

# HARD LAW, SOFT LAW, AND INTERNATIONAL TAXATION

ALLISON CHRISTIANS\*

Why do countries follow the rules they do for international taxation? Are they legally obligated, obligated by something that is not law but is similarly compelling, or not obligated at all? Discussion in international tax literature is increasingly using terms such as *hard law*, *customary law*, and *soft law* in an effort to answer these questions and suggest policy approaches.<sup>1</sup> For example, it has been argued that consensus views on certain practices in international tax constitute customary law,<sup>2</sup> that guidance issued by some international organizations is soft law,<sup>3</sup> and that hard law, not soft law, approaches should be used to further certain tax policy goals.<sup>4</sup>

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\* Assistant Professor of Law, University of Wisconsin Law School. I am indebted to Professors Howard Erlanger, Michael McIntyre, Michael Livingston, Steven Dean, Richard Bilder, and Daniel Sokol for many helpful comments and suggestions.

<sup>1</sup> These types of issues have been discussed for a number of years in other international regulatory fields, such as environmental, securities, and antitrust law, but the discussion is relatively less thorough in the field of international taxation. As such, the discussion in the tax literature is an extension of a larger dialogue that has been going on in international law circles for some time, but the problems presented by taxation may raise some unique issues.

<sup>2</sup> See, e.g., Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 496-501 (2004); Frank Engelen, *Some Observations on the Legal Status of the Commentaries on the OECD Model*, 60 BULL. INT'L TAX 105, 106, 109 (2006); Brian Lepard, *Is the United States Obligated to Drive on the Right? A Multidisciplinary Inquiry into the Normative Authority of Contemporary International Law Using the Arm's Length Standard as a Case Study*, 10 DUKE J. COMP. & INT'L L. 43, 167-75 (1999); Chantal Thomas, *Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method*, 14 BERKELEY J. INT'L L. 99 *passim* (1996).

<sup>3</sup> See, e.g., Frank Engelen, *Some Observations on the Legal Status of the Commentaries on the OECD Model*, BULLETIN—TAX TREATY MONITOR, Mar. 2006, at 106; David R. Tillinghast, *Commentaries to the OECD Model Convention: Ubiquitous, Often Controversial; but Could They Possibly Be Legally Binding?*, 35 TAX MGMT. INT'L J. 580, 580-84 (2006). Each of these authors states that interpretive guidance issued by the OECD with respect to its model income tax conventions constitute soft law. Professor Engelen argues further that states can by implicit conduct (i.e., failure to disclaim the authority of the guidance) bind themselves to the guidance as a matter of (hard) international law. Engelen, *supra*. This analysis suggests that careful scrutiny must also be made with respect to other OECD guidance, as well as guidance from other organizations concerned with international tax matters, such as the United Nations.

<sup>4</sup> See Avi Nov, *The "Bidding War" To Attract Foreign Direct Investment: The Need for a Global Solution*, 25 VA. TAX REV. 835 (2006) (arguing that a hard law solution in the form of a multilateral agreement is needed to combat the negative effects of international tax competition).

The use of these terms raises the specter of whether and to what extent international tax norms should be considered legally binding on other states and whether the categorization as law has practical effects. Does it matter whether an international tax practice or norm is described as a “hard” law,<sup>5</sup> a “customary” law,<sup>6</sup> a “soft” law, or no law at all, if most countries feel compelled to abide by it in any case?

In this essay, I want to make the case that the description does matter. It is worth the trouble of exploring the distinctions implied by these terms because they are being used to convey something about expectations regarding how nations will or should behave in response to emerging international tax norms. In defining the terms and attempting to categorize international tax norms within them, we may better understand the process by which international tax laws emerge, evolve, and diffuse across states.

