renders the sovereignty question a side issue in this context.

Second, even when considering organizations that do have states as members, the core questions include the nature of the organization's influence, how it is exercised, how the organization's positions are formulated, and how the organization interacts with others. Potentially, a state-based organization that exercises its influence effectively and can translate its positions into broader tax policy may also be an organization that appears to usurp the sovereignty of its member states.¹⁹ An inquiry into this possible usurpation²⁰ presupposes an

17. See Diane Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155 (2008).

18. Some scholars challenge even the conception of identifying actors as state versus nonstate, arguing that this formulation disguises the variability among states and obscures the potential roles that a variety of actors play. See, e.g., Peter Willetts, *Transnational Actors and International Organizations in Global Politics*, in *THE GLOBALISATION OF WORLD POLITICS* 356–83 (John Baylis & Steve Smith eds., 2001). Although this point has merit, for the purposes of this Article's inquiry into international tax policy, which remains formally in the control of national governments, the state versus nonstate classification of organizations is relevant. That said, the analysis herein reveals the complicated relationship among state-based organizations and nonstate actors over international tax policy.

19. See, e.g., JAMES E. DOUGHERTY & ROBERT L. PFALTZGRAFF, JR., *CONTENDING THEORIES OF INTERNATIONAL RELATIONS: A COMPREHENSIVE SURVEY* 32–33 (2001) (examining competing views on the health of the modern state); ALAN JAMES, *SOVEREIGN STATEHOOD* 3 (1986) (noting assertions by some observers that "sovereignty" is on the decline); Jessica T. Matthews, *Power Shift*, *FOREIGN AFF.*, Jan.–Feb. 1997, at 50, 53 (describing nongovernmental organizations as increasingly powerful and capable of taking over state functions and shaping future state function).

20. See Ring, *supra* note 17 (contending that although arguments based on tax sovereignty can serve solely as rhetoric, there are important functional roles and normative values at stake when a state exercises "tax sovereignty").

“effective” international organization, which is what this paper seeks to examine.²¹

As suggested earlier, there are a number of international organizations involved in tax policy that are not state-based, such as the International Fiscal Association (“IFA”)²² or the Business and Industry Advisory Committee (“BIAC”).²³ Many of the international organizations have a nonstate membership base that includes businesses, tax professionals, and academics.²⁴ Of course this category itself is not homogeneous. IR scholars distinguish among transnational actors on several different dimensions. For example, these organizations can operate under widely varying formats. Some organizations, such as multinational corporations and international nongovernmental organizations, like the International Committee of the Red Cross,²⁵ display a formal structure with clear formation documents, bylaws, and specified rights and obligations of the participants. Others exhibit an organizational relationship that may be more aptly characterized as a “network,”²⁶ although formal organizations may also be discerned within this class.²⁷ The International Tax Dialogue (“ITD”), for instance, might constitute a more formal network.²⁸ Another important dimension along which nonstate

21. Subsequent analysis of the long-term impact of international organizations on tax policy and on the nation-state would be a complement to this Article’s mission to develop a comprehensive vision of international organizations and their role in tax policy.

22. See generally What Is IFA? http://www.ifa.nl/organisation/what_is_ifa/ (last visited Apr. 3, 2010).

23. See generally About BIAC, <http://www.biac.org/aboutus.htm> (last visited Apr. 3, 2010).

24. See *infra* notes 50–71 and accompanying text.

25. See generally Int’l Comm. of the Red Cross, *ICRC in Action*, Ref. 0728/002 (Nov. 2006), available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0728/\\$file/icrc_002_0728.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0728/$file/icrc_002_0728.pdf) (providing a brief descriptive on the object of the organization).

26. See Thomas Risse, *Transnational Actors and World Politics*, in HANDBOOK OF INTERNATIONAL RELATIONS 255, 255 (Walter Carlsnaes et al. eds., 2002) (defining networks as “forms of organization characterized by voluntary, reciprocal, horizontal patterns of communication” (quoting MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: TRANSNATIONAL ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 8 (1998))).

27. See Risse, *supra* note 26, at 256–57.

28. See *id.* The International Tax Dialogue (“ITD”) is an arrangement among various entities, including the OECD, International Monetary Fund, and World Bank; its purpose is to facilitate discussion among state leaders, international organizations, and “other key stakeholders.” About the ITD, <http://www.itdweb.org/pages/help.aspx?id=17&lang=3> (last visited Apr. 3, 2010). By facilitating such discussion, the

organizations are divided concerns their motivations. Some of these transnational actors are more clearly “interest groups” because they are primarily motivated by their own well-being, for example BIAC or the ICC.²⁹ Others arguably seek to promote a broader vision of public well-being as characterized by the different kinds of knowledge-based advocacy groups,³⁰ such as the European Association of Tax Law Professors (“EATLP”)³¹ or the International Bureau of Fiscal Documentation (“IBFD”).³²

Still another division among these organizations can be made on the basis of criminality. All of the organizations mentioned thus far in this Article or listed in the Appendix are legal bodies. But the universe of international organizations is not limited to legitimate bodies. International criminal organizations can display the same kinds of influence, power, reach, and function as “legitimate” organizations.³³ Though they might not play a dramatic role in tax policy, recognition of that possibility heightens the appreciation for the forces operating on a global level.

This initial examination of what constitutes an international organization not only provides boundaries for this Article’s inquiry, but also highlights the important place for IR scholars and literature. How does the preexisting literature on international organizations orient our own inquiry into tax policy? As discussed in the following sections, we can draw upon this body of research to determine the relevant questions, the concerns to address, and the issues that warrant caution. The research agenda crafted for international tax need not start from zero. The recent and rich attention to international

ITD hopes to help identify good tax practices and allow states to work toward cooperation on tax issues. *Id.*

29. *See generally* What Is ICC?, <http://www.iccwbo.org/id93/index.html> (last visited April 3, 2010).

30. *See Risse, supra* note 26, at 258 (observing that the profit/nonprofit line roughly captures this divide, but only serves as an initial grouping guide; moreover, the two categories likely reflect ends of a spectrum). It is important not to attach undue significance to this differentiation between organizations and the likely value of their respective contributions.

31. *See generally* Aim of the EATLP, <http://www.eatlp.org/index.php?itemid=54> (last visited April 3, 2010).

32. *See generally* About IBFD, <http://www.ibfd.org/portal/AboutIbfd.html> (last visited April 3, 2010).

33. *See Willetts, supra* note 18, at 367–68.

organizations in the IR literature reflects a general, though not completely unchallenged, shift³⁴ away from viewing the world as constructed by state-based, state-dominated relationships to one seen as a highly interconnected “global society” shaped by a range of forces (e.g., norms, rules, international law) and actors (e.g., states, state-based international organizations, multinational corporations, transnational networks).³⁵ Having established that international organizations operate at the heart of international tax policy, this Article will next craft an approach to study and evaluate their role.

34. This shift reflects the continuing tension in IR theory between the two important traditions framing the debate: neorealism and neoliberalism. Although both traditions presume that states are the central (and rational) players in international policy making, the neorealists consider states to be more strongly motivated to achieve relative gains over other states; thus, power dynamics become pivotal. See KENNETH M. WALTZ, *THE THEORY OF INTERNATIONAL POLITICS* 102–28 (1979); see also, e.g., Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. CONFLICT RESOL.* 3, 6 (1998); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Level-Games*, 42 *INT’L ORG.* 427 (1988); Peter J. Spiro, *NGOs in International Environmental Lawmaking: Theoretical Models* 9 (Temple Univ. Beasley Sch. of L. Legal Studies Research Paper Series, Research Paper No. 2006-26, 2006), available at <http://ssrn.com/abstract=937992> (citing PETER NEWELL, *CLIMATE FOR CHANGE: NON-STATE ACTORS AND THE GLOBAL POLITICS OF THE GREENHOUSE* 128–36 (2000)). In contrast, neoliberalism, which is also discussed as “neoliberal institutionalism” following the work of Robert Keohane, *Neoliberal Institutionalism: A Perspective on World Politics*, in *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY* 1, 2 (Robert O. Keohane ed., 1989), views states as engaging in a market model calculus of self-interest when deciding what steps to take in their international relations.

The shift in the literature away from the primary role accorded states is considered more reflective of a complex reality. See, e.g., Willetts, *supra* note 18, at 356 (“Greater clarity is obtained by analysing intergovernmental and intersociety relations, with no presumption that one sector [e.g., the states] is more important than the other.”). Pluralism, which examines “the role of individuals, bureaucracies, and nongovernmental organizations in decision-making at the international level,” and cognitivist theory, which views “knowledge and information as critical to the shaping of international dynamics,” have additionally shaped the evolving IR research agenda. Ring, *supra* note 14 at 91, 93.

35. See, e.g., Michael Barnett & Kathryn Sikkink, *From International Relations to Global Society*, in *THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS* 62, 62–64 (Christian Reus-Smit & Duncan Snidal eds., 2008). Terminology in these analyses is not fixed. The “international organizations” category is considered broadly and could potentially cover state-based organizations, non-state-based organizations, multinational corporations, and many versions of transnational networks. The category is also frequently used to connect with the origins of these studies in the post–World War I period where state-based international organizations dominated the stage. See Risse, *supra* note 26, at 257 (discussing the nature of IR in the twentieth century). This Article uses the term in its encompassing manner and then relies on more descriptive categories, such as state-based organization or multinational corporation, to draw distinctions.

B. *Unpacking the Power of International Organizations: A Taxonomy for International Tax*

Regardless of the type of international organization under scrutiny, certain questions must be answered to create a clearer sense of the dynamic of their particular international relations. This section identifies the four basic inquiries: (1) membership, (2) structure, (3) agenda setting, and (4) output, and provides some initial examples of the utility of the information. With this preliminary information established, more nuanced examinations of the dynamics in international tax policy formation can be undertaken.

1. Elements

a. Membership

This question of membership harkens back to the early academic examinations of international organizations following World War I. These analyses were descriptive in form and premised on an idealistic belief in international cooperation.³⁶ At that time, observations of international organizations emphasized their formal composition, including membership. But the events leading up to World War II diminished the analytical importance of international organizations, and also increased interest in the normative views of realism that emphasized *power* over cooperation and idealism. The dramatic growth in international organizations *after* World War II restored attention to the organizations themselves. The inquiry, however, remained focused on international organizations as concrete entities “with a physical presence—names, addresses, and so on.”³⁷ The narrowness of these questions and their implicit confirmation that only entities capable of having such formal elements could be active international players ultimately faded with the growing appreciation of international “regimes” and “institutions.”³⁸

Although an examination of the membership of an organization only begins to provide a full picture of the

36. See Arthur A. Stein, *Neoliberal Institutionalism*, in THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 35, at 201, 202.

37. *Id.* at 203.

38. See, e.g., Jackson *supra* note 4, at 5, 10.

organization's potential, these are questions that nonetheless must be addressed. Consider, for example, the frequent comparison between the U.N. and the OECD. The latter, which has regularly been derided as a rich country's club,³⁹ stands in contrast to the U.N., with its much broader base of state membership.⁴⁰ In terms of raw numbers, there are 192 member states within the U.N.,⁴¹ but only 30 states that make up the OECD.⁴² A significant difference in both membership size and composition could plausibly be expected to impact the agendas, goals, and operations of each organization. In fact, the basic differences between the U.N. and the OECD model income tax treaties are regularly attributed to the U.N.'s greater commitment to developing nations.⁴³

Membership size can also correlate with the organization's mission; membership may be very small where the organization's mission is limited in scope, of narrow interest, or of a sensitive nature. Consider, for example, the Pacific Association of Tax

39. See, e.g., James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 776 (2000) (describing the OECD as "an amalgam of a rich man's club"); Reuven S. Avi-Yonah, *Tax, Trade, and Harmful Tax Competition: Reflections on the FSC Controversy*, 21 TAX NOTES INT'L 2841, 2844 (2000) (noting that the OECD "is still identified as the rich countries' club"); see also *No Breakthroughs Expected at Industrialized Nations Meeting*, L.A. TIMES, May 17, 1988, at A11 (referring to the OECD as the "rich countries club"). OECD members include, among others, Australia, France, Germany, Japan, the United Kingdom, and the United States. See Ratification of the Convention on the OECD, http://www.oecd.org/document/58/0,3343,en_2649_201185_1889402_1_1_1_1,00.htm (last visited April 3, 2010). Save for Mexico, Poland, and Turkey, none of the other OECD member states are "developing" countries. See World Bank Country Groups, <http://go.worldbank.org/D7SN0B8YU0> (last visited April 3, 2010). For analytical convenience, the rubric used to classify the above countries as "developing" is that set by the World Bank. See World Bank Country Classification, <http://www.worldbank.org/data/countryclass.htm> (last visited April 3, 2010).

40. Current U.N. members include, among many others, Albania, Bangladesh, Chad, El Salvador, Haiti, and Somalia—certainly not among the wealthiest or most powerful of nations. See Member States of the United Nations, <http://www.un.org/members/list.shtml> (last visited Apr. 3, 2010).

41. See Member States of the United Nations, *supra* note 40.

42. OECD, Members and Partners, <http://www.oecd.org> (select "About OECD," then "Members and Partners") (last visited Apr. 3, 2010).

43. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. of Experts on Int'l Cooperation on Tax Matters, *Report on the Fourth Session (20–24 October 2008)*, ¶ 23, U.N. Doc. E/2008/45, E/C.18/2008/6 (2008) (noting that the U.N. Model Income Tax Treaty would continue to operate as a "model for treaties between developing and developed countries" and that "the focus in the Committee's mandate on the needs of developing countries" would continue).

Administrators (“PATA”), which was organized in 1980 to facilitate the exchange of information among the member administrators.⁴⁴ Ultimately, PATA came to focus on developing coordinated approaches for transfer pricing reporting and bilateral advance pricing agreements.⁴⁵ PATA’s four members, Australia, Canada, Japan, and the United States,⁴⁶ all share developed economies, significant interactions through cross-border business, and a basic commitment to addressing tax enforcement and transfer pricing. The group’s size and strong interest in transfer pricing⁴⁷ likely facilitated its detailed transfer pricing enforcement work. PATA was eventually superseded in 2006 by an initiative known as the Leeds Castle group,⁴⁸ a ten member body devoted to national and global tax administration matters, with a particular emphasis on mutual enforcement issues.⁴⁹ The expansion hints at the need to include some additional partners to effectively reach the kinds of cases and questions dominating the tax administrators’ agendas.

The examples noted above all consider organizations with states as members, but many active international tax organizations operate with nonstate membership. The growth and significance of such organizations supports the supposition of neoliberal institutionalists, pluralists, and others who contend

44. See Susan C. Borkowski, *The History of PATA and Its Effect on Advance Pricing Arrangements and Mutual Agreement Procedures*, 17 J. INT’L ACCT. AUDITING & TAX’N 31, 31 (2008).

45. See *id.* at 32–33. For more information on the transfer pricing documentation produced by the Pacific Association of Tax Administrators (“PATA”), see Pacific Association of Tax Administrators (PATA) Transfer Pricing Documentation Package (June 24, 2009), <http://www.irs.gov/businesses/international/article/0,,id=156266,00.html>.

46. See Borkowski, *supra* note 44, at 32.

47. See Pacific Association of Tax Administrators (PATA) Transfer Pricing Documentation Package, *supra* note 45.

48. See Australian Taxation Office, *Tax Havens and Tax Administration* (Feb. 12, 2010), <http://www.ato.gov.au/individuals/content.asp?doc=/content/46908.htm&page=25&H25>.

49. See H.R. REP. NO. 111-202, at 24 (2010). The ten members of the Leeds Castle group are the original four members of PATA plus China, France, Germany, India, South Korea, and the United Kingdom. See Allison Bennett, *Everson Says Discussions on Expanding Joint International Shelter Group Under Way*, 13 Daily Tax Rep. (BNA) I-1 (Jan. 22, 2007) (paraphrasing remarks of then Internal Revenue Service (“IRS”) Commissioner Mark Everson on the first meeting of the Leeds Castle group). The commissioners of the member state tax administrations meet annually. See Australian Taxation Office, *supra* note 48.

that states and state-based organizations do not define the universe of relevant actors in international tax.⁵⁰ The shared eagerness of these IR scholars to expand the inquiry beyond state-based international organizations masks underlying theoretical and empirical disputes among IR theorists over the “real” role and power of international organizations. Certainly, the mere volume of these organizations does not prove their role and power relative to states and state-based organizations. However, their number and variety indicates their likely importance, and at the very least warrants evaluation. The international tax arena offers an array of organizations whose contributions must be assessed. These organizations include BIAC, the Center for Freedom and Prosperity (“CFP”),⁵¹ EATPL, IBFD, ICC, IFA, ITD, International Tax Planning Association (“ITPA”),⁵² Joint International Tax Shelter Information Centre (“JITSIC”),⁵³ Seven Country Working Group on Tax Havens,⁵⁴ Tax Executives Institute (“TEI”),⁵⁵ Taxpayers Association of Europe,⁵⁶ United States Council for International Business,⁵⁷ and World Taxpayers Associations.⁵⁸

Not surprisingly, these non-state-based organizations can be grouped according to several different themes. Some of the nonstate organizations might be best characterized as bodies seeking to promote learning, analysis, and research in taxation. Candidates for this label include IFA, EATLP, and IBFD. Despite their “common” missions, their membership is not uniform. IFA, for example, has a very broad, global membership of tax lawyers,

50. *See supra* note 34.

51. *See generally* CFP Mission Statement, <http://www.freedomandprosperity.org/Mission/mission.shtml> (last visited Apr. 3, 2010).

52. *See generally* A Brief History of the ITPA and Why You Should Join, <http://www.itpa.org/history.html> (last visited Apr. 3, 2010).

53. *See generally* IRS News Release IR-2004-61 (May 3, 2004).

54. *See generally* ERNST & YOUNG, TAX ADMINISTRATION GOES GLOBAL: COMPLEXITY, RISKS, OPPORTUNITIES 4 (2007), *reprinted in* 114 TAX NOTES 847 (2007).

55. *See generally* About TEI, <http://www.tei.org/topnav/> (last visited Apr. 3, 2010).

56. *See generally* Profile of the TAE, <http://english.taxpayers-europe.com/aboutus/profile.html> (last visited Apr. 3, 2010).

57. *See generally* USCIB at a Glance, <http://www.uscib.org/index.asp?documentid=2410> (last visited Apr. 3, 2010).

58. *See generally* World Taxpayers Associations Purpose, <http://www.worldtaxpayers.org/purpose.htm> (last visited Apr. 3, 2010).

scholars, and accountants.⁵⁹ In contrast, EATLP limits membership to tax professors in the EU, though associate status is available for certain other tax professors.⁶⁰ The IBFD is a nonprofit tax documentation and research organization overseen by a board of trustees comprised of approximately fifteen tax professionals and academics from around the world.⁶¹

Organizations structured around businesses and commercial goals are another subset of nonstate organizations. BIAC, for example, which was founded in 1962 as an independent organization, is “[o]fficially recognised . . . as being representative of the OECD business community.”⁶² BIAC’s members are multinational businesses from the OECD’s member countries.⁶³ Similarly, the ICC has thousands of multinational business members worldwide that use the ICC to influence “governments and intergovernmental organizations, whose decisions affect corporate finances and operations worldwide.”⁶⁴

Another category of organizations shares the business community’s concern about levels of taxation, but is more explicitly focused on advocating for low taxes and no income taxes. The World Taxpayers Associations, whose members are themselves local taxpayers organizations, is such a body.⁶⁵ Similarly, the ITPA, whose mission is to explore tax issues from the taxpayers’ perspective,⁶⁶ devotes its resources to disseminating cross-border tax planning advice to its tightly controlled membership.⁶⁷ The CFP, which is a U.S. tax-exempt

59. See What Is IFA?, *supra* note 22 (self-describing its membership as consisting of 12,000 members from over 100 countries).

60. See European Ass’n of Tax Law Professors [EATLP], *Articles of Association EATLP* arts. 5–7, available at http://www.eatlp.org/constitution_of_EATLP.html [hereinafter *EATLP Articles of Association*].

61. See IBFD Board of Trustees, <http://www.ibfd.org/portal/BoardofTrustees.htm> (last visited Apr. 3, 2010).

62. About BIAC, <http://www.biac.org/aboutus.htm> (last visited Apr. 3, 2010).

63. See BIAC Membership, <http://www.biac.org/members.htm> (last visited Apr. 3, 2010) (listing a variety of multinational business members).

64. Links to ICC Member Companies, <http://www.iccwbo.org/id19696/index.html> (last visited Apr. 3, 2010).

65. See World Taxpayers Associations: Member Associations, <http://www.worldtaxpayers.org/members.htm> (last visited Apr. 3, 2010).

66. See A Brief History of the ITPA and Why You Should Join, *supra* note 52. (“We examine our subject mostly from the point of view of the taxpayer; membership is limited to practitioners who act for or in the interests of taxpayers.”).

67. See *id.* (noting that “[t]he object of our Association is to disseminate and exchange information about international tax planning” but that membership may be

entity that was founded by a U.S. economist and a former Capitol Hill staffer,⁶⁸ challenges the OECD's efforts to curb certain types of tax competition as well as the Financial Action Task Force's ("FATF")⁶⁹ efforts to curb money laundering.⁷⁰ It instead encourages jurisdictions to keep taxes low and to resist FATF banking and financial controls.⁷¹

Finally, multinational businesses themselves fall within the category of nonstate international organizations. The case study in Part III.A.1 explores some avenues by which multinational enterprises exert influence; here, it suffices to note that these enterprises play important roles both as organizations themselves and as members of other organizations. While financial resources are not the sole measure of influence, one concrete way in which to capture this potential muscle is through comparisons of revenue and gross national product ("GNP"). A 2001 discussion observed that "[t]he 50 largest transnational industrial companies have annual sales revenue greater than the GNP of 132 members of the United Nations."⁷² Even if multinational businesses themselves can constitute international organizations, is it worthwhile to inquire about their "membership"? Regardless of whether membership is defined as representing (1) owners;

revoked or denied "without being required to disclose any reason"). Until August 2008, prospective members were required to aver that "My work is concerned with or includes the theory or practice of international tax planning or the study thereof *but is not concerned with and does not include in the normal course (whether or not as the employee of any government) levying taxes of any kind in any part of the world (Rule 4(1) of the Association)*. I understand that the Committee has the power to grant or refuse this application without being required to disclose any reason." Int'l Tax Planning Assoc., *ITPA Membership Application Form* (June 30, 2008) (emphasis added), available at <http://new.itpa.org/memform.html>.

68. See CF&P At-a-Glance, <http://freedomandprosperity.org/Glance/glance.shtml> (last visited Apr. 3, 2010).

69. The Group of Seven ("G7") countries created the Financial Action Task Force ("FATF") as an intergovernmental body in 1989 to address the threat that international money laundering posed to the global banking and financial systems. Under its current mandate, the FATF responds to threats from money laundering and terrorism financing. See About the Financial Action Task Force, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1,00.html (last visited Apr. 3, 2010).

70. See CF&P At-a-Glance, *supra* note 68. The source of funding for the Center for Freedom and Prosperity ("CFP") is unknown, although financial services firms (who stand to potentially benefit from the existence of tax havens) have reportedly been among its contributors. See Thomas F. Field, *Tax Competition in Europe and America*, 29 TAX NOTES INT'L 1235, 1242 (2003).

71. See CF&P At-a-Glance, *supra* note 68.

72. Willetts, *supra* note 18, at 360.

(2) owners and management; or (3) owners, management, and workers,⁷³ the membership, on balance, would be strongly attentive to producing the largest profit possible for that specific organization, which would then be divided among its constituents.⁷⁴

The preceding examination of international tax organizations' membership criteria reveals how groups can structure membership around shared geography, mission, or identity. It also foreshadows some of the observations based on variability in size and composition considered below in Part II.B.2.d.

b. Organizational Structure

Closely linked to the question of membership is the choice of organizational structure, which can range from informal and essentially "network-like" to highly formal. Not surprisingly, some of the larger state-based organizations exhibit a highly formal structure. For example, the U.N. operates under a charter that

73. Characterizing owners, management, and workers together as the "members" represented by the firm is one way of conceptualizing the firm as a collection of interests. One could also argue that membership of these organizations should reflect only the interests of their owners, or perhaps owners and managers. But including workers as members is valuable, since workers will generally prefer that their corporations have more disposable after-tax income. That said, there are various important fissures in the bonds between workers and the owners and managers, and these fissures may emerge in some international decision-making contexts. For example, a determination to relocate a portion of domestic jobs overseas may suit owners and managers, but not their employees.

74. Although modern visions of corporations and corporate responsibility may promote a broader vision of social responsibility, that is not the standard operating framework today for most multinational business decisions. See, e.g., Joseph William Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. 1031, 1034 (2008); Robert B. Reich, *The Case Against Corporate Social Responsibility* (Univ. of Cal., Berkeley, Goldman School Sch. of Public Pub. Pol'y Working Paper GSPP 08-003, 2008), available at <http://ssrn.com/abstract=1213129>.

As academics begin to focus more attention on multinational entities as international organizations, it will be interesting to explore how their decision-making reveals the "real" membership. Who is in mind when decisions are made? Current owners? Current workers? Some subset of workers? This question may become more revealing as countries demand that changes in business form be accompanied by real, on-the-ground consequences in order to trigger tax effects. Thus, for example, a decision to restructure a business and remove certain functions from a tax jurisdiction (with the expectation of lower source country tax in the new jurisdiction) could not be accomplished by paper only; it would also require real and meaningful changes (typically reductions) in worker functions and risks undertaken in the original country.

specifies its member states' rights and sets out the U.N. organs and procedures that will enable execution of the U.N.'s mission.⁷⁵ Currently there are six major organs: (1) the General Assembly; (2) the Security Council; (3) the Economic and Social Council; (4) the Trusteeship Council; (5) the International Court of Justice; and (6) the Secretariat.⁷⁶ In addition to these groups, there are fifteen agencies, and a host of subsidiary programmes and bodies.⁷⁷ Some of the programs are subsidiaries of the General Assembly, while others have special agreements with and report to one of the six bodies. The structure is highly complicated but also explained in great detail in the U.N. Charter.⁷⁸ When analyzing the U.N. as a player in international

75. See generally HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* (1950) (providing a detailed legal analysis of the U.N. Charter and organization).

76. U.N. Charter art. 7, para. 1.

77. See U.N. Structure and Organization, <http://www.un.org/en/aboutun/structure/index.shtml> (last visited Apr. 3, 2010) (listing the various subdivisions). For a graphical representation of the entities comprising the United Nations, see U.N. Dep't of Pub. Info., *The United Nations System: Principle Organs*, U.N.Doc.DPI/2470 (Dec. 2007), available at http://www.un.org/aboutun/chart_en.pdf [hereinafter *U.N. Organizational Chart*].

78. See U.N. Charter arts. 9–101; see also *U.N. Organizational Chart*, *supra* note 77. Note that formality is not inherently linked with state-based membership. Many multinational organizations are very formally organized. The International Fiscal Association (“IFA”), for instance, is made up of Central IFA, which is composed of an Executive Committee, Permanent Scientific Committee, and General Council, Int'l Fiscal Assoc. [IFA], *Articles of Association* arts. 5, 13, http://www.ifa.nl/organisation/central_ifa/articles_of_association/ (last visited Apr. 3, 2010) [hereinafter *IFA Articles of Association*]; see also Central IFA, http://www.ifa.nl/organisation/central_ifa/pages (last visited Apr. 3, 2010) (supplying information on each of the three Central IFA committees), and sixty branch offices worldwide, *IFA Articles of Association* art. 7; see also Branches—IFA, <http://www.ifa.nl/branches/pages/default.aspx> (last visited Apr. 3, 2010) (displaying branch offices graphically and in list form). Central IFA is charged through its several bodies with the tasks of day-to-day management of the association (Executive Committee), *IFA Articles of Association*, *supra*, art. 12.1, planning and implementing scientific work (Permanent Scientific Committee), *id.* art. 13.1, and long-term/strategic management (General Council), *id.* art. 11.1. Each of Central IFA's three bodies has its own leadership structure, beginning with a General Council whose members are appointed by the General Assembly (composed of all IFA members) on the basis of nominations by the branch offices. See *id.* art. 11.6. The General Council then appoints the members of the Executive Committee and Permanent Scientific Committee, and selected leadership therein. See *id.* art. 11.4. The President is appointed by the General Assembly for a two-year term. See *id.* arts. 10.6, 15.1. IFA is dedicated to the study of international and comparative law in the areas of finance and taxation. See *What Is IFA?*, *supra* note 22. It pursues its aims through annual meetings on topics chosen by the Permanent Scientific Committee and held at one of the branches. See *id.* IFA also puts forth scientific research and publications to support its views and allows

relations, it is important to specify where in its organizational structure the power, influence, decision making, and budgeting for the particular issue rests. For example, the Security Council has fifteen members, five of whom are permanent members, and ten of whom are elected by the General Assembly for two-year terms.⁷⁹ Issues impacting security questions cannot be envisioned as a vote among the majority of U.N. members, but rather as questions on which a few nations have notable influence.⁸⁰

In contrast to the U.N. and other formally structured organizations (such as, the OECD or multinational enterprises), some organizations exhibit much less formality. For example, the Seven Country Working Group on Tax Havens, which consists of Australia, Canada, France, Germany, Japan, the United Kingdom, and the United States, serves as a forum in which member states can exchange and develop strategies for combating tax evasion and tax competition.⁸¹ In this forum, “[m]embers bilaterally exchange information at a [taxpayer and tax shelter] promoter level, share research and information on transactions encountered and strategies adopted, and conduct joint training sessions.”⁸² Although the details regarding the precise

members access to its databank. *See* IFA Membership, <http://www.ifa.nl/organisation/membership/> (last visited Apr. 3, 2010).

79. U.N. Charter art. 23, para. 1–2.

80. Resolutions brought before the Security Council will fail if any permanent member casts a negative vote. *See* U.N. Charter art. 27, para. 3. But even possession of veto power is not absolute, because any permanent member may choose to withhold their veto power for political reasons. *See* Thomas Buha, *Security Council*, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 1147, 1156–57 (Rudiger Wolfrum ed., 1995) (describing the permanent member veto power as a form of “political protectionalism”); *see also* David M. Malone, *Security Council*, in THE OXFORD HANDBOOK OF THE UNITED NATIONS 117, 120 (Thomas G. Weiss & Sam Daws eds., 2007) (remarking on the historic stalemate has occurred as a result of the veto power).

81. *See* ERNST & YOUNG, *supra* note 54, at 4. Common problems tackled by the members include “e-commerce, the internet and credit or debit cards in abusive tax haven arrangements, intangibles, offshore banking and brokerage, [and promoters of tax haven arrangements].” Australian Taxation Office, *supra* note 48.

82. ERNST & YOUNG, *supra* note 54, at 4. The Internal Revenue Service (“IRS”), for example, explicitly references its work with international bodies, including the Seven Country Working Group. IRS, LARGE AND MIDSIZE BUSINESS SUBGROUP REPORT, 8 TaxCore (BNA) No. 224 (Nov. 20, 2008) (“Currently, . . . representatives engage with many multi-national collaborative tax administration groups in order to exchange ideas, and to expand their understanding of the various innovative programs. Examples of such groups include: Organization for Economic Cooperation and Development’s (OECD) – Forum on Tax Administration’s Large Business Task Group; Seven Country

organizational structure of the Seven Country Working Group are not published, the available information paints a picture of an informal, nonhierarchical arrangement.⁸³ The nature of the group's goals can be characterized as advisory, informative, and enforcement-oriented at most. JITSIC, another small, state-based organization, was established by a consortium of countries in 2004 under a multilateral agreement to assist in responding to tax avoidance and tax shelters.⁸⁴ The relatively brief four-page memorandum of understanding identifies "information exchange" as the core function of the group in order to share best practices and enhance enforcement efforts against abusive tax schemes.⁸⁵ In order to achieve these ambitions, meetings are to be held "periodically."⁸⁶ The document also specifies that an executive steering group will coordinate and oversee JITSIC's work.⁸⁷ Although it is possible to imagine a more detailed and formal organizational document accompanying the mission of these organizations, it is not clear what such a structure would add.⁸⁸ Moreover, it is possible that some of the organization's

Tax Haven Working Group (7C); the Tax Administration for Large Companies (TALC) research group; and the Joint International Tax Shelter Information Centre (JITSIC).").

83. See, e.g., ERNST & YOUNG, *supra* note 54, at 4 (qualifying that "it is difficult to know exactly what information governments are exchanging and what actions have been taken as a direct consequence"); Peter Menyasz, *Canada Volunteers for Global Forum's Tax Information Exchange Peer Review*, 5 Daily Tax Rep. (BNA) I-2 (Jan. 11, 2001) (reporting on a series of "high-level working sessions" with tax administration counterparts from the various working group states); David D. Stewart, *Canadian UBS Clients Disclose Millions in Unreported Income*, 57 TAX NOTES INT'L 128, 128 (2008) (quoting Canadian Revenue Minister Jean-Pierre Blackburn as describing the group as a series of impromptu meetings where information is exchanged between tax officials); Australian Taxation Office, *supra* note 49 (indicating only that members states "bilaterally exchange information" and "issue international tax alerts").

84. See Memorandum of Understanding for the Creation of a Joint International Tax Shelter Information Centre, Apr. 23, 2004, 2004 WL 1080239. A copy of the agreement is electronically available on the IRS website at <http://www.irs.gov/pub/irs-utl/jitsic-finalmou.pdf> (last visited Apr. 3, 2010). The signatories to the agreement are Australia, Canada, the United Kingdom, and the United States. See Memorandum of Understanding for the Creation of a Joint International Tax Shelter Information Centre, *supra*.

85. See Memorandum of Understanding for the Creation of a Joint International Tax Shelter Information Centre, *supra* note 84. For more information on the intended work of JITSIC, see Press Release, *supra* note 53.

86. See Memorandum of Understanding for the Creation of a Joint International Tax Shelter Information Centre, *supra* note 84.

87. See *id.*

88. Incidentally, the United States is party to several income tax treaties with each of the countries that are members of JITSIC and the Seven Country Working Group,

flexibility could be lost if these interactions were more formally constituted and potentially subject to other approval processes.⁸⁹ On the other hand, this degree of informality may limit the group's ability to advocate a unified position on particular questions or to lobby other organizations in furtherance of that agenda. Case study examination of how such an informally constituted group generates influence beyond its membership should provide some insight.

c. Agenda Setting

Perhaps the most crucial element of control over an organization is agenda setting. Regardless of how much power, influence, control, or persuasion an international organization possesses, the true impact of these forces is only experienced if and when the organization takes a particular position on an issue. Thus, the ability to affect the agenda of an international organization is critical, and the relevant input and impact may come from sources both internal and external to the organization. In fact, one can envision agenda setting as a

which could provide a formal basis for implementing their cooperation. *See, e.g.*, Convention Between the Government of the United States of America and the Government of Japan For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, U.S.-Japan, Nov. 6, 2003, S. TREATY DOC. NO. 108-14; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.S.-U.K., July 24, 2001, S. TREATY DOC. NO. 107-19 (2002); Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Fr., Aug. 31, 1994, S. TREATY DOC. NO. 103-32; Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, U.S.-F.R.G., Aug. 29, 1989, S. TREATY DOC. NO. 101-10; Convention Between the United States of America and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austl., Aug. 6, 1982, 35 U.S.T. 1999; Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Sept. 26, 1980, T.I.A.S. No. 11,087.

89. *See, e.g.*, Arthur Cockfield, A Law and Technology Perspective on Enhanced Cross-Border Tax Information Exchange 20 (Nov. 28, 2007) (unpublished manuscript on file with the author and available at http://taxprof.typepad.com/taxprof_blog/files/cockfield_toronto.pdf) (observing that "Canada and other countries are increasingly turning to informal multilateral agreements sponsored by groups such as the Joint International Tax Shelter Information Centre, the Pacific Association of Tax Administrators and the Seven Country Working Group on Tax Havens to share tax and financial information without these agreements being vetted by legislative bodies").

cascading and interconnected process whereby some players, including international organizations, determine a desirable agenda and then seek to encourage others to pursue the identified path. Agenda setting may be determined through either the formal structure of an organization (members and sometimes nonmembers may be able to petition the organization to address a particular question) or informal mechanisms (members and nonmembers have the opportunity to influence the agenda setting body).

TEI is one of the international tax organizations that consciously articulates the importance of participating in agenda setting. Founded in 1944, its membership includes “accountants, lawyers, and other corporate and business employees who are responsible for the tax affairs of their employers in an executive, administrative, or managerial capacity.”⁹⁰ TEI’s established mission is to “enhance and improve the tax system and to serve its members, their employers, and society . . . by effectively advocating its members’ views, and by promoting competence and professionalism in both the private and government sectors.”⁹¹ The advocacy section of TEI’s website outlines ten ways to become involved in the organization’s advocacy activities including: (1) joining a TEI committee, (2) volunteering to work on a specific project, (3) posting an issue on the specified web page, (4) faxing an issue directly to TEI staff, and (5) calling or emailing TEI’s committee chairs or staff.⁹² The entire sixteen page TEI Membership and Advocacy Guide places significant emphasis on the advocacy role of the organization.⁹³ Thus, TEI is signaling the importance of its agenda and its members’ participation in creating and executing that agenda. The explicit invitation to participate in setting the agenda does not guarantee that members perceive the process as one that truly fosters an

90. TEI Benefits, <http://www.tei.org/membership/pages/benefits.aspx> (last visited Apr. 3, 2010). Additional membership eligibility requirements apply. Members must have at least five years of corporate tax-related experience. *See* TEI Eligibility, <http://www.tei.org/membership/pages/eligibility.aspx> (last visited Apr. 3, 2010). Public tax practitioners or other consultants are ineligible for membership. *See id.*

91. About TEI, *available at* http://www.tei.org/topnav/pages/about_tei.aspx (last visited Apr. 3, 2010).

92. Tax Executives Institute [TEI], *TEI’s Membership and Advocacy Guide* (n.d.), *available at* http://www.tei.org/membership/documents/tei_memberbro_web.pdf (last visited Apr. 21, 2010).

93. *Id.*

open agenda. However, TEI's public and straightforward encouragement of active and direct member participation would certainly raise the expectations of members and generate negative feedback to the organization if such opportunities for agenda setting proved illusory.

The U.N.'s tax policy body, the Committee of Experts on International Cooperation in Tax Matters, also exemplifies a more formal process. This body was established by resolution of the Economic and Social Council ("ECOSOC"), one of the U.N.'s six major organs.⁹⁴ The Committee includes twenty-five tax administrators coming from each of ten developed countries and fifteen developing countries.⁹⁵ These experts are nominated by their governments, but act "in their expert capacity."⁹⁶ The Secretary-General appoints the twenty-five members for four-year terms, taking into account the organization's needs for tax policy, tax administration, geographic distribution, and representation of different types of tax systems.⁹⁷ The Committee now meets for five days annually.⁹⁸ According to its ECOSOC mandate, the Committee is responsible for maintaining and updating the U.N. Model Treaty, "provid[ing] a framework for dialogue" for national tax administrations, and making recommendations to assist developing economies.⁹⁹ Thus, the basic contours of the Committee's agenda are established by resolution.

The Committee's report from its 2008 session¹⁰⁰ provides additional insight into the operational dimensions of its agenda

94. See ECOSOC Res. 2004/69, U.N. Doc. E/RES/2004/69 (Nov. 11, 2004). This committee was originally created as the Ad Hoc Group of Experts on Tax Treaties Between Developed and Developing Countries by resolution in 1967. See ECOSOC Res. 1273 (XLII), U.N. Doc. E/4429, at 5 (Aug. 4, 1967). That body was reconstituted as the Ad Hoc Group of Experts on International Cooperation in Tax Matters by subsequent resolution in 1980. See ECOSOC Res. 1980/13, U.N. Doc. E/RES/1980/13 (Apr. 28, 1980).

95. See ECOSOC Res. 2004/69, *supra* note 94, para. (b) (outlining structure of the committee); see also The Secretary-General, *Appointment of 25 Members of the Committee of Experts on International Cooperation in Tax Matters*, U.N. Doc. E/2009/9/Add.17 (Apr. 22, 2009) (appointing new membership and listing country of origin).

96. ECOSOC Res. 2004/69, *supra* note 94, para. (b).

97. See *id.*

98. See Mandate of the Committee of Experts on International Cooperation in Tax Matters, <http://www.un.org/esa/ffd/tax/mandate.htm> (last visited Apr. 3, 2010).

99. ECOSOC Res. 2004/69, *supra* note 94, para. (d) (ii).

100. See ECOSOC, *supra* note 43.

process. As an initial matter, the proposed agenda was adopted by consensus,¹⁰¹ but it was the product of interactions prior to the 2008 session.¹⁰² Subcommittees or working groups researched and analyzed many of these items, and then presented their detailed work to the Committee for consideration.¹⁰³ Following the presentations at the 2008 session, the subcommittees and working groups were given further directions and mandates.¹⁰⁴ The first topic, which emerged from preparations for the upcoming Doha Conference on financing for development, addressed whether the Expert Committee should be transformed from its expert, nongovernmental structure to an intergovernmental commission.¹⁰⁵ Reconfiguring the body to an intergovernmental commission would enable its work to “carry greater weight” as a result of its members’ political influence.¹⁰⁶ Given the increased attention to both the global financial system and the need for international tax cooperation, the U.N. was considering “the future of the Committee and its possibilities as the only truly global forum in this area.”¹⁰⁷ Some experts on the Committee expressed reservations and viewed additional information as essential to passing on the composition and operation of the proposal.¹⁰⁸ They also voiced apprehension that the proposed shift in the body would undesirably politicize issues and reduce success on more technical matters.¹⁰⁹ It was recognized, however, that the decision to ultimately implement this change would rest in the hands of U.N. member states, not

101. *See id.* ¶ 8.

102. *See, e.g.*, ECOSOC, Comm. of Experts on Int’l Cooperation on Tax Matters, *Report on the Third Session (29 October–2 November 2007)*, ¶ 78, U.N. Doc. E/2007/45, E/C.18/2007/19 (Jan. 15, 2008) (adopting a draft agenda for the Committee’s next session).

103. *See* ECOSOC, *supra* note 43, ¶¶ 21, 28, 40, 52, 56, 61, 70, 76.

104. *Id.* ¶¶ 25, 31, 59, 61, 75. *But see id.* ¶ 51, 78 (thanking a subcommittee for successfully carrying out the objective of its mandate). For an example of a report prepared by a subcommittee for consideration during the 2008 session, *see*, for example, ECOSOC, Comm. of Experts on Int’l Cooperation on Tax Matters, Subcomm. on Improper Use of Treaties, *Proposed Amendments*, U.N. Doc. E/C.18/2008/CRP.2 (Oct. 17, 2008)

105. *See* ECOSOC, *supra* note 43, ¶ 11.

106. *See id.*

107. *See id.*

108. *See id.* ¶ 17.

109. *See id.*

the Committee.¹¹⁰ The Committee then proceeded to discuss the other items on the agenda in turn.¹¹¹ As for attendance, 108 observers attended in addition to the twenty-two (of twenty-five) Committee members that participated.¹¹² Forty-eight came from U.N. countries without an expert on the Committee, one from the Isle of Man, and one from the Holy See.¹¹³ Additional observers came from five intergovernmental organizations.¹¹⁴ Lastly, seventeen persons attended the session in their individual capacity.¹¹⁵

This brief overview of the U.N. tax policy committee does not provide exhaustive guidance on the question of agenda setting for the U.N. It does, however, begin to describe the basic formal framework and the informal opportunities for agenda setting. On the formal side, the Committee receives its mandates, develops responsibilities and tasks for its subcommittees, considers work reported back from those subcommittees, and then ultimately presents its views to the ECOSOC thereby moving specific tax items onto their agenda.¹¹⁶ On the informal side, the acknowledged presence of observers indicates the existence of a discernable mechanism for nonmembers, who by definition cannot affect outcome through a vote, to offer their views. Moreover, these nonmembers have the potential to interact with each other and coordinate their comments at the very moment when members are beginning to make decisions.

One caution must be noted: the mere presence of nonmembers does not guarantee their ability to influence debate and outcome, even when their presence is regular or institutionalized. It is certainly possible that this type of openness may constitute nothing more than window dressing. That said, it seems much more plausible to anticipate that a decision to

110. *See id.* ¶ 15.

111. *See* ¶¶ 21–78 (considering items such as revising the model treaty commentaries, defining “permanent establishment,” exchanging information, and addressing dispute resolution).

112. *Id.* at ¶ 2.

113. *Id.* at ¶ 3.

114. *See id.* at ¶¶ 4–5 (including the European Commission, the International Bureau of Fiscal Documentation (“IBFD”), International Chamber of Commerce (“ICC”), OECD, and the Tax Justice Network).

115. *Id.* at ¶ 5.

116. *See* Mandate of the Committee of Experts on International Cooperation in Tax Matters, *supra* note 98.

permit observers itself indicates some expectation for contribution. Furthermore, even if some U.N. members accepted observers' presence on the assumption that their involvement would *only* be cosmetic, the observers' proximity to decision making and their opportunity to connect with other observers could make their presence more substantive.

An interesting question for empirical investigation is where and how observers realistically contribute. The admission of outside observers could range from silent presence in the back of the room, to the opportunity to debate and present arguments on par with members, stopping just short of the voting process. Does access enable these nonmembers to participate in *shaping* action on issues, or even *setting* the organization's agenda? Of course, even this dichotomy may prove too stylized. Agenda setting itself is likely to be the product of multiple avenues of influence and communication with organizational leadership. In some cases, new issues may be identified as obvious and critical topics for the organization. In others, new agenda issues may emerge through the process of responding to current agenda items. It is at least plausible to imagine that parties permitted to actively engage in discussion could shape the future agenda by raising problems and questions in the course of debate.

d. Output

How does an organization commemorate and capture its decision-making and planning process? How does it envision its end product? The answers to these questions vary across international organizations. For example, multinational businesses and international organizations attentive to member profit (such as the ICC) might pursue any number of output strategies, including: (1) conducting or funding studies that support a particular conclusion or approach; (2) developing talking points and position statements for lobbying states and state-based international organizations; and (3) creating informal or formal alliances with other organizations that share a similar disposition on the particular issue.

State-based organizations with targeted agendas (such as PATA) may find that their ultimate goal is to develop administrative practices for their members on identified issues; this may or may not require producing guidelines for their

members or for taxpayers.¹¹⁷ In some cases, the nature of the work may not lend itself to publication outside of the group. Consider, for example, JITSIC, which provides limited details on its current targets of inquiry, and on how it obtains and disseminates information.¹¹⁸ JITSIC does, however, publish information on new tax shelters and abusive transactions once they have been formally targeted.¹¹⁹

Larger state-based international organizations with broad agendas and membership (such as the U.N. or OECD) may find that formalizing agreement on issues by way of guidelines, model rules, or model treaties is vital to ensuring that the value of any agreement process is preserved and maximized. Of course, these types of organizations perform a wide range of functions that do not explicitly require support nor affirmation of the general membership, including conducting studies and issuing member reviews.¹²⁰ Moreover, as any organization expands or shifts its focus, new forms of output can emerge. The trajectory of the OECD's interaction with nonmembers over the past two decades reflects this potential for output shift. The OECD's growing number of tax programs for nonmembers, often conducted on a regional basis, corresponds to its increasing interest in cultivating and expanding connections with nonmembers.¹²¹ For example,

117. See, e.g., Pacific Association of Tax Administrators, MAP Operation Guidance for Member Countries of the Pacific Association of Tax Administrators (PATA), http://www.nta.go.jp/foreign_language/pata2004/02.htm (last visited Apr. 3, 2010) (prescribing mutual agreement procedures for transfer pricing disputes involving PATA member nations).

118. See, e.g., *TEI-LSMB Liaison Meeting*, TAX EXECUTIVE, Feb. 12, 2009, at 3 (reporting on a new initiative "to develop a multi-year proposal to expand JITSIC's traditional role of fighting tax shelters," but questioning, "what are the areas of expanded inquiry under considerations?").

119. See, e.g., Lisa M. Nadal, *JITSIC Puts U.S. Antiabuse Effort on Fast Track*, Former Director Says, 52 TAX NOTES INT'L 294, 295 (2008).

120. See What We Do and How, <http://www.oecd.org/> (follow "About OECD" hyperlink; then follow "What We Do and How" hyperlink) (last visited Apr. 3, 2010) (describing the OECD's responsibilities, which include "data collection" and "analysis" at the most basic levels); see also U.N. Charter art. 13 (mentioning its obligation to perform studies); G.A. Res. 60/251, ¶ 5(3), U.N. Doc. A/RES/60/251 (Apr. 3, 2006) (providing that member states are subject to review for adherence to human rights obligations).

121. See OECD, Members and Partners, *supra* note 42 (describing OECD's commitment to global relations with non-members, generally); see also *Participating in the Global Relations Tax Programme 1* (n.d.), available at <http://www.oecd.org/dataoecd/25/62/44459895.pdf> (advertising that "[c]loser engagement with non-OECD economies is essential" for purposes of tax policy).

in June 2000, the OECD held its first significant symposium on harmful tax competition that included representatives from twenty-nine nonmember countries.¹²² In commenting on the event, OECD Deputy Secretary-General Seiichi Kondo observed, “This is historic. The OECD was once criticized as a rich man’s club, but this cooperation shows that it is not so.”¹²³ In December 2006, the OECD announced that it was organizing an “informal consultative group of government and private sector representatives, under the auspices of the Centre for Tax Policy and Administration” to address questions regarding cross-border portfolio investments through collective investment vehicles.¹²⁴ The OECD indicated that the group would seek input from both member and nonmember countries, and anticipated “securing nonmember representation.”¹²⁵ The group meets periodically and prepares reports for the Centre for Tax Policy. Its 2009 report included among the group members two representatives from China, three from the BIAC, and twenty-five from the private sector.¹²⁶

Organizations oriented toward developing and studying tax issues (such as IFA¹²⁷ and the EATLP) often participate in

122. See OECD, *The OECD’s Project on Harmful Tax Practices: The 2001 Progress Report* (2001), available at <http://www.oecd.org/dataoecd/60/5/2664450.pdf>.

123. Robert Goulder, *OECD Tax Symposium Looks to Outside Governments for New Era of International Cooperation*, 21 *TAX NOTES INT’L* 91, 91 (2000) (quoting OECD Deputy Secretary-General Seiichi Kondo).

124. Kevin A. Bell, *OECD Officials Discuss Tax Treaty Projects*, 52 *TAX NOTES INT’L* 32, 33 (2007).

125. *Id.*

126. OECD, *REPORT OF THE INFORMAL CONSULTATIVE GROUP ON THE TAXATION OF COLLECTIVE INVESTMENT VEHICLES AND PROCEDURES FOR TAX RELIEF FOR CROSS-BORDER INVESTORS ON POSSIBLE IMPROVEMENTS TO PROCEDURES FOR TAX RELIEF FOR CROSS-BORDER INVESTORS* (2009), available at <http://www.oecd.org/dataoecd/34/26/41974553.pdf>.

127. One could argue that the practicing tax lawyers and accountants among the IFA members are more akin to the ICC because they approach international tax issues from their client base’s perspective, and hence function as a proxy for their clients’ views. Although there is certainly some validity to this observation, it overstates the similarity between a multinational business itself (or a trade- or business-based association, such as the ICC) and bodies such as the IFA. First, lawyers and accountants have multiple clients whose interests may not all coincide. Second, they have professional identities distinct from their agency role in representing clients and often participate in teaching and writing beyond their clients’ basic goals. Third, practicing lawyers and accountants are not IFA’s exclusive members, as academics also participate. IFA’s Permanent Scientific Committee, which is charged with “planning and implementation of the scientific work of the Association,” has an academic vice chair,

research and report writing projects, and sponsor regular conferences. The expectation is that the organization can help examine issues that will be foundational to policy decision-making. IFA identifies its objectives as “the study and advancement of international and comparative law in regard to public finance, specifically international and comparative fiscal law and the financial and economic aspects of taxation.”¹²⁸ IFA achieves these goals through its annual IFA congress, during which major IFA research, other secondary topics, and corresponding “scientific” publications are presented and discussed. In preparation for each annual congress, IFA identifies two important topics that will be the foundation of the two signature reports for the year.¹²⁹ A general reporter is selected for each topic, and then national reporters are also chosen. Together, the general and national reporters devise an analytical framework for the topic, and each national reporter prepares a report from the perspective of the national reporter’s own country’s domestic tax law. The general reporter then prepares an overview report based on the work of the national reporters. IFA publishes a volume containing the general and national reports for both topics.¹³⁰

Research also dominates the EATLP’s agenda. According to EATLP’s constitution, its objectives are “to contribute to the development of European tax law and to the development of academic teaching and research programmes on European, international, domestic and comparative taxation.”¹³¹ To this end, the EATLP

organiz[es] annual congresses and other meetings; carr[ies] out research projects; assist[s] members in developing undergraduate and post graduate tax curricula at Universities throughout Europe; present[s] the opinion of

and ten of the twenty-two members of the committee are academics. International Fiscal Association [IFA], Permanent Scientific Committee, http://www.ifa.nl/organisation/central_ifa/permanent_scientific_committee/ (last visited Apr. 3, 2010).

128. IFA, What is IFA?, *supra* note 22.

129. See IFA Annual Congress, http://www.ifa.nl/activities/annual_congresses/ (last visited Apr. 3, 2010); IFA, What is IFA?, *supra* note 22 (“Although the operations of the IFA are essentially scientific in character, the subjects selected take account of current fiscal developments and changes in local legislation.”).

130. See Cashiers de Droit Fiscal, <http://www.ifa.nl/publications/cahiers/> (last visited Apr. 3, 2010) (listing the publications from each congress dating back to 1939).

131. *EATLP Articles of Association*, *supra* note 60, art. 2.1.

the Association to institutions of the European Union and parliaments, governments and tax authorities of European countries; support[s] exchange programmes for professors and students of tax law; and all other means conducive to its objects.¹³²

If IFA and EATLP successfully create or enhance shared language, policy expectations, and analytical frameworks they can affect the dialogue, decision making, and agreement process. The precise nature of this impact partially depends on whether the organization's influence is best characterized as a shared educational platform, the influence of experts, or network effects; in some cases, the organization's influence may be captured by all three concepts.¹³³

3. Summary

Evaluating these four major components that underlie international organizations—membership, organizational structure, agenda setting, and output—should form the basis of any inquiry into the development of international tax policy. As demonstrated above, these factors significantly impact an organization's actions. And not only is each factor individually influential, but certain combinations, such as organizational structure and agenda setting, can generate predictable outcomes. For example, consider the treatment of tax policy in the EU. Because matters of direct taxation in the EU require a unanimous vote of the EU member states,¹³⁴ actors able to influence the EU agenda may “self censor” and withhold agenda items unlikely to be successfully adopted (e.g., rate harmonization) because proposing these agenda items would waste time and political capital.¹³⁵ Ultimately, the organizational

132. *Id.* art. 3.

133. *See, e.g.*, Peter M. Haas, *Introduction to KNOWLEDGE, POWER, AND INTERNATIONAL POLICY* 1, 3 (Peter M. Haas ed., 1992).

134. Although the EU increasingly relies on qualified majority voting (“QMV”) for more issues, many questions still require a unanimous vote, including foreign policy, defense, EU membership applications, election rules, and taxation. *See, e.g.*, WILLIAM NICOLL & TREVOR C. SALMON, *UNDERSTANDING THE EUROPEAN UNION* 555–56 (2001); The Council of the European Union, <http://europa.eu/institutions/inst/council/> (last visited Apr. 3, 2010) (noting that unanimous voting is retained for “sensitive areas”).

135. It is certainly possible that some actors may have a different definition of success, perhaps because they adopt a longer time horizon, view a matter as leverage on another issue, or use the EU stage to frame the issue for another forum. That said,

structure, by requiring unanimous voting, constrains the issues that appear on the EU agenda.

C. *A Dynamic Understanding of International Relations in Tax Policy*

1. Sophisticated Scrutiny

Despite the importance of the four factors in defining the contours of an international organization, they only begin to capture how an organization participates in the policy formation process. Different actors, including states and international organizations, deal with each other in complex ways, and part of the resulting analytical challenge is to evaluate and understand those relationships. IR literature's study of regime formation targets this inquiry by trying to determine how and when countries will reach agreement and how they cooperate.¹³⁶ A brief examination of this literature helps to frame the analysis of the roles played by international organizations.

Although the bulk of the regime theory literature adopts a statist orientation, a growing body of work contemplates international regimes as comprising nonstate players, such as members of a given industry.¹³⁷ Most international regime theories derive from IR theory's neoliberal tradition, in which states are viewed as "instrumentally rational actors" that pursue

participants seem to exhibit a continued belief that a break with unanimity, which some would consider the first step on the path to harmonization, on tax issues is highly unlikely. See, e.g., JOHN PETERSON & ELIZABETH BROMBERG, *DECISION-MAKING IN THE EUROPEAN UNION* 63 (1999) (quoting an EU ambassador, "[T]ax harmonization is not going to take place . . . [I]t all comes down to QMV versus unanimity. It is all that matters."); Eileen O'Grady, *United Kingdom Holds Its Ground in Opposing EU Tax Harmony*, 31 *TAX NOTES INT'L* 1121, 1122 (2003) (quoting a U.K. government spokesman in Brussels: "We have been very clear [that the U.K. wants the EU to pass] nothing on tax. Tax is the province of the national states . . . Anything to do with tax is about sovereignty, and the Treasury must have control over how and what is collected. The Commission talks about moving to majority voting only on issues of tax administration in Europe but that is a slippery slope.").

136. Peter Mayer, Volker Rittberger & Michael Zurn, *Regime Theory: State of the Art and Perspectives*, in *REGIME THEORY AND INTERNATIONAL RELATIONS*, *supra* note 14, at 391, 392 (explaining that regime theory focuses on the "possibility, conditions, and consequences of international governance").

137. See, e.g., Virginia Haufler, *Crossing the Boundary Between Public and Private: International Regimes and Non-State Actors*, in *REGIME THEORY AND INTERNATIONAL RELATIONS*, *supra* note 14, at 95, 101-09; Ring, *supra* note 14, at 93-94 n.44.

self-interest and reciprocal benefits.¹³⁸ Under this view, the mission for states is to overcome market failure (that is, barriers to optimal agreements). International regimes become an important tool for combating this market failure. In studying regime formation, this literature targets three core elements: (1) the type of bargaining game involved,¹³⁹ (2) the issue at stake,¹⁴⁰ and (3) the background factors.¹⁴¹

Regime theory work coming from neorealism, the other dominant tradition, has generated a response to the neoliberals. This thread of neorealism “recognize[s] that regimes can and will be formed in the absence of a hegemon but contend[s] that power remains at the core of why a particular regime result is reached.”¹⁴² Specifically, these neorealists contend that where the “game” in question has more than one Pareto optimal outcome, power becomes decisive in the choice among outcomes. Although the neorealists do not argue that the neoliberal approach *ignores* power, they do believe neoliberal accounts give inadequate weight to both power and distributional aspects of their market failure story. Neorealists highlight several key ways in which power shapes the game: (1) deciding who can play; (2) setting the rules, including who moves first; and (3) using power to change the “payoff matrix” by, for example, linking the game

138. Andrew Hurrell, *International Society and the Study of Regimes*, in REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 14, at 49, 56; *see also* Ring, *supra* note 14, 104–05.

139. A number of different “games” based on game theory models (e.g., coordination games, dilemma games) could be in play. *See* Ring, *supra* note 14, at 105; *see also* ARTHUR STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS 27–38 (1990).

140. Different types of issues involve securities, economics, and government operation.

141. A wide range of “background” factors can impact the likelihood of “regime” formation, and the regime’s content: frequency of interaction among the parties, number of relevant actors, distribution of resources germane to the issue, presence of an “obvious” solution, and strong individual leadership. *See* ANDREAS HASENCLEVER ET AL., THEORIES OF INTERNATIONAL REGIMES 54–55, 76 (1997); Oran R. Young & Gail Osherenko, *Testing Theories of Regime*, in REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 14, at 224, 231 (identifying “individual leadership” as a necessary condition for regime change and “salient solutions” as an important condition).

142. Ring, *supra* note 14, at 100; *see also* Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 14, at 95, 140 (“Regime creation and maintenance are a function of the distribution of power and interests among states[.]”).

with other unrelated issues so that only one outcome is Pareto efficient and that result is favored by the powerful party.¹⁴³

Although neorealism and neoliberalism generally engage each other in debate, cognitivism,¹⁴⁴ another distinct strand in the IR literature, challenges both. Cognitivists argue that both the neorealist and neoliberal traditions have failed to recognize the importance of perception, knowledge, and ideology in international relations.¹⁴⁵ They contend that states participate in regime formation because they *believe* they have problems meriting such action: “the demand for regimes in international relations depends on actors’ perceptions of international problems, which are partially produced by their causal and normative beliefs.”¹⁴⁶ The important question, therefore, is what is the source of the states’ beliefs and views about the world and events?¹⁴⁷ In answering this question, the cognitivists¹⁴⁸ proceed from certain baseline assumptions: (1) states’ interests, which drive their rational decision making, are not a given¹⁴⁹ and instead derive from their vision of the world; and (2) states frequently turn to experts and scientists for advice as the policy questions under consideration become more complex and it is no longer apparent which position would further their interests.¹⁵⁰

Who are these experts (or “epistemic” communities),¹⁵¹ how do they function, and how might they exert influence on

143. Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POL.* 336, 340 (1991); *see also* Ring, *supra* note 14, at 101.

144. Cognitivism itself exhibits both a “strong” and a “weak” version, with only the latter engaging with the regime theory project as described in the text above. The “strong” expression of cognitivism dismisses the underlying assumption of both neorealism and neoliberalism that states are goal maximizers. *See* HASENCLEVER ET AL., *supra* note 141, at 155; *see also* Ring, *supra* note 14, at 110–11. Strong cognitivists envision states as “role players” whose decisions are shaped by the specific roles that they take on. *See* HASENCLEVER ET AL., *supra* note 141, at 155; *see also* Ring, *supra* note 14, at 111 n.156.

145. *See* HASENCLEVER ET AL., *supra* note 141, at 137.

146. *Id.*

147. *Id.*

148. More precisely, the “weak” cognitivists. *See supra* note 144.

149. *See* HASENCLEVER ET AL., *supra* note 141, at 136 (positing that it is not always clear what “rule” will be in a state’s best interests even though it is presumed that a state seeks to do what is “best” for itself).

150. *See* Ring, *supra* note 14, at 111.

151. An epistemic community has been defined as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim

decision making? What role do international tax organizations play in the collection and dissemination of expert knowledge? Given the highly technical nature of many tax questions, the degree to which one can identify likely networks and groups of tax experts working in concert, the stories of international tax organizations and tax policy are likely intertwined with the story of knowledge and expertise.

The layers of nuance and complexity added by cognitivists seems appropriate for international tax policy analysis, but what of the tension between neorealism and neoliberalism? Cognitivist theory does not dictate a choice; it simply refines the picture. Is it necessary, then, to choose between the two basic strands of IR theory—neorealism and neoliberalism—in order to study international tax policy? The sensible answer is “no,” because these theories should not be viewed as mutually exclusive options, but rather as possible descriptions of dynamics in certain circumstances. If, for example, a particular problem solved by international cooperation involves inadequate information (that is, market failure), then neoliberalism and its claims and assumptions may be a better fit.¹⁵² Alternatively, if a problem involves the allocation of the right to tax between two jurisdictions (that is, a distributional issue), then neorealism may more accurately capture the forces behind the cooperation.¹⁵³ There is no reason to believe that all tax policy questions will predominantly reflect either market failure *or* distributional tensions. Thus, the different theories may be useful for different subsets of tax policy cases. Furthermore, cognitivist theories on knowledge and epistemic communities serve as an important overlay to both neoliberal and neorealist approaches. In both cases, if the actors’ interests are unclear, an epistemic community may be positioned to exert influence either on the dominant state in cases where power seems more relevant, or on the general bargaining framework where market failure concerns prevail. In either situation, a true assessment of international tax policy formation would require an appreciation for the role of knowledge and expertise in shaping the ultimate policy outcome.

to policy-relevant knowledge within that domain or issue-area.” Haas, *supra* note 133, at 3.

152. See Ring, *supra* note 14, at 113.

153. See Krasner, *supra* note 142, at 140.

2. Pursuing Policy Formation: Options and Expectations

What is the best way to capture the complexity of policy formation? One option is to investigate through the lens of a single issue and consider how the relevant players act and interact over time. Alternatively, one could investigate through the lens of a particular organization by asking: What does the organization do? How does it engage with other actors? How do those interactions vary depending on the issue? What is the organization's trajectory? Still another possibility is to take a snapshot in time of all the different international tax organizations and consider what they are doing at that time. This last approach is valuable because it offers the potential to see how organizations play different issues and actors off each other in a juggle of influence, compromise, and deal-making.

Of course, the full dynamic of international tax relations even for a single issue or topic cannot be captured through either a simple chronology or a momentary snapshot of the web of connections; many actors are participating in simultaneous and interactive engagements. That said, by beginning the process of identifying key players in international tax, with respect to both their positive dimensions and normative goals, their roles, power, and influence can be more precisely delineated. Part II.A above tackled this challenge by identifying and examining the core questions that need be asked of any international organization prior to assessing its role and function. This Section continues the analysis by contending that state-based international organizations play a unique role in the area of international tax policy. This role is by no means exclusive or supremely powerful, but it is centralizing.

Why might we expect international organizations with state-based membership to have a special role? Despite persuasive analysis in the IR literature demonstrating that states are not monolithic actors, they remain *the* formal actors in enacting domestic tax legislation that governs cross-border transactions, and in signing binding agreements with other states. Thus, for a large number of tax issues, actors need a forum in which to influence and engage states—a place where states are susceptible and receptive to multiple views. An international organization can be more than a mere forum, though. The organization itself can be an affirmative actor in shaping policy not necessarily

completely *sua sponte*, but neither as a servant of its members. As some IR scholars contend, prior IR analysis has underestimated or misconstrued the “international organization” as merely an instrumentality of the states.¹⁵⁴ The professional policy staff of the OECD exemplifies the kind of organizational leadership that is independent of the states themselves. However, neither the IR literature, which advocates a deep and nuanced understanding of international organizations, nor the case studies on international taxation outlined in Part III, proffers a *normative* claim as to whether such influence is predictably desirable or undesirable. Ultimately, though, further case studies on international tax organizations should improve the overall assessment of their power and influence, and correspondingly direct attention to their decision-making processes, accountability, and legitimacy in shaping international tax policy.¹⁵⁵

Despite the centralizing role that state-based international organizations may play in international tax policy, direct engagement with state-based international organizations is not the exclusive avenue through which *other* international organizations act. In reality, they follow several very observable and different paths that can be understood as extensions of the “output” discussion in Part II.B.2.

a. Lobbying

Lobbying in the international tax policy arena denotes the attempt to directly influence individual states at the national level. Even this lobbying is not uniform because a national

154. *See, e.g.*, Barnett & Sikkink, *supra* note 35, at 7 (“First, the functionalist treatment of international institutions and IOs reduced them to technical accomplishments, slighting their political character and the political work they do Secondly, the statism of many contemporary treatments of IOs reduced them to mere tools of states, akin to how pluralists treated the state.”). New work on IOs emphasizes their intrinsic nature as “political creatures” that “construct the social world in which cooperation and choice take place . . . [and] help to define the issues that need to be governed and propose the means by which governance should occur.” *Id.*

155. *See id.* at 71; *see also* MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 16–44 (2004); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *AM. POL. SCI. REV.* 29, 43 (2005) (exploring conflicting concepts of accountability among international organizations).

government is not a single mind or body itself.¹⁵⁶ In the case of democracies, it comprises a range of elected officials and executive appointees with decision-making power that on balance generates a single national position.¹⁵⁷ When lobbying the state, successful organizations will take stock of the important players and tailor the message so that it resonates with each subset of players' unique concerns and goals. Thus, both the exact message and the form of the output from the international organization will be calibrated to reach each target audience.

b. Uniting

Uniting refers to the effort to coordinate with other organizations to provide a more unified and powerful front. For example, the World Taxpayers Associations is itself a nonprofit organization whose *members* are taxpayer associations located in countries all over the globe.¹⁵⁸ According to its founding statute, the mission includes “stimulat[ing] contacts and exchanges of information between the different countries and their organizations” and “enabl[ing] members in one country to receive assistance in tax matters from associations in other countries.”¹⁵⁹

Even where members are individuals rather than other organizations, an organization itself may highlight and promote its contacts with other bodies. The EATLP, for example, notes in its charter that it “shall pursue its objectives through cooperation not only with academic institutions but also with other non-profit

156. Along these lines, some IR scholars argue that the term “government” provides greater analytical clarity than the term “state.” They argue that the “concept of ‘state’ has three very different meanings: a legal person, a political community, and a government” and that states vary tremendously in the cohesiveness of the political community. Willetts, *supra* note 18, at 361. Thus, indiscriminate use of the term “state” can convey unsupported meaning. These scholars instead focus on “government” when discussing formal official actions and interactions, and on the specific nonstate actors when considering the multiplicity of forces acting on and under the state’s “government.” *See id.* at 361–62.

157. This is not to suggest that any dissent at the state-level dissipates. Rather, at some point in the process a state must act on tax policy with a single voice, even if there are many voices in the background, and even if the background voices eventually drown out and replace the initial voice.

158. *See* Members of World Taxpayers Associations, *supra* note 65 (listing member organizations from forty-four different countries).

159. Statutes of World Taxpayers Associations, <http://www.worldtaxpayers.org/statutes.htm> (last visited Apr. 3, 2010).

organizations with similar objects, in particular with the International Bureau of Fiscal Documentation in Amsterdam.”¹⁶⁰ Similarly, IFA highlights its links with other international organizations: “IFA has consultative status with the United Nations Economic and Social Council. In that capacity, it is represented at meetings of the UN Committee of Experts on International Tax Cooperation.”¹⁶¹ Thus, the links among many international tax organizations are not the byproduct of chance, but instead are part of a carefully constructed mission and identity.

c. Diversifying

Diversifying encompasses simultaneous efforts to contact or interact with a number of different bodies, including states, in order to establish connections and identify a fertile launching point for a plan. Groups such as the Federation of Tax Administrators (“FTA”) utilize a wide variety of media in order to convey information that shapes tax policy to U.S. states, individual members of government, and other international organizations.¹⁶² TEI, mentioned earlier, states that it has advocated “on a range of tax matters to the U.S. Treasury Department, the Internal Revenue Service, the tax-writing committees of Congress, and in Canada to the Department of Finance and the Canada Customs and Revenue Agency. Submissions are also filed with the states and provinces.”¹⁶³ For example, when the disclosure of advance pricing agreements (“APA”) ¹⁶⁴ became a prominent international tax question in the

160. *EATLP Articles of Association*, *supra* note 60, art. 2(2). The IBFD is a nonprofit organization engaged in publication of tax materials and information, research, and education. See IBFD’s Academic Activities, <http://www.ibfd.org/portal/AcademicActivities.htm> (last visited Apr. 3, 2010).

161. IFA Consultative Status, http://www.ifa.nl/organisation/consultative_status/ (last visited Apr. 3, 2010).

162. See Facts About the Federation, <http://www.taxadmin.org/fta/ftafact1.html> (last visited Apr. 3, 2010).

163. TEI Advocacy Overview, <http://www.tei.org/news/pages/advocacyoverview.aspx> (last visited Apr. 3, 2010). The Tax Executives Institute (“TEI”) anticipates that its expansion into Europe and Asia will open up corresponding advocacy opportunities. See *id.*

164. An advance pricing agreement (“APA”) is an agreement between the taxpayer and the government (or in some cases the taxpayer and the governments of several countries) detailing how the taxpayer will handle its pricing of specified transactions between certain related parties. See, e.g., Rev. Proc. 2006-9, § 2.01–04, 2.08, *as amended by*

United States in 1999,¹⁶⁵ TEI developed a position on the issue and pursued it through multiple forums. In February 1999, TEI submitted an amicus brief to the U.S. District Court for the District of Columbia in the lawsuit filed by the Bureau of National Affairs seeking APA disclosure by the IRS.¹⁶⁶ Following the submission, TEI had U.S. Treasury Assistant Secretary of Tax Policy Donald C. Lubick speak at TEI's midyear meeting on, among other topics, the subject of APA disclosure.¹⁶⁷ A few months later, TEI's president offered testimony on the subject of APA disclosure before the Committee on Ways & Means of the U.S. House of Representatives.¹⁶⁸ The following year, the

Rev. Proc. 2008-31 (providing a summary of the APA system in the United States); *see also* I.R.C. § 482 (2006) (law vesting the Secretary of the Treasury with authority to regulate the allocation of profits, losses, and deductions among related taxpayers). An APA does not establish a price, but rather outlines the method and parameters relevant to setting the price. Rev. Proc. 2006-9, § 2.04. If the taxpayer complies with the terms of the APA, then the signatory governments agree to respect the resulting transfer prices. *See* Rev. Proc. 2006-9, § 10 (describing the legal effect of an APA). An APA has a set term, but can be renewed under some circumstances. *See* Rev. Proc. 2006-9, § 12.

165. The question in 1999 was whether the government was required to release and publish APAs, perhaps in redacted form. A major legal publisher, the Bureau of National Affairs, filed a lawsuit against the IRS in 1996 under the Freedom of Information Act to compel public disclosure of the content of APAs. *See* Bureau of Nat'l Affairs, Inc. v. Internal Revenue Serv., 24 F. Supp. 2d 90, 91 (D.D.C. 1998). Much of industry and business, including TEI, argued that the APAs should not be disclosed. *See, e.g.*, filing cited *infra* note 166. Following several years of litigation, the IRS changed its position after conferring with the Department of Justice and determined that APAs were "written determinations" subject to limited disclosure under section 6110 of the Internal Revenue Code. *See IRS Agrees to Make Redacted APAs Public, Abandons Position in Long-Standing Lawsuit*, 7 Tax Mgmt. Transfer Pricing Rep. (BNA) 650 (Jan. 13, 1999); *see also* Molly Moses, Judge Allows BNA to Propose Schedule for IRS to make APAs Publicly Available, 28 Daily Tax Rep. (BNA) G-7 (Feb. 11, 1999). Congress ultimately intervened in 1999 to bar disclosure of APAs even in redacted form. *See* I.R.C. § 6110(b)(1).

166. Memorandum of Tax Executives Institute, Inc. as *Amicus Curiae* in Opposition to Plaintiff Bureau of National Affairs, Inc.'s Motion for Summary Judgment, Bureau of Nat'l Affairs, Inc. v. IRS, No. 1:98-cv-01473 (D.D.C. Feb. 25, 1999). The February 2009 brief had been "prepared under the aegis of the Institute's International and IRS Administrative Affairs Committee [and] was approved by TEI's Executive Committee." 51 TAX EXECUTIVE, 155, 155 (1999).

167. Honorable Donald Lubick, U.S. Treasury Assistant Sec'y on Tax Policy, Remarks at the Tax Executives Institute (Mar. 23, 1999), in 19 TAX NOTES TODAY 56-29 (1999); *see also* Lubick Says Legislation May Be Needed to Limit APA Background File Disclosures, 7 Tax Mgmt. Transfer Pricing Rep. (BNA) 876 (Mar. 24, 1999). A copy of Assistant Secretary Lubick's remarks is electronically available at <http://www.treas.gov/press/releases/rr3035.htm> (last visited Apr. 3, 2010).

168. *See Current U.S. International Tax Regime: Hearing Before the Subcomm. on Oversight of the H. Comm. of Ways & Means*, 106th Cong. 20-34 (June 22, 1999)

Canadian government invited TEI's Canadian Income Tax Committee to meet with the Canadian Customs and Revenue Agency to "engage in private consultations on a draft information circular relating to" APAs.¹⁶⁹ The scope of TEI's advocacy and engagement on the subject of APAs reflects its strategy of operating on different fronts simultaneously in the pursuit of the organization's goals.

d. Researching

Research refers to development of a research agenda to support a policy line advocated through lobbying, uniting, and diversifying. Evidence of attention to both research and written analysis can be witnessed in organizations ranging from the OECD, which publishes a wide variety of material,¹⁷⁰ to the CFP, which has supported its primary mission of objecting to the OECD tax competition work by publishing papers such as *The Global Flat Tax Revolution: Lessons for Policy Makers*.¹⁷¹

Of course, not all of the issues pursued by each and every international tax organization will follow the same path. Arguably, a goal of reduced taxation can be pursued either by changing states' tax policies or by "facilitating" tax planning. For example, the ITPA describes itself as an organization that adopts "the point of view of the taxpayer" and whose "membership is limited to practitioners who act for or in the interests of taxpayers."¹⁷² The organization's goal is to "disseminate and exchange information about international tax planning."¹⁷³ A significant feature of the Association's meetings is:

(testimony and statement of Lester Ezrati, General Tax Counsel, Hewlett-Packard Co., and President, Tax Executives Institute).

169. *TEI Consults on Draft Information Circular for APAs*, 52 *TAX EXECUTIVE* 348, 348 (2000).

170. The OECD produces a range of publications, including assessments of member and nonmember economies, factbooks, economic surveys, comparative analyses, case studies, and policy briefs on many tax- and nontax-related topics. See *Tax: Publications and Documents*, http://www.oecd.org/findDocument/0,3354,en_2649_37427_1_1_1_1_37427,00.html (last visited Apr. 3, 2010).

171. See Daniel J. Mitchell, *The Global Flat Tax Revolution: Lessons for Policy Makers*, 8(1) *PROSPERITAS* 1, 1–12 (2008), <http://www.freedomandprosperity.org/Papers/flattax/flattax.shtml>.

172. A Brief History of the ITPA and Why You Should Join, *supra* note 52.

173. *Id.*

[T]he opportunity it offers to form contacts with practitioners in other jurisdictions. The programmes at our meetings are not overcrowded—deliberately so. There are opportunities during each of the two days and at the receptions in the evenings to mingle with other members. It is virtually impossible to come away from a meeting of the Association not having learned something new and useful, and not having made at least one contact which proves valuable.¹⁷⁴

It is not unreasonable to infer that ITPA believes that many of its goals (focused on reducing taxes paid) can be achieved without engaging states themselves.

Of course, evasion aside, taxation does depend on the states¹⁷⁵ because the *affirmative* act of taxation is purely and formally a state function.¹⁷⁶ The case studies in Part III below offer initial insights into the roles played by international tax organizations and into the special status occupied by state-based organizations.

III. INTERNATIONAL ORGANIZATION CASE STUDIES

A. *Emergence of a Mandatory Arbitration Clause in the OECD Model Income Tax Treaty*

In summer 2008, the OECD revised its model income tax treaty by adding a new paragraph to the provision governing mutual agreement procedures (“MAP”).¹⁷⁷ The new language provides for mandatory arbitration in certain circumstances.¹⁷⁸ Interestingly, the concept of *mandatory* arbitration in international tax has been a long-standing source of controversy.¹⁷⁹ The story behind the decision to support

174. *Id.*

175. Even taxpayers pursuing strategies of evasion have an incentive to lobby or advocate against various kinds of substantive and administrative rules that could make their current strategies more difficult and less effective.

176. *See* Ring, *supra* note 17, at 166; *see also* DOUGHERTY & PFALTZGRAFF, *supra* note 19, at 33.

177. *See* OECD, *The 2008 Update to the OECD Model Tax Convention* 4, July 18, 2008, available at <http://www.oecd.org/dataoecd/20/34/41032078.pdf>.

178. *See id.*

179. *See, e.g.*, Ehab Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem* 6–8 (Mar. 18, 2008) (unpublished, available at <http://ssrn.com/abstract=1115178>).

mandatory arbitration provides a valuable opportunity to assess the roles and interactions among a variety of international organizations.

1. The Story Behind the Mandatory Arbitration Clause

While the use of mandatory arbitration is certainly not new, and prominently appears in a variety of other international contexts, it has not historically found its way into international tax agreements.¹⁸⁰ The mutual agreement provision in the typical income tax treaty provides mechanisms for dispute resolution (e.g., when two countries seek to tax a taxpayer in inconsistent ways which would result in the taxpayer facing double taxation).¹⁸¹ However, these provisions leave open the possibility that the dispute will not be resolved and that the taxpayer will have little recourse to force reconciliation of the issue.¹⁸² As a result, the goal of ensuring resolution of international tax disputes gained a prominent place on the agendas of global taxpayers and business-related organizations, including the ICC.

What is the ICC? The organization was founded in 1919 “to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital.”¹⁸³ ICC members include thousands of businesses and associations from approximately thirty different countries.¹⁸⁴ The ICC’s supreme governing body, the ICC World Council, meets twice a year.¹⁸⁵ When the Council meets, each national committee names

180. *See id.* at 4.

181. *See id.* at 5.

182. *See* Hugh Ault, *Improving the Resolution of International Tax Disputes*, 7 FLA. TAX REV. 137, 140 (2005) (“The [Mutual Agreement Procedure] takes too long; it is costly and the taxpayer must incur expenses with no assurance of acceptable outcome. It is often necessary to pay tax in order to get into the process and then the interest paid if the taxpayer wins is not adequate and cannot be offset against the interest that the taxpayer has to pay the other jurisdiction.”).

183. What Is ICC?, <http://www.iccwbo.org/id93/index.html> (last visited Apr. 3, 2010).

184. *See id.*; *see also* Links to ICC Member Companies, *supra* note 64 (listing a selection of ICC member companies).

185. How ICC Works?, <http://www.iccwbo.org/id96/index.html>; *see also* ICC, *Constitution of the International Chamber of Commerce*, art. 5(7), June 8, 2009 [hereinafter *ICC Constitution*], available at http://www.iccwbo.org/uploadedfiles/icc/icc_home_page/pages/icc_constitution_en_8_june_2009.pdf (governing the frequency with which the World Council must convene). The World Council is described by the ICC as “the equivalent of the general assembly of a major intergovernmental

a business executive as their delegate and ten seats are open for direct delegates from countries in which there is no national committee.¹⁸⁶ The Council is responsible for appointing the secretary-general and electing the chairman, vice-chairman, and the executive board.¹⁸⁷ The executive board, in turn, establishes the various ICC commissions and their missions based on proposals from the Committee on Policy and Commissions.¹⁸⁸ The relevant tax body, the Commission on Taxation, is composed of experts in international taxation who review “developments in international fiscal policy and legislation and put forward business views on government and intergovernmental projects affecting taxation.”¹⁸⁹ The Commission meets twice per year and operates with roughly 130 members, plus observers from other international tax organizations, such as BIAC, IFA, the International Bar Association, the International Stock Exchange Federation, and the Union of Industries of the European Community (“UNICE”).¹⁹⁰

The Commission has promoted mandatory arbitration since as early as 1995.¹⁹¹ More specifically, the Commission argued that the mutual agreement procedure set forth in the model treaties was unsatisfactory and that the competent authorities¹⁹² should

organization” with the exception that “delegates are business executives and not government officials.” How ICC Works?, *supra* note 183.

186. See *ICC Constitution*, *supra* note 185, arts. 3(5)(a), 4(5). A national committee represents the ICC in its respective country. See *id.* art. 3(1), (4). At present there are eighty-four national committees. See What Is ICC?, *supra* note 183; see also ICC National Committee Network and Group, <http://www.iccwbo.org/id100/index.html> (last visited Apr. 3, 2010) (listing each national committee by country and geographic region).

187. See *ICC Constitution*, *supra* note 185, art. 5(3)(a) 186.

188. See *ICC Constitution*, *supra* note 185, art. 10(2).

189. ICC’s Commission on Taxation, <http://www.iccwbo.org/policy/taxation/id1194/index.html> (last visited Apr. 3, 2010).

190. See Commission on Taxation, How Does it Work?, <http://www.iccwbo.org/policy/taxation/id1195/index.html> (last visited Apr. 3, 2010).

191. See ICC, Comm’n on Taxation, *The Revision of the U.N. Model Tax Convention Between Developed and Developing Countries and Related Issues*, pt. 1, § 12, Doc. No. 180/402, Nov. 24, 1995, available at <http://www.iccwbo.org/policy/taxation/id360/index.html> (submitted to the U.N. Ad Hoc Group of Experts on International Cooperation in Tax Matters).

192. Competent authorities are government representatives designated pursuant to the treaty. They are meant to attempt to resolve the problem prior to the implementation of the mutual agreement procedure. If the competent authorities of the states in question are unable to come to an agreement on how the taxpayer should be taxed, then the mutual agreement procedure is followed. Under traditional treaties,

be required to reach a resolution of disputes with taxpayer involvement, offering arbitration as one possibility.¹⁹³

In 2000, the Commission on Taxation again turned its attention to mandatory arbitration and issued a policy statement in which they recommended that “compulsory and binding arbitration in international tax matters should be adopted in bilateral or multilateral tax conventions.”¹⁹⁴ The ICC explicitly directed its policy statement to the OECD, describing the OECD as the “appropriate forum” in which to develop the system of mandatory arbitration and encourage its inclusion in bilateral and multilateral treaties.¹⁹⁵ The policy statement offered detailed reasoning as to why the current mutual agreement procedures were inadequate, including: (1) the likelihood of double taxation under the existing MAP, (2) frequent exclusion of taxpayers from the deliberations, (3) lack of procedural rules or time limits, (4) procedural conflicts regarding competent authority, domestic examination, and appeals rules, and (5) delays in arriving at a conclusion to the competent authority stage.¹⁹⁶ The analysis included a review of the EU Convention, U.S. treaty practice, and the OECD’s dispute resolution practices.¹⁹⁷ The ICC then stipulated the essential characteristics of an effective arbitration clause. They recommended: (1) initiation by states (jointly or individually) or by taxpayers themselves, (2) compulsory participation, (3) binding decisions, (4) appropriate scope and basis, (5) procedural fairness enforced by control mechanisms, (6) taxpayer participation throughout the process, and (7) implementation of the decision by the state.¹⁹⁸ These suggestions were aimed at producing three outcomes: getting the

there was no authority under the mutual agreement procedure to force the contracting states to resolve their dispute. See Farah, *supra* note 179, at 11.

193. See *The Revision of the U.N. Model Tax Convention Between Developed and Developing Countries and Related Issues*, *supra* note 191, pt. 1, § 12.

194. See ICC, Comm’n on Taxation, *Arbitration in International Tax Matters*, Doc. No. 180/438, May 3, 2000, available at <http://www.iccwbo.org/policy/taxation/id442/index.html>. This paper was eventually memorialized by the U.N. in ECOSOC, Ad Hoc Group of Experts on Int’l Cooperation in Tax Matters, *Arbitration in International Tax Matters*, 2, ¶ 3, U.N. Doc. ST/SG/AC.8/2001/CRP.15 (Aug. 29, 2001) (*prepared by ICC, Comm’n on Taxation*) [hereinafter *Arbitration in International Tax Matters*].

195. See *Arbitration in International Tax Matters*, *supra* note 194, at 5.

196. See *id.* at 2–3.

197. See *id.* at 3–5.

198. See *id.* at 5–6.

parties to the arbitration table, ensuring that the necessary issues are resolved in a fair manner, and producing a binding decision for the parties to enforce.¹⁹⁹ In this way, the ICC pushed for the OECD to create a procedure which states would be obligated to utilize. The ICC argued that a mandatory arbitration provision would resolve the enumerated problems because it would be impartial, time limited, predictable, transparent, and involve the taxpayer.²⁰⁰

Beyond a general exhortation to pursue mandatory arbitration seriously, the ICC's statements offered concrete advice to the OECD. At the time the ICC was releasing this statement, the OECD Model Tax Convention did not contain an arbitration clause, although commentary in the then-existing model treaty did note that arbitration was a possible solution when competent authorities reach an impasse.²⁰¹ Moreover, the OECD's Committee on Fiscal Affairs had previously agreed to study mandatory arbitration and to supplement its transfer pricing guidelines with the outcome of that research.²⁰² With these tentative OECD commitments in place, the ICC urged the OECD to contemplate arbitration for tax matters outside of transfer pricing, and to study the plausibility of a multilateral arbitration convention.²⁰³

Continuing its push for arbitration, the ICC's Commission on Taxation issued another policy statement in 2002, this time including draft language that could be inserted as a model treaty provision.²⁰⁴ The draft provision was prepared to correspond with the OECD's own model treaty, and provided a timeline for requesting arbitration, a mechanism for selecting an arbitration board, a specified role for the taxpayer, and a binding resolution from the board.²⁰⁵

199. *See id.* at 2.

200. *See id.*

201. *See* MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 25 cmts. ¶ 48 (OECD 2000).

202. *See* OECD, COMM. ON FISCAL AFFAIRS, TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS ¶¶ 4.167–4.171 (1995 ed.).

203. *See* *Arbitration in International Tax Matters*, *supra* note 194, at 5.

204. *See* ICC, Comm'n on Taxation, *Arbitration in International Tax Matters: Bilateral Convention Article*, Doc. 180/455 Rev. 2, Feb. 6, 2002, available at <http://www.iccwbo.org/policy/taxation/id501/index.html>.

205. *See id.*

Although the ICC had been encouraging the OECD to pursue mandatory arbitration for a number of years, the primary impetus for the OECD's efforts in this area, starting in 2003, was that the growing volume of cross border transactions would inevitably increase the number of tax disputes between and among countries.²⁰⁶ The OECD began to recognize that the mutual agreement procedure approach in bilateral tax treaties was under strain due to the volume of cases and their complexity.²⁰⁷

As a result of this understanding, the OECD's Committee on Fiscal Affairs ("CFA"), in 2003, convened a joint working group ("JWG") comprising government officials with tax treaty or transfer pricing expertise.²⁰⁸ The JWG was created to improve the effectiveness of the mutual agreement procedure and supplemental dispute resolution mechanisms.²⁰⁹ In undertaking the project, the JWG: (1) solicited information from member countries; (2) held a consultation in Paris with the private sector; (3) had input from non-OECD economies through the Global Forum on Taxation; and (4) issued a questionnaire to elicit initial comments regarding dispute resolution and to provide an opportunity for people and organizations to contribute previous experiences with the system and ideas as to how it could be

206. See OECD, Ctr. for Tax Policy & Admin., *Improving the Process for Resolving International Tax Disputes*, ¶ 1, July, 27, 2004 [hereinafter *OECD Recommendations for Improving International Tax Disputes*], available at <http://www.oecd.org/dataoecd/44/6/33629447.pdf>.

207. See *id.*; see also Jeffrey Owens, *The OECD's Work on Dispute Settlements in Tax Matters: A Progress Report*, 41 TAX NOTES INT'L 1056, 1057 (2006) (using similar language from the director of the OECD Centre for Tax Policy and Administration).

208. See *OECD Sets Up Joint Working Group on Using Arbitration in Competent Authority*, 11 Tax Mgmt. Transfer Pricing Rep. (BNA) 143 (May 29, 2002); Press Release, OECD, OECD Launches Project on Improving the Resolution of Cross-Border Tax Disputes (n.d.), available at http://www.oecd.org/document/26/0,3343,en_2649_33753_2508762_1_1_1_1,00.html; see also James Morgan, *New Developments in the Resolution of International Tax Disputes*, 43 TAX NOTES INT'L 77, 77 (2006). The joint working group was composed of "Working Party 1 (Double Tax Conventions) and Working Party 6 (Transfer Pricing) delegates from OECD Member States' tax administrations." Commission of the European Communities, EU Joint Transfer Pricing Forum: Secretariat Discussion Paper on Alternative Dispute Avoidance and Resolution Procedures, JTPF/003/2005/EN, at 3, ¶ 8 (Mar. 10, 2005), reprinted in *WORLDWIDE TAX DAILY*, Apr. 22, 2005, 2005 WTD 77-11; see also *OECD Sets Up Joint Working Group*, *supra*, at 143 (quoting two officials from the IRS).

209. See Jeffrey Owens, *Improving and Supplementing Tax Dispute Resolution Procedures*, 36 TAX NOTES INT'L 739 (2004); Press Release, OECD, *supra* note 208.

improved.²¹⁰ The JWG identified a number of areas in which the existing dispute resolution procedures could be improved.²¹¹ It developed proposals, but acknowledged that additional problems might surface dictating additional research before more concrete and final proposals could be drafted.²¹² The JWG's 2004 progress report discussed what it learned during the consultation in Paris in 2003, and what had been the successes and failures of other existing arbitration programs.²¹³ The report indicated that the JWG would continue to analyze the feasibility of implementing a mandatory arbitration resolution of unresolved MAP cases, and that no decision had yet been reached on whether to support such a proposal.²¹⁴

During this period IFA also produced a list of suggestions for the proposed OECD arbitration clause.²¹⁵ While many mirrored the ICC's proposals, there were several marked differences: (1) "reference to an appointing authority for arbitrators," which would be the Permanent Court of Arbitration in The Hague; (2) "a control mechanism to address aberrant awards" in the form of a challenge process; (3) "coordination with the United Nations Arbitration Convention" in defining the proceedings; and (4) "a *lis alibi pendens* provision that suspends litigation until conclusion of the arbitral proceedings."²¹⁶ Additionally, the IFA proposal included different procedural mechanisms than those in the ICC model, "such as provision for (a) Terms of Reference; (b) jurisdictional limits; (c) language of proceedings; (d) arbitral situs; (e) interim measures; (f) penalties; (g) arbitrator qualification; (h) declaratory relief; and

210. See *OECD Recommendations for Improving International Tax Disputes*, *supra* note 206, ¶ 8.

211. See *id.* ¶ 9.

212. See *id.* ¶ 12. For a list of each proposal and suggestion for future work, see *id.* annex 1.

213. See *id.* ¶ 127 (specifically referencing the 1990 EU Convention on the Elimination on Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises).

214. See *id.* ¶¶ 133–35.

215. The list of the IFA proposals is reproduced in *OECD Recommendations for Improving International Tax Disputes*, *supra* note 206, annex 4. These suggestions, however, come from a more comprehensive work that was sponsored by the IFA. See WILLIAM W. PARK & DAVID R. TILLINGHAST, *INCOME TAX TREATY ARBITRATION* (2004).

216. *OECD Recommendations for Improving International Tax Disputes*, *supra* note 206, annex 4.

(i) ‘last best offer’ (baseball) arbitration.”²¹⁷ IFA provided alternatives in each section of its proposal in contrast to the model language of the ICC proposal, which included no options.²¹⁸ This approach bespeaks a desire of IFA to directly apply its language verbatim—or near verbatim—as opposed to the ICC’s seeming desire to merely generate ideas and leave activity of shaping the precise language to the JWG.

Finally, in February 2006, the JWG released a public discussion draft regarding proposals for improving dispute resolution, including a proposal to amend article 25 of the model treaty and its corresponding commentary.²¹⁹ The goal of the draft was to present more detailed proposals and draft language that could be discussed during a public consultation in Tokyo in March 2006 and that could be the subject of written comments.²²⁰ The 2006 consultation²²¹ was held in conjunction with BIAC,²²² and drew over 150 participants, including senior tax executives from multinational firms, international tax experts and academics, representatives from the OECD members’ governments, and key participants from the OECD’s group dealing with the issue.²²³ The JWG then held another consultation in Washington, D.C., for comments by the business community, member countries, and tax professionals.²²⁴

217. *Id.*

218. *Id.*

219. See OECD, *Proposals for Improving Mechanisms for the Resolution of Tax Treaty Disputes*, Feb. 1, 2006, available at <http://www.oecd.org/dataoecd/5/20/36054823.pdf>. A copy of this discussion draft is also available in 14 Tax Mgmt. Transfer Pricing Rep. (BNA) 846 (Feb. 15, 2006).

220. See OECD, Press Release, The Release of a Public Discussion Draft for the Upcoming Tokyo Consultation (Feb. 8, 2006), available at http://www.oecd.org/document/3/0,3343,en_2649_37989739_36037635_1_1_1_1,00.html. For an description of the content of the conference, see Toshio Aratitake, *OECD Draft on Dispute Resolution Well Received at Tokyo Consultation*, 52 Daily Tax Rep. (BNA), at G-4 (Mar. 17, 2006). An agenda for the meeting can be found at <http://www.oecd.org/dataoecd/4/52/36054180.pdf>.

221. See Press Release, OECD, OECD Aims to Improve International Tax Disputes Mechanisms (Mar. 13, 2006), available at http://www.oecd.org/document/28/0,3343,en_2649_37989739_36271004_1_1_1_1,00.html.

222. *Id.*

223. See *id.*; see also OECD, *Improving the Resolution of Tax Treaty Disputes*, ¶ 4, Feb. 7, 2007, available at <http://www.oecd.org/dataoecd/17/59/38055311.pdf>.

224. See Joint OECD/U.S. Business Conference on OECD Initiatives in International Taxation: Looking Ahead, http://www.oecd.org/document/20/0,3343,en_2649_33753_36255444_1_1_1_37427,00.html (last visited Apr. 3, 2010); see also Press Release, U.S. Council for Int’l Bus., Conference Underscores Role of OECD

The ICC reentered the policy arena in May 2006. Recognizing the interactive nature of the mission upon which it had embarked, the ICC hosted a conference of its own, *The Resolution of International Tax Disputes Through Arbitration*.²²⁵ The goal of the conference was to “unravel some of the issues regarding the arbitral process by offering participants the chance to hear perspectives of prominent experts in the fields of international taxation and international arbitration.”²²⁶ The array of panel participants reveals the connections among international organizations active in this issue area. Participants included: (1) Mary Bennett, head of the Tax Treaty Transfer Pricing & Financial Transactions Division of the OECD’s Centre for Tax Policy and Administration, (2) Robert Couzin, the incoming chair of the ICC Commission on Taxation and also a member of IFA’s Permanent Scientific Committee, (3) David Tillinghast, former chair of IFA’s Permanent Scientific Committee, and (4) a number of academics.²²⁷

In January 2007, the OECD’s Committee on Fiscal Affairs, which commissioned the work of the JWG, adopted a report providing new language for the text and commentary of the article of the Model Tax Convention governing MAP.²²⁸ The primary change from the prior draft to this final version was the deletion of a requirement that the party making the arbitration request waive its rights to domestic remedies as a condition of requesting arbitration.²²⁹ Business participants at the Tokyo consultation were the primary forces behind this change.²³⁰ The new OECD model treaty released in July 2008 included the mandatory arbitration provision.²³¹

on International Taxes (June 6, 2006), *available at* <http://www.uscib.org/index.asp?documentID=3491>.

225. See Press Release, ICC, ICC to Host Conference on International Tax Disputes (Mar. 31 2006), *available at* <http://www.iccwbo.org/collection22/folders57/id6706/printpage.html>.

226. *Id.*

227. *See id.*

228. *See Improving the Resolution of Tax Treaty Disputes*, *supra* note 223.

229. *See id.* ¶ 5.

230. *See id.*

231. *See, e.g.*, Joann M. Weiner, *OECD Updates Model Tax Convention*, 51 TAX NOTES INT’L 89 (2008).

The U.N., the other major international organization with an established model income tax treaty,²³² also entered the arbitration design business. As early as 2003, and as recently as the U.N. tax committee's last official discussion in 2008, the U.N. has debated the issue of implementing mandatory arbitration provisions to settle tax disputes.²³³ The committee has recognized and evaluated the mandatory arbitration clauses espoused by both the EU and OECD, but concluded that more research needed to be done on workable possibilities for developing and developed countries.²³⁴ In its most recent report, the committee advised that a memorandum of understanding ("MOU") outlining the arbitration process in detail should be established before any disputes arose.²³⁵ These MOUs would cover such topics as the relationship among the arbitration, local court proceedings, and the mutual agreement procedures established by treaty.²³⁶ The committee concluded by observing that more familiarity with certain underlying substantive tax rules would be required before implementing a successful arbitration scheme.²³⁷ However, the committee recommended that an arbitration

232. See U.N. DEP'T OF ECON. & SOC. AFFAIRS, U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, U.N. Doc. ST/ESA/PAD/SER.E./21 (2001); see also U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS [DIESA], U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, U.N. Doc. ST/ESA/102, U.N. Sales No. E.80.XVI.3 (1980). The U.N. began its exploration of tax treaties in 1968 through its Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries. See ECOSOC Res. 1273 (XLII), *supra* note 94, ¶ 1 (requesting the creation of a working group to facilitate "the conclusion of tax treaties between developed and developing countries"). Over the course of seven meetings between 1968 and 1977, the group formalized a set of guidelines for the negotiation of bilateral tax treaties. See DIESA, MANUAL FOR THE NEGOTIATION OF BILATERAL TAX TREATIES BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, U.N. Doc. ST/ESA/94, U.N. Sales No. E.79.XVI.3 (1979).

233. See ECOSOC, Ad Hoc Group of Experts on Int'l Cooperation in Tax Matters, *Intermediation and Arbitration: the Arbitration Convention of the European Union for the Resolution of Transfer Pricing Disputes*, U.N. Doc. ST/SG/AC.8/203/L.8 (Aug. 27, 2003) (prepared by Juan Lopez Rodriguez); see also *Report on the Fourth Session (20–24 October 2008)*, *supra* note 43, ¶¶ 61–69.

234. See ECOSOC, Comm. of Experts on Int'l Cooperation in Tax Matters, *Revision of the United Nations Model Resolution of Tax Treaty Disputes*, ¶¶ 23–28, U.N. Doc. E/C.18/2005/3/Add.1 (Dec. 5, 2005) (prepared by Pascal Saint-Amans)

235. See *Report on the Fourth Session (20–24 October 2008)*, *supra* note 208, ¶ 65.

236. See *id.* ¶ 64.

237. See *id.* ¶ 66.

provision should be included in any future U.N. Model Tax Convention.²³⁸

2. Analysis of the Mandatory Arbitration Clause Story

What is there to learn from the story of how the OECD incorporated mandatory arbitration in the model treaty? The case study highlights a number of points regarding the participation of different international organizations.

About the issue. As suggested at the outset of the Article, many problems of international tax require more than unilateral solutions. Treaty terms and model treaties have been among the earliest tax questions for which international organizations have assumed responsibility.²³⁹ Thus, to the extent mandatory arbitration concerned the reform of the treaty implementation process, the locus of this action at the international organization level is unsurprising. Moreover, the specific treaty problem—the inability of competent authorities to reach a consistent outcome although each collects its intended revenue—signals an issue that states are unlikely to make a top unilateral priority.

About the actors. A number of international organizations played an active and public role in the process culminating in the OECD mandatory arbitration provision. But a primary and persistent mover in the process was the ICC. Why did it play that role? Consider the issue at stake—unlike many other tax problems that either foster substantive interest among states *and* taxpayers (for example, transfer pricing) or exclusively among states (for example, tax shelters), unsuccessful MAP negotiations are fundamentally a taxpayer problem. The ICC members, which are businesses, were precisely the subset of actors most likely to take the failure of MAP seriously. Although in theory countries should desire rules and procedures that constitute a fair system, the burden of unsuccessful MAP negotiations ultimately falls on the taxpayer. One could imagine an administration adopting the view that in a world of sovereign and independent tax systems, it should not have to unilaterally sacrifice revenue. After all, taxpayers have regularly relied on cross-border tax arbitrage to their advantage; they justify it as the inevitable result of

238. See *id.* ¶ 68.

239. See Graetz & O'Hear, *supra* note 3.

compliance with independent and uncoordinated systems. But given the fundamental and explicit premise of bilateral tax treaties—that double taxation is undesirable—it is not altogether surprising that states could be prompted to support changes to the OECD model and their own bilateral treaties.

The ICC assisted in this “prompting.” As perhaps one of the largest business-based international organizations, the ICC was a prime candidate for raising this issue. Its membership base, consisting of thousands of businesses across the globe,²⁴⁰ would have a collective interest and relatively uniform view of this problem. Although the ICC undertook an examination and pursuit of a mandatory arbitration provision, it recognized that its role was limited. It could effectively research and document the failures of the current MAP system, and even draft potential arbitration clauses, but ultimately another organization would need to carry the reform through to fruition—namely, the OECD.

Not only did the ICC acknowledge its limitations, it specifically identified the OECD as the proper international body, and explicitly directed its recommendations to the OECD.²⁴¹ Why? In one sense the answer is obvious: MAP is part of the bilateral treaty process and the OECD model treaty is probably the dominant force in the world of tax treaty design.²⁴²

240. See *supra* note 64 and accompanying text.

241. See *supra* note 195 and accompanying text.

242. See Yariv Brauner, *An International Tax Regime in Crystallization*, 56 *TAX L. REV.* 259, 310 (2003) (portraying the OECD model treaty as “practically the infrastructure of the current bilateral treaty-based system”); Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa*, 71 *BROOK. L. REV.* 639, 653 (2005) (describing the OECD convention as the “standard” that nearly 2000 tax treaties are based upon). Although the U.N. also has a model treaty, see *supra* note 232, it was released well after the OECD treaty and followed the basic structure of the OECD model, making various adjustments consistent with the needs of developing countries. See U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, *supra* note 232, intro. ¶ 9 (noting that drafting committee used the OECD model treaty as a “main reference text” when crafting the U.N. model convention). The U.S. model, which also closely tracks the OECD model, functions by definition as the U.S. starting point for treaty negotiations. See UNITED STATES MODEL INCOME TAX CONVENTION OF NOVEMBER 15, 2006, [1 IRS Forms] Tax Treaties (CCH) ¶ 209 (U.S. Dep’t of Treasury, 2006), available at <http://www.ustreas.gov/press/releases/reports/hp16801.pdf>; see also Press Release, U.S. Dep’t of Treasury, Treasury Issues New Version of the U.S. Model Income Tax Convention and Model Technical Explanation, Doc. HP-168 (Nov. 15, 2006), available at <http://www.ustreas.gov/press/releases/hp168.htm> (noting that the U.S. model is the starting point for all bilateral tax negotiations with other countries).

Mandatory arbitration constituted a refinement of the MAP process and was thus properly located in the body responsible for crafting MAP originally, the OECD. However, there is another complementary way to understand the OECD's role. States are international actors that ultimately must reform the actual treaty process. Despite the significant influence exercised by many actors in the shaping of international tax policy, states retain a pivotal role that cannot be "usurped."²⁴³ It is the state that imposes and collects the taxes in question. A change in the process requires states' participation and support. Thus, it becomes crucial for the ICC and other interested parties to get the issue on the agenda of a state-based organization such as the OECD.

Policy Development. Once the OECD acknowledged its more serious and immediate interest in mandatory arbitration with the convening of the Joint Working Group,²⁴⁴ a dynamic exchange unfolded. The OECD itself, through the JWG, sought information on treaty dispute resolution in an iterative process. The JWG invited comments from a full range of potentially interested parties including its own members, nonmembers,²⁴⁵ and businesses.²⁴⁶ In addition, other international organizations interjected, offering their own suggestions. For example, IFA provided suggestions for the mandatory arbitration clause that the OECD had already started to draft.²⁴⁷ The ICC also returned to the stage in 2006 seemingly eager to ensure that the arbitration issue maintained its high profile and that any remaining tensions could be vetted by an expert panel.²⁴⁸ Moreover, this expert panel itself comprised key figures from prominent international tax organizations. The conference featured the OECD's head of Tax Treaty Transfer Pricing and Financial Transactions, the ICC's chair, and two IFA Permanent Scientific Committee members (one current, one former). Both

243. In contrast, it is possible to imagine the private sector intervening and taking over a variety of typically "state" functions including security, business standards, and social welfare.

244. See sources cited *supra* note 208 and accompanying text.

245. Note that many treaties are with non-OECD countries.

246. See *supra* note 210 and accompanying text.

247. See *supra* notes 215–18.

248. See *supra* notes 225–27.

the MAP problem and the mandatory arbitration solution were understood to be part of a global tax discussion.

B. *The Effort to Limit “Harmful” Tax Competition*

Another interesting story of international tax policy created through the interactions of multiple international actors over a decade involved international tax competition. In its broadest terms, “tax competition” refers to a country’s efforts to draw business, investment, or money into the country by making its tax system attractive to potential taxpayers.²⁴⁹ More specifically, countries reduce or eliminate tax on particular activities or classes of taxpayers, or refrain from disclosing information to other governments.²⁵⁰

In the last two decades of the twentieth century, globalization and growing capital mobility increased the possibility of successful competition and countries responded by pursuing tax policies designed to enhance their appeal.²⁵¹ The OECD highlighted some of the problems posed by the rapid increase in globalization in its 1998 report on tax competition.²⁵² Although most tax actors would acknowledge that certain forms of tax competition in the international arena are both

249. See GARY CLYDE HUFBAUER, INST. FOR INT’L ECON., U.S. TAXATION OF INTERNATIONAL INCOME: BLUEPRINT FOR REFORM 29 (1992) (positing that “[t]ax competition often starts when one country lowers its tax rates in an effort to attract outside investment”); Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1233–34 (2009) (acknowledging that jurisdictions often exploit differentials in tax systems in order to attract capital); see also Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L.J. 543, 546–49 (2001) (appreciating the relationship between reduced business taxation and investment and describing the general practices of the United States and Europe).

250. See, e.g., Adam H. Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555, 587 n.60 (2007) (“Tax competition arises from the intentional use of tax rates or special tax regimes by states, such as “ring fencing” and secrecy laws, to attract capital.”); see also Yoram Margoliath, *Tax Competition, Foreign Direct Investment and Growth: Using the Tax System to Promote Developing Countries*, 23 VA. TAX REV. 161, 187–90 (2003) (defining tax incentives as a particularized deviation from a baseline and providing examples).

251. See, e.g., Avi-Yonah, *supra* note 13, at 1575–76 (“The mobility of capital has resulted in international tax competition, in which sovereign countries aim to attract both portfolio and direct investment by lowering their tax rates on income earned by foreigners.”).

252. See OECD, *Harmful Tax Competition: An Emerging Global Issue*, Apr. 9, 1998, available at <http://www.oecd.org/dataoecd/33/0/1904176.pdf>.

appropriate and beneficial,²⁵³ some forms of tax competition were considered “harmful.” As the OECD and others ultimately articulated, “harmful” tax competition was undesirable because it would create a race to the bottom in tax revenue and result in the erosion of countries’ tax bases.²⁵⁴ Because the race involves the reduction or complete elimination of taxation on mobile factors (e.g., investment), states would be left dependent on consumption and payroll taxes to fund government.²⁵⁵ A tax burden premised on such a tax base would be more regressive and would lead to a decline in revenue available to fund state infrastructure and social welfare programs.²⁵⁶ The significant, but not universal, concern over the trajectory of tax competition prompted OECD action and a decade of dialogue, reactions, and new directions. Part III.B.1 will describe how tax competition got onto the OECD agenda, how the global dialogue evolved, and what steps were ultimately taken. Part III.B.2 will then consider the specific and very strategic roles played by different international organizations in the process.

1. OECD’s Effort to Combat “Harmful” Tax Competition

The OECD embodies a tripartite structure in which responsibilities are divided among a council, secretariat, and standing committees.²⁵⁷ Formal OECD decision-making power rests in the OECD Council, comprising a representative from each member state and one from the EU.²⁵⁸ The Council meets at the “session of Ministers”²⁵⁹ once a year “to discuss key issues

253. An example is the competition between countries that collect and spend their revenues efficiently and those that do not.

254. See *Harmful Tax Competition: An Emerging Global Issue*, *supra* note 252, ¶¶ 23, 43 (forecasting that, in light of the globalized economy, tax policies in one jurisdiction are now more likely to have repercussions on another and specifically referencing the “race to the bottom”); see also Roin, *supra* note 249, at 550–54 (articulating the “race to the bottom” phenomenon as it relates to international tax competition).

255. See Avi-Yonah, *supra* note 13, at 1578 (explaining that both labor and consumption would be less mobile than capital and investment).

256. See *id.* at 1577–78.

257. See Who Does What, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html (last visited Apr. 3, 2010) (providing a graphical representation of the OECD’s structure).

258. See Convention on the Organisation for Economic Co-operation and Development art. 7, Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179 [hereinafter OECD Convention]; see also Who Does What, *supra* note 257.

259. That is, the minister of the economy for each country.

and set priorities.”²⁶⁰ Any work “mandated by the Council” is then carried out by the OECD Secretariat,²⁶¹ including by delegation to one of the many OECD committees.²⁶² One such committee, the CFA, was created by Council resolution on May 1, 1971, and is responsible for tax matters.²⁶³

In May 1996, the Council, through a ministerial communiqué, directed the OECD to “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.”²⁶⁴ Although the OECD did not identify the specific state members that instigated the organization’s focus on tax competition, both France and Japan were reported to be the primary advocates for the OECD’s involvement, with support coming from Germany and the United

260. Who Does What, *supra* note 258. The Council meets at the permanent representative level regularly where decisions are made on a census basis. *See id.* The Council is headed by the Secretary-General of the OECD Secretariat. OECD Convention, *supra* note 258, art. 10(2).

261. Who Does What, *supra* note 257. The OECD Secretariat is headed by the Secretary-General who is assisted by deputy secretaries general and a significant staff. OECD Convention, *supra* note 258, art. 10(1); Organisation Chart, http://www.oecd.org/document/60/0,3343,en_36734052_36734103_37241660_1_1_1_1,00.html (last visited Apr. 3, 2010). The Paris-based staff of the Secretariat numbers approximately 2500 and includes lawyers, economists, and scientists. *See* Who Does What, *supra* note 257.

262. Pursuant to article 9 of the OECD Convention, the Council may establish committees and subsidiary bodies as need be to achieve the objectives of the organization. OECD Convention, *supra* note 258, art. 9. The OECD currently has over 200 committees, working groups, and expert groups pursuing the work of the organization. *See* Who Does What, *supra* note 257. For a list of all the committees, working groups, and other subsidiary bodies established by the Council in accordance with article 9, see On-Line Guide to OECD Intergovernmental Activity, <http://webnet3.oecd.org/oecdgroups/> (last visited Apr. 3, 2010).

263. *See*, OECD, *Resolution of the Council Concerning the Activities of the Organisation in the Field of Taxation*, Council Res. C(71)41 (May 1, 1971), revised by Council Res. C(2008)147 & C/M(2008)20, item 285 (Nov. 13, 2008), reprinted in OECD, *DIRECTORY OF BODIES OF THE OECD* 258 (2009 ed.); *see also* About the Centre for Tax Policy and Administration, http://www.oecd.org/about/0,3347,en_2649_34897_1_1_1_1_1,00.html (last visited Apr. 3, 2010). The original 1971 resolution is excerpted at http://webnet3.oecd.org/oecdgroups/bodies.asp?body_id=963&lng=e, and partially reprinted in OECD, *DIRECTORY OF BODIES OF THE OECD* 255–56 (2008 ed.) [hereinafter OECD 2008 BODIES DIRECTORY].

264. *See* OECD, Council at Ministerial Level, *Communiqué*, ¶ 15(xv), May 21–22, 2006, reprinted in 44 Eur. Y.B., at OECD 18 (1996). A copy of the communiqué is also electronically available at <http://www.g7.utoronto.ca/oecd/oecd96.htm>.

States.²⁶⁵ The interest of these four countries would not be surprising; they are generally viewed as relative “high” tax countries with significant capital and investment at stake.

In response to the 1996 ministerial communiqué, the CFA organized the “Special Sessions on Tax Competition” chaired by France and Japan.²⁶⁶ Ultimately the special sessions prepared the Harmful Tax Competition report, which was adopted by the CFA in January 1998.²⁶⁷ In April 1998, the OECD Council approved the report, and directed the CFA to organize a forum on harmful tax practices and to initiate dialogue with nonmember states.²⁶⁸ Additionally, the Council recommended a series of domestic legislative steps for member states to pursue.²⁶⁹

The report addressed practices of OECD member countries²⁷⁰ and nonmember countries. Although acknowledging that tax competition occurs in many contexts, the report targeted geographically mobile activities (for example, financial services and the provision of intangibles).²⁷¹ The two basic competition scenarios were selected by the report for remedy: (1) so-called “tax-haven” jurisdictions that impose virtually no income tax; and (2) countries that impose significant individual or corporate income taxes yet incorporate preferential features into the system to enable certain types of income earned by certain classes of taxpayers to face little or no taxation.²⁷² At the outset, the report recognized that there was no intention to “explicitly or implicitly suggest that there was some general minimum effective rate of

265. See, e.g., Avi-Yonah, *supra* note 13, at 1603 (identifying France and Japan as the primary players); Jacqueline B. Manasterli, *OECD, EU, U.S. Representatives Discuss Tax Haven Initiatives*, 1999 TAX NOTES TODAY 112-9 (quoting chair of the Business and Industry Advisory Committee (“BIAC”) Taxation and Fiscal Committee, Richard M. Hammer as referencing “rumors” that the U.S. Treasury led the initiative).

266. See *Harmful Tax Competition: An Emerging Global Issue*, *supra* note 252, ¶ 3.

267. See *id.*

268. See OECD, *Recommendation of the Council on Counteracting Harmful Tax Competition*, Council Res. C(98)17/FINAL, reprinted in OECD 2008 BODIES DIRECTORY, *supra* note 263, at 259–60. Switzerland and Luxembourg abstained from the vote. See *id.* n.1.

269. See *id.*

270. After the 1998 report, the Slovak Republic joined in 2000. See About the Slovak Republic, http://www.oecd.org/about/0,3347,en_33873108_33873781_1_1_1_1_1,00.html (last visited Apr. 3, 2010).

271. See *Harmful Tax Competition: An Emerging Global Issue*, *supra* note 252, ¶ 6. Other forms of competition were reserved for future study. See *id.*

272. See *id.* ¶¶ 38–44.

tax to be imposed on income below which a country would be considered to be engaging in harmful tax competition.”²⁷³ Even the two scenarios targeted by the report were not uniformly chastised. The report identified specific factors that would lead these two basic scenarios to constitute “harmful practices”: (1) lack of effective exchange of information, (2) lack of transparency, (3) lack of substantial activities in the jurisdiction, and/or (4) special geographic or industry-limited tax regimes.²⁷⁴ The report then detailed the reason for a collaborative, OECD-level response to tax competition:

The need for co-ordinated action at the international level is also apparent from the fact that the activities which are the main focus of this report are highly mobile. In this context, and in the absence of international cooperation, there is little incentive for a country which provides a harmful preferential tax regime to eliminate it since this could merely lead the activity to move to another country which continues to offer a preferential treatment.²⁷⁵

Ultimately, the report urged various unilateral steps,²⁷⁶ treaty changes,²⁷⁷ and certain coordinated measures.²⁷⁸ Given the centrality of non-OECD members to matters of tax competition, the report also encouraged the new forum to “engage in a dialogue with non-member countries *using, where appropriate, the fora offered by other international tax organizations, with the aim of promoting the Recommendations*” of the report.²⁷⁹

The OECD Council’s adoption of the report evoked much controversy. Both states and businesses benefiting from the current system did not welcome change. BIAC, the OECD’s

273. *Id.* ¶ 41.

274. *See id.* ¶¶ 52–55, 61–64 (identifying factors for tax havens and harmful preferential systems, respectively).

275. *Id.* ¶ 89.

276. *See id.* ¶¶ 97–112 (including, among others, strong controlled foreign corporation rules). Controlled foreign corporation, or “CFC,” rules proscribe circumstances in which a residence country may tax its resident corporations on income earned by their foreign subsidiaries in absence of a dividend distribution to the parent. *See id.* ¶ 97.

277. *See id.* ¶¶ 113–37 (including, among others, the use of provisions on exchange of information and on treaty shopping).

278. *See id.* ¶¶ 138–48 (including guidelines on harmful preferential tax regimes (even self-evaluation) and a new forum to implement the guidelines and to produce a list of tax havens against which to apply a coordinated response).

279. *Id.* ¶ 156 (emphasis added).

“independent” business community representative body, reacted harshly to the report. In June 1999, at the European-American Business Council’s fourth annual conference, the BIAC Taxation Committee chair listed multiple critiques of the OECD project: (1) BIAC had no role in its preparation even though BIAC had been continuously involved in other important OECD international tax initiatives such as the development of the transfer pricing guidelines, (2) the OECD project reached beyond its own borders to control tax policy of nonmember states, and (3) the report would not have been issued in its actual form if BIAC were involved because businesses across the globe were unhappy with the end product.²⁸⁰ Several days earlier, BIAC issued a written response to the OECD report charging it with insufficient clarity, a return to artificial constraints on countries’ ability to choose their own tax system, an apparent promotion of high tax rates, and a failure to appreciate the benefits of competition.²⁸¹ BIAC described the OECD report as “overblown” and sounding both a “sinister tone” and a “ring of arrogance.”²⁸² To the extent the OECD’s report identified valid concerns, BIAC urged OECD countries to adopt and strictly adhere to the already existing OECD transfer pricing guidelines.²⁸³

At the end of June 1999, during a regularly scheduled meeting between BIAC and the CFA, tax competition dominated the agenda.²⁸⁴ In addition to the chair of BIAC and the representatives of the CFA, attendees included tax delegations from about twelve OECD members, including Australia, France, Germany, Japan, Sweden, Switzerland, the United Kingdom, and the United States.²⁸⁵ Following the meeting, whose contents were not disclosed, a U.S. attendee, Joseph Feuer, manager of

280. See Manasterli, *supra* note 265, at 2383 (quoting Chair of the BIAC Taxation and Fiscal Committee, Richard M. Hammer).

281. See Business and Industry Advisory Committee [BIAC], *A Business View on Tax Competition*, June 1999, reprinted in 40 EUR. TAX’N 421 (2000). A copy of the report can also be found in 19 TAX NOTES INT’L 281 (1999) and is available at <http://www.biac.org/statements/tax/htc.pdf>.

282. See *A Business View on Tax Competition*, *supra* note 281, annex 1.

283. See *id.* para. 18.

284. See Robert Goulder, *OECD Takes Exception with BIAC’s Exception to OECD Tax Haven Report*, 19 TAX NOTES INT’L 227 (1999) (the U.S. delegation included “several corporate representatives”).

285. See Goulder, *supra* note 284, at 227 (reporting that the U.S. delegation included “several corporate representatives”).

European affairs and taxation with the U.S. Council for International Business in New York, reported that the CFA was displeased that BIAC had strongly criticized the 1998 report, but that both sides recognized that some form of reconciliation was necessary to produce constructive results.²⁸⁶

Of course not all organizations objected to the OECD's work in tax competition. When the Group of Seven ("G7") met in June 1999 and again in September 1999, they praised the OECD's creation of a forum on harmful tax practices and supported the OECD's effort to identify tax havens.²⁸⁷ To address both tax evasion and money laundering, the G7 encouraged the OECD to enhance the exchange of information between tax authorities.²⁸⁸

As the OECD's initiative through the forum on harmful tax practices continued, further challenges to the work of the OECD emerged from several different quarters. In 2000, the OECD released a progress report identifying thirty-five "tax havens," as defined by the criterion set out in its 1998 report.²⁸⁹ The United States, in apparent opposition to the OECD's report naming havens, organized a campaign against the tax competition project. A dominant actor in this campaign was the CFP, which itself was organized in October 2000.²⁹⁰ The CFP identified its "top project" as "the Coalition for Tax Competition, which is fighting to preserve jurisdictional tax competition, sovereignty, and financial privacy."²⁹¹ The CFP characterized the OECD's efforts as "ill-advised" and argued that the OECD was trying to "bully 'tax havens' into raising their tax rates and eliminating

286. *Id.*

287. See European Commission, *G-7 Meets, Pledges to Combat Harmful Tax Competition*, 19 TAX NOTES INT'L 250, 250, (1999); Robert Goulder, *G-7 Officials Discuss Harmful Tax Competition*, 19 TAX NOTES INT'L 1303, 1303 (1999). The G-7 also expressed support for a related, but narrower, project underway in the European Union to implement a "business code of conduct" to limit harmful tax competition. See European Commission, *supra*, at 250.

288. See European Commission, *supra* note 287; Goulder, *supra* note 287.

289. See OECD, *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs*, at 17, June 26, 2000, available at <http://www.oecd.org/dataoecd/25/27/44430257.pdf>.

290. See CF&P At-a-Glance, *supra* note 68.

291. *Id.* For more information on the CFP, see Ring, *supra* note 17, at 187-97.

financial privacy, [and was] assert[ing] the right to interfere with American tax laws.”²⁹²

Having decided to marshal its resources against the OECD tax competition project, the CFP pursued two major directions. The first prong of the attack was to lobby the U.S. Congress and the U.S. administration against the OECD plan.²⁹³ As a direct result of the CFP’s lobbying,²⁹⁴ members of Congress, including members of the Congressional Black Caucus, questioned or objected to U.S. participation in the OECD project²⁹⁵ and sent letters—often times quite similar to one another—to U.S. Secretary of the Treasury Paul O’Neill and other key political figures detailing their objections.²⁹⁶ The culmination of the CFP’s

292. See CF&P At-a-Glance, *supra* note 68.

293. See Robert Goulder, *New Coalition Strikes Back at OECD Tax Havens Campaign*, 21 TAX NOTES INT’L 2650, 2653–54 (2000) (reporting on interviews with CFP founders Mitchell and Quinlan who describe their plans to attack the OECD tax competition project).

294. See David S. Cloud, *Virginian Fights for International Tax Havens—Lobbyist Finds Bush Receptive to Ideas Clinton Rejected*, WALL ST. J., July 30, 2001, at A20 (reviewing the lobbying efforts of the CFP and quoting its co-founder Andrew Quinlan: “We’re going to end up generating probably 100,000 pieces of mail”); Goulder, *supra* note 293 (quoting CFP co-founder Quinlan: “What our coalition has, which no one else can claim, is that we are now set to successfully deal with Congress. We have already met with the key players.”); see also, e.g., Alex Easson, *Harmful Tax Competition: An Evaluation of the OECD Initiative*, 34 TAX NOTES INT’L 1037, 1053–55 (2004) (describing how the CFP plan worked); Field, *supra* note 68, at 1242–43 (same).

295. Majority House Leader Richard K. Armey was the first major member of Congress to speak out against the OECD tax competition work and to urge the then Secretary of the Treasury Lawrence Summers to “withdraw U.S. support for the initiative.” Goulder, *supra* note 293, at 2653. Comments by Representative Armey marked the CFP’s success on the Congressional front: “By fighting against an international tax cartel and working to preserve financial privacy, the Center for Freedom and Prosperity is protecting taxpayers, both in America and around the world.” *Id.* The members of the Congressional Black Caucus focused their critique on the harm caused to poorer nations, especially those in the neighboring Caribbean. See, e.g., Field, *supra* note 68 (“Even the Black Caucus was induced to speak out against the OECD plan, on the basis of solidarity with people of color living in Caribbean tax havens.”); see also Cordia Scott & Adrion Howell, *Congressional Black Caucus Says OECD Tax Move Unfairly Blasts Developing Nations*, 22 TAX NOTES INT’L 1600, 1600–01 (2001). A letter signed by twenty-six of the thirty-eight members of the caucus and addressed to Secretary of the Treasury, Paul O’Neill, echoed this concern. See *infra* note 296.

296. Many of these congressional letters were reprinted in *Tax Notes International*, including letters by Senator Don Nickles, and Representatives Sam Johnson, Major R. Owens, and Richard K. Armey. See Ring, *supra* note 17, at 188 n.135; see also Cordia Scott, *House Majority Leader, Congressional Black Caucus Members Join Growing List of U.S. Lawmakers Opposed to OECD Tax Haven Campaign*, WORLDWIDE TAX DAILY, Mar. 21, 2001, 2001 WTD 55-1 (reporting on, and linking to, letters from House representatives to the U.S. Treasury Secretary expressing disapproval of the OECD’s international campaign

lobbying campaign came in May 2001, when U.S. Secretary of the Treasury Paul O’Neill published a statement that was the product of several months of the new U.S. administration’s increasingly hostile posture towards the OECD tax competition project:

The United States does not support efforts to dictate to any country what its own tax rates or tax systems should be, and will not participate in any initiative to harmonize world tax systems. The United States simply has no interest in stifling the competition that forces governments—like businesses—to create efficiencies.²⁹⁷

This aggressive U.S. critique and withdrawal of support was perceived as a significant blow to the tax competition work.²⁹⁸ Secretary O’Neill’s position “was considered by most tax experts to represent a misreading of the tax competition project, which did not propose rate harmonization and did not reject competition of all types.”²⁹⁹ Despite the fact that the United States ultimately backpedaled on Secretary O’Neill’s language and continued to support the project in what became a modified form, the end result was a tax competition effort mostly focused on information exchange and a “major retreat from the OECD’s original tax competition goals.”³⁰⁰

In addition to its lobbying activities in the United States, the CFP engaged the identified tax havens directly. The CFP issued press releases and statements on the OECD tax competition

against harmful tax competition). A list of Congress members sending letters, along with copies, are also posted on the CFP website. See Congressional Letters on the OECD’s “Harmful Tax Competition” Project, <http://www.freedomandprosperity.org/congress/congress.shtml> (last visited Apr. 3, 2010). For a copy of the letter sent by the Congressional Black Caucus, see Letter from the Cong. Black Caucus to Paul O’Neill, U.S. Sec’y of the Treasury (Mar. 14, 2001), available at <http://www.freedomandprosperity.org/cbc.pdf>.

297. Paul O’Neill, Op-Ed., *Confronting OECD’s Notions on Taxation*, WASH. TIMES, May 10, 2001, at A15. A copy of the Treasury press release is reprinted in 22 TAX NOTES INT’L 2617 (2001), and is also available at <http://www.treas.gov/press/releases/po366.htm>.

298. Although at the time, the strong U.S. rebuke of the OECD project was envisioned as a serious problem (particularly given the strong support previously provided by the United States), later analyses have argued that the ultimate course of history indicates that the anticipated harm to the work did not materialize. See Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 BROOK. J. INT’L L. 757, 770–71 (2009).

299. Ring, *supra* note 17, at 189 (citing Field, *supra* note 70).

300. Field, *supra* note 70.

project, and “organized” many of the Caribbean havens.³⁰¹ In a very strategic move, CFP founders, including Dan Mitchell, attended the 24th Annual Conference on Caribbean and Latin American Economies, in early December 2000.³⁰² Mitchell also spoke on behalf of the CFP at the Bahamas Bar Association in December 2000.³⁰³ This trip had “followed a period during which several key Bahamian officials held consultative discussions with OECD representatives.”³⁰⁴ Several weeks later in Barbados, the CFP sponsored a symposium on the OECD tax competition project.³⁰⁵ During its time in the Caribbean, CFP successfully persuaded Antigua to “designate [the two CFP founders] as its official delegates to [the] January OECD summit with other Caribbean tax-haven countries in Barbados.”³⁰⁶ Then, in late February 2001, the CFP again held a strategic meeting in Paris a few days before an OECD meeting.³⁰⁷

In the decade since the 1998 report, the OECD has developed criteria to determine haven status, issued a series of progress reports on tax competition, and prepared, revised, and published various lists of tax havens. As the OECD itself recently described this process and its goals:

[The 1998 report] initiated a period of intense dialogue aimed at eliminating preferential tax regimes within OECD Member states, identifying “tax havens” and *seeking their commitments to the principles of transparency and effective exchange of information* and encouraging other non-OECD economies to associate themselves with the harmful tax practices work.³⁰⁸

With respect to its success, the OECD observed that

301. See Cloud, *supra* note 294.

302. See, e.g., Goulder, *supra* note 293, at 2653 (describing CFP planned action at the 24th Annual Conference on Caribbean and Latin American Economies).

303. See Linda Thompson, *CFP’s Mitchell Warns Bahamas Against OECD Cooperation*, 22 TAX NOTES INT’L 157, 157 (2001).

304. *Id.*

305. See Robert Goulder, *U.S. Congressional Staffer: Opposition to OECD Tax Haven Campaign May Be Growing in Washington*, 22 TAX NOTES INT’L 236, 236 (2001).

306. Cloud, *supra* note 296.

307. See Trevor Drury, *Center for Freedom and Prosperity Meets in Paris*, 22 TAX NOTES INT’L 1201, 1201 (2001).

308. OECD, *Promoting Transparency and Exchange of Information for Tax Purposes*, ¶ 25, Apr. 21, 2010, available at <http://www.oecd.org/dataoecd/32/45/43757434.pdf> (emphasis added).

[b]y 2004, all but one of the preferential tax regimes identified within the OECD had been abolished, amended or found not to be harmful. The only outstanding regime was the Luxembourg 1929 holding company regime. In December 2006, Luxembourg enacted legislation to abolish the regime by the end of 2010.³⁰⁹

The OECD worked steadily to increase the involvement of both the business community and non-member states. For example, after the OECD published its progress report in 2000 on tax havens, it held a symposium in Paris to discuss harmful tax practices and their implications.³¹⁰ Twenty-nine nonmember states attended the symposium.³¹¹ In September 2008, the OECD “[f]or the first time, . . . opened its doors and welcomed private-sector specialists to its annual meeting of government officials.”³¹² At that same meeting, “[d]elegates from countries as diverse as Argentina and Georgia, Zambia and Brazil, and Singapore and Iran participated as equals.”³¹³ Moreover, the decline in corporate tax rates across OECD member countries (rates now more than twenty percentage points lower than in the mid 1980s) powerfully signaled that the OECD was not trying to harmonize tax rates at a high level³¹⁴—a charge that had been leveled against it following the 1998 report.

With its tax competition work now focused on ensuring transparency and information exchange, the OECD directed its attention to defining, measuring, and monitoring compliance with these goals. Although myriad havens have “committed” to achieving transparency and participating in exchange of information through tax information exchange agreements,³¹⁵ do these promises have any bite? A “commitment” does not

309. *Id.* ¶ 25 n. 2.

310. See Goulder, *supra* note 123.

311. See *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report*, *supra* note 122, ¶ 14.

312. Joann M. Weiner, *News Analysis: Change Is in the Air at the OECD*, 51 TAX NOTES INT'L 1006, 1006 (2006).

313. *Id.*

314. See *id.*

315. See OECD, *Promoting Transparency and Exchange of Information for Tax Purposes*, *supra* note 308, ¶ 10 (noting that in 2009 alone almost 200 tax information exchange agreements and 110 double taxation conventions were concluded or revised with language committing its signatories to engage in transparency and exchange of information).

equal execution of the steps—and even the signing of an information exchange agreement does not ensure meaningful compliance.³¹⁶

The OECD efforts to support and foster exchange of information have received repeated support from other governmental bodies. For example, on July 8, 2009, the Group of Eight (“G8”) issued a declaration which, among other points, urged the OECD to “now concentrate on implementing actual exchange of information and increasing the number, quality and relevance of the agreements that adhere to [OECD] standards” and to discuss and agree to a “toolbox of effective counter measures for countries to consider for use against countries that do not meet international standards in relation to transparency.”³¹⁷ The G8 is a body comprised of eight of the major industrialized nations—Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States (the EU, through the European Commission, attends the G8 meetings but does not hold a formal role).³¹⁸ Although the website for last year’s G8 summit³¹⁹ states that it “is not an international organisation, nor does it have an administrative staff with a permanent secretariat,”³²⁰ it also notes that the G8 has a rotating presidency “taken on by each country in turn, which works to define the topics to be placed on the agenda and the priorities for action, and to identify the fresh goals and sectors of intervention.”³²¹

316. See, e.g., OECD, *Promoting Transparency and Exchange of Information for Tax Purposes*, *supra* note 308, ¶ 10; Ault, *supra* note 298, at 770–72; Charles Gnaedinger et al., *News Analysis: Tax Havens Play Nice with OECD—For Now*, 54 TAX NOTES INT’L 103, 103–05 (2009).

317. Group of Eight, Declaration, *Responsible Leadership for a Sustainable Future*, ¶¶ 17(b), (f) (July 8, 2009), available at http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final,0.pdf.

318. See About the G8 (Mar. 17, 2010), <http://g8.gc.ca/about/>.

319. Each year, a new website is sponsored by the country holding the presidency for that year. For this year’s website, see The Muskoka G8 Summit, <http://g8.gc.ca/home> (last visited Apr. 3, 2010).

320. How the G8 Works, http://www.g8italia2009.it/g8/home/approfondimenti/g8-G8_layout_locale-1199882116809_comefunzionag8.htm (last visited Apr. 3, 2010). Instead the website characterizes the actions of the body as “a process that culminates in an annual Summit at which the Heads of State and Government of the member countries hold talks with a view to finding solutions to the main world issues, which are summed up in the ‘Final Statement.’” *Id.*

321. *Id.*

Similarly, in 2009, the Group of Twenty (“G20”) issued words of encouragement for the OECD’s information exchange work:

We note that the OECD has today published a list of countries assessed by the Global Forum [as] against the international standard for exchange of information. We welcome the new commitments made by a number of jurisdictions and encourage them to proceed swiftly with implementation. We stand ready to take agreed action against those jurisdictions which do not meet international standards in relation to tax transparency.³²²

The G20 includes those countries that are members of the G8, plus a broad range of other nations, including Argentina, Indonesia, Saudi Arabia, and Turkey.³²³ The G20 serves as a meeting of finance ministers and central bank governors that was established to provide regular economic discussions among industrial and developing nations.³²⁴ In addition to the nineteen member countries, the EU sits in (through the European Council presidency and the European Central Bank) as the twentieth member.³²⁵ Moreover, other international organizations with a specific monetary focus have an explicit but unofficial role:

To ensure global economic fora and institutions work together, the Managing Director of the International Monetary Fund (IMF) and the President of the World Bank, plus the chairs of the International Monetary and Financial Committee and Development Committee of the IMF and World Bank, also participate in G-20 meetings on an ex-officio basis.³²⁶

322. Group of Twenty, *Declaration on Strengthening the Financial System*, at 4 (Apr. 2, 2009), available at http://g20.org/documents/fin_deps_fin_reg_annex_020409_-_1615_final.pdf.

323. See What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Apr. 3, 2010).

324. See *id.*

325. See *id.*

326. *Id.* Like the Group of Eight, the Group of Twenty emphasizes that it is a more informal organization with no permanent staff, and only a rotating presidency. The finance ministers and central bank governors meet on an annual basis. Prior to that meeting, there are deputy level meetings and technical work, including “workshops, reports and case studies on specific subjects, that aim to provide ministers and governors

The OECD's push, in the context of the tax competition project, for effective exchange of information between countries received a notable boost from a series of banking scandals that erupted over the past year and a half. In these scandals, the most publicized of which involved UBS, taxpayers hid their assets and income offshore with the assistance of "reputable" banking institutions.³²⁷ Some of these banks had even entered into agreements with the United States in which they were permitted to use certain streamlined reporting and withholding procedures in return for agreeing to ascertain and confirm the tax status of their account holders.³²⁸ The measures that these institutions took to hide assets directly contravened their own existing commitments and their clients' tax reporting obligations.³²⁹ These events in the banking world did not create the transparency and exchange of information initiative, but they did accelerate the pace at which countries, many of them frequently identified as havens, began signing formal exchange of information agreements.³³⁰ Even Switzerland, a long-standing holdout on bank secrecy, has since signed exchange of information agreements with four OECD members and initialed agreements with at least eight other members.³³¹ In addition, Switzerland, along with Austria, Belgium, and Luxembourg, withdrew their opposition to the OECD's exchange of information provision in the model treaty.³³² As a result, all OECD members have now approved this standard.³³³

with contemporary analysis and insights, to better inform their consideration of policy challenges and options." *Id.*

327. See *supra* notes 5–7.

328. See Lynnley Browning, *U.S. Details Executive; Deepening UBS Inquiry*, N.Y. TIMES, May 8, 2008, at C3.

329. See Nick Mathiason, *Tax Scandal Leaves Swiss Giant Reeling*, OBSERVER (London), June 29, 2008, at 4; see also Hilzenrath, *supra* note 5.

330. See, e.g., Press Release, OECD, Bermuda Signs Eight New Tax Information Agreements (Apr. 17, 2009), available at http://www.oecd.org/document/4/0,3343,en_2649_33767_42578308_1_1_1_1,00.html; Press Release, OECD, Cayman Islands Signs Tax Information Agreements With Nordic Economies (Apr. 1, 2009), available at http://www.oecd.org/document/9/0,3343,en_2649_33767_42482889_1_1_1_1,00.html.

331. See *OECD Assessment Shows Bank Secrecy as a Shield for Tax Evaders Coming to an End*, 2009 WORLDWIDE TAX DAILY 167-16.

332. See *id.*

333. See David Stewart, *OECD Report Highlights Progress on Information Exchange*, 55 TAX NOTES INT'L 808, 808 (2009).

2. Analysis of the Tax Competition Story

Although the rich history that began with the OECD tax competition project and now plays out in the effort to secure meaningful transparency and exchange of information cannot be fully captured in a few pages, this case study affords the opportunity to make certain observations on the role of international organizations.

About the issue. Tax competition was initially perceived as a problem at the individual country level. Unfortunately, unilateral solutions can be limited so long as other countries continue to compete and refuse to exchange taxpayer information. Not surprisingly, countries concerned about the effects of tax competition would turn to an international organization—but not just any organization. It needed to be one whose membership would, on balance, be receptive to these concerns. It also needed to be an organization of sufficient size such that its actions could have adequate reach, both in disciplining members and in persuading or threatening nonmembers.

About the actors. The OECD was the logical choice. However, as events revealed, revenue-protecting countries were not the only actors deeply concerned by these questions. The decision not to substantially engage the business community or tax haven jurisdictions produced (or at least facilitated the creation of) a vocal backlash to the 1998 OECD report. BIAC's repeated comments revealed a strong negative reaction not just to the content of the report but also to businesses' exclusion from the process.³³⁴ Ten years later, in September 2008, BIAC's tax chair, Patrick Ellingsworth observed:

[I]n the last few years, we have seen a welcome reversal of the controversy that had arisen over the OECD's work on the harmful tax competition project. The project, as an inquiry into global tax practice, was a good project, but it misdirected resources away from the OECD's main purposes. . . . There was some good that came out of this criticism, as the project eventually evolved into a project

334. *See supra* note 280.

largely involving information exchange. It seems to be working fine as such.³³⁵

Additionally, the CFP's intervention and advocacy against the OECD project demonstrated strategic appreciation for the variety of important international actors. The CFP's coordinated efforts to influence individuals and groups in the U.S. Congress, to publish frequent policy papers, and to coordinate a tax haven "revolt" against the OECD undermined support for the OECD's 1998 report and project.³³⁶ Although the OECD itself was the organization pushing the tax competition issue, the OECD did not and could not operate in a vacuum. To the extent the CFP published competing articulations of tax competition and healthy international tax policy, these alternative positions could influence the undecided, galvanize supporters, and solidify the arguments of the opposition. Moreover, if support inside the OECD fractured, the organization's ability to aggressively pursue its agenda could be compromised. The efforts to influence the U.S. executive branch through Congressional opposition resulted in a formal change in the official U.S. position on the OECD project.³³⁷ This shift was widely considered a blow to the OECD's work even though the tax competition project later shifted its focus successfully towards transparency and exchange of information.³³⁸

Even the transparency and exchange of information agenda benefited from the support offered by other international organizations with overlapping but distinct membership, such as the G8 and the G20. Their explicit encouragement of the OECD's work here provided momentum and a signal that the mission now reflected broader international tax principles.³³⁹

Policy Development. The basic story of the tax competition projects reveals several interesting interactions and decisions,

335. Joann M. Weiner, *Members of BIAC*, 51 TAX NOTES INT'L, 1014, 1014 (2008) (quoting Patrick Ellingsworth, Chair of the BIAC Committee on Taxation and Fiscal Affairs).

336. See *supra* notes 290–307

337. See *supra* note 297 and accompanying text.

338. See *supra* note 298 and accompanying text.

339. See OECD, Press Release, Moves By Financial Centres Boost OECD Fight Against Tax Evasion (Mar. 12, 2009), available at http://www.oecd.org/document/16/0,3343,en_2649_201185_42339984_1_1_1_1,00.html; see also *Responsible Leadership for a Sustainable Future*, *supra* note 317; *Declaration on Strengthening the Financial System*, *supra* note 322.

including: (1) Japan's and France's effort to harness the collective force of the OECD to pursue a tax issue high on their agendas, (2) the OECD's effort to draft a document that captured its members' reasoning (although later OECD efforts reflected a growing appreciation of reaching beyond member states), (3) the powerful role played by taxpayer advocacy groups who strategically and simultaneously lobbied different segments of Congress and the haven states, (4) the reality that national positions such as the one initially espoused by the United States on tax competition are not uniform or static—but can reflect the emergence of an initial view that may later succumb to lobbying, and (5) the active engagement of academics and other bodies on the desirability of the OECD project. More broadly, the shift over time of the OECD's focus from harmful tax competition to transparency and exchange of information was itself the result of the interplay of these forces through and on the OECD.

CONCLUSION

These two initial case studies document the active and complex role played by a variety of international organizations in shaping tax policy. A sophisticated consideration of the impact of membership, structure, agenda setting, and outputs, helps explain the choices, patterns, and interactions seen in these two cases. Where, for example, impetus for change comes from the taxpayer side, an organization dedicated to the business community can be a sensible launching point. However, given that tax changes must ultimately be an act of the state, support from a state-based international organization becomes imperative. The choice of *which* state-based organization reflects a prediction about the probability of getting the matter on the agenda and moving it through to a successful conclusion. Save for organizations focused on tax planning (or even evasion), most organizations ultimately intend their output to either directly or indirectly reach state actors. Of course, if the original organization is itself state-based it might not always reach beyond its membership. If a particular issue is regional, topical, or sensitive and does not require broader participation for its adequate resolution, then limited involvement may be appropriate. Although neither case study represents such a

situation, the mission of JITSIC (Joint International Tax Shelter Information Centre) discussed in Part II.B.1.b. would.³⁴⁰

Organizations also display an organic quality, adjusting as circumstances and expectations change. Consider two different examples: First, following the backlash over its tax competition project, the OECD increased (both in quantity and depth) its involvement and interactions with nonmember states. Second, PATA (an organization focused on administrative and compliance matters) originally had four member states—however, after several years, it morphed into the Leeds Castle group presumably because the members found the issues important, more universal, and the operations valuable. That said, it did not jump to a forty-member size which would likely have made implausible, at least at this stage, the kind of mutual information sharing that can occur among a still small subset of countries with similar developed economies and income tax expectations.

The examination of international tax policy formation through international tax organizations illustrates the relevance of IR theory regarding international organizations and the international agreement process. The value of the cognitivists' focus on knowledge and belief—including their attention to expertise and epistemic communities—emerged at various junctures in both case studies, for example: (1) the ICC body assessing mandatory arbitration was composed of “experts” in international tax; (2) the ICC 2006 conference, which was designed to resolve residual questions on arbitration, relied on a panel “of prominent experts in . . . international tax and international arbitration”;³⁴¹ (3) the CFP, in its effort to influence the general perception of the OECD's tax competition project and the empirical and policy arguments regarding competition, began and continue to draft articles and commentary for publication in tax journals; and (4) the effort by interested international organizations to assign special committees to prepare documented reports outlining the policy foundations for any recommendations. Additionally, certain international organizations themselves may effectively serve as experts, or epistemic communities—for example the EATLP or

340. See *supra* notes 84–87.

341. Press Release, ICC, *supra* note 225.

the IBFD, both of which have a research-based mission. Does this status influence the way in which other international organizations seek to engage with them?

The broader visions of IR captured by the debate between the neorealists and the neoliberals direct us to consider the nature of the problems at issue in each case study and precisely what they “require” for resolution. Power does not seem to be a dominant element behind the agreements on mandatory arbitration. The initiative drew upon a widespread taxpayer base, not a subset of states. Additionally, resistance by states was more likely a function of their general sovereignty concerns over the possibility that arbitration might reduce their existing taxing authority.

As with the double taxation problems prompting the original development of the tax treaty framework, tax competition can exist between comparable states with similar investment flows and revenues. Thus, agreement on harmful tax competition and practices (at least within the OECD) more plausibly reflects efficiencies created by the agreement process, and thus support neoliberalism. Further research on international tax organizations might illuminate whether the active participation of certain kinds of organizations are more indicative of an international agreement dictated by power (neorealism) or by efficiency goals (neoliberalism).

The story of harmful tax competition does reveal, though, the potential overlay of power on agreements propelled substantially by market failure. Recall that modern IR theory suggests that neither neorealism nor neoliberalism likely captures the full picture of international decision-making. Even the critique offered by the neorealists is that neoliberalism gives inadequate attention to power, not that it disregards power entirely. Where might power be relevant here? Although the initial agreement on harmful tax competition occurred within the OECD and identified OECD member regimes that were harmful and required modification or elimination, there was an important external component as well. Part of the OECD report targeted tax havens that were not OECD members. Given that most of these countries were smaller and poorer, opponents of the OECD characterized the OECD position on these havens as an aggressive, unseemly power move. Regardless of whether these

charges stand (one could counter that havens had been forced by market failure to engage in competition that did not serve them well), it is certainly plausible that concerted action through a state-based organization could draw upon coercive power. This inquiry raises an even broader question: What, if anything, do international organizations owe to nonmembers? Is it merely the same duties the members themselves would owe? Is it a higher duty because the organization gains a unique leverage and influence beyond that possessed by its members? Should the answer differ depending on whether the organization is state-based or not? Further research on the real role and operations of international tax organizations in setting international tax policy is essential as we formulate our normative vision for these influential organizations.

APPENDIX

International Tax Organizations with State Membership

Centre de Rencontre et d'Etudes des Dirigeants des Administrations Fiscales (CREDAF)
 Commonwealth Association of Tax Administrations (CATA)
 Inter-American Centre for Tax Administrations
 International Tax and Investment Organisation (ITIO)
 Intra-European Organisation of Tax Administrations (IOTA)
 Leeds Castle Group
 Organisation for Economic Cooperation and Development (OECD)
 Pacific Association of Tax Administrators (PATA)
 Seven Country Working Group
 United Nations (U.N.)

International Tax Organizations with Non-state Membership

Business and Industry Advisory Committee (BIAC)
 Center for Freedom and Prosperity (CFP)
 Confederation Fiscale Europeenne (CFE)
 European American Tax Institute (EATI)
 European Association of Tax Law Professors (EATLP)
 European Taxpayers Association

Institute for Fiscal Studies (IFS)

Institute for Professionals in Taxation (IPT)

International Bureau of Fiscal Documentation (IBFD)

International Chamber of Commerce (ICC)

International Federation of Accountants (IFAC)

International Fiscal Association

International Tax Dialogue (ITD)

International Tax Planning Association (ITPA)

Tax Executive Institution (TEI)

United States Council for International Business (USCIB)

World Taxpayers Associations