Consider for example the initiative by the Organization for Economic Cooperation and Development (OECD) to curb what it calls “harmful tax practices” in member and non-member states.<sup>7</sup> This initiative began in 1996 when an OECD Ministerial Communiqué called upon the organization to curb the rise of tax havens, which were seen as eroding the revenue-raising ability of capital-exporting nations.<sup>8</sup> Two

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<sup>5</sup> Arguably the term “hard” is superfluous to the use of the term “law,” but we may use the redundancy to distinguish this kind of law from the possibility of soft law. For a critique of the distinction between hard and soft law, see generally Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT’L L. 167 (1996).

<sup>6</sup> Customary law is a form of hard law, as discussed below. However, it is characterized by an informal, dynamic and uncertain nature which international law scholars suggest often leads to confusion and misunderstanding in application. See, e.g., INT’L LAW ASS’N COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 2 (2000) [hereinafter INT’L LAW ASS’N].

<sup>7</sup> See OECD, Centre for Tax Policy and Administration, Harmful Tax Practices, [http://www.oecd.org/departement/0,3355,en\\_2649\\_33745\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,3355,en_2649_33745_1_1_1_1_1,00.html) (last visited Aug. 15, 2007). This is but one relatively recent example of the formulation of international tax norms. Another OECD-related example is currently at issue in a recent dialogue among international tax experts regarding the binding nature of OECD treaty-related guidance. See generally Engelen, *supra* note 2. International tax initiatives of other bodies such as the United Nations and the European Union are additional examples that are worth exploring, perhaps especially in cases of overlap with OECD efforts (such as in the area of tax treaty negotiation and interpretation, and best practices for corporate governance).

<sup>8</sup> Organization for Economic Cooperation and Development [OECD], Meeting of the Council at Ministerial Level, May 21-22, 1996, *Communiqué*, ¶ 15(XV) (requesting that the OECD “analyse and develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions, and the consequences for national tax bases”). At a meeting in September of that year, the Heads of State of the G-7 countries stated that “[t]ax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax

years later, the OECD published a report that “developed criteria to identify harmful tax competition” and laid out nineteen recommendations to counteract these practices.<sup>9</sup> This report was followed by a series of subsequent progress reports that named regimes deemed harmful by the OECD, called for sanctions on uncooperative member and non-member states,<sup>10</sup> and later reported on compliance.<sup>11</sup>

Through this initiative, the OECD used “dialogue, consensus, peer review and pressure”<sup>12</sup> to develop international tax norms defining appropriate international tax practices.<sup>13</sup> These norms quickly disseminated within and beyond the member states of the OECD.<sup>14</sup> Do

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competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases,” and “strongly urge[d] the OECD to vigorously pursue its work in this field.” Group of Seven Lyon Summit, June 28, 1996, Lyon, Fr., *Economic Communiqué: Making a Success of Globalization for the Benefit of All*, ¶ 16.

<sup>9</sup> OECD, *More Information on the Harmful Tax Practices Work*, [http://www.oecd.org/document/49/0,2340,en\\_2649\\_33745\\_33995569\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/49/0,2340,en_2649_33745_33995569_1_1_1_1,00.html) (last visited Aug. 3, 2007); see also OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 8 (1998) [hereinafter 1998 REPORT].

<sup>10</sup> OECD, TOWARDS GLOBAL TAX CO-OPERATION: REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE OF FISCAL AFFAIRS: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES (2000) [hereinafter 2000 REPORT] (explaining the OECD’s review process, naming states in violation of the OECD’s harmful tax practices criteria, explaining the commitments necessary to avoid being named as uncooperative, and setting out “defensive measures” member states were to take with respect to uncooperative states, including imposing penalties and other economic sanctions, cutting off “non-essential economic assistance,” and other non-tax measures); see also OECD, OECD PROJECT ON HARMFUL TAX PRACTICES: THE 2001 PROGRESS REPORT 13 (Nov. 14, 2001), <http://www.oecd.org/dataoecd/60/5/2664450.pdf> [hereinafter 2001 REPORT] (reiterating that member states may use “defensive measures” against states with tax regimes deemed to be harmful). Some practitioners suggest that the real threat presented by the OECD was “unplugging the offshore tax centers from the global financial grid.” E.g., Patrick Tracey, *Harmful Tax Competition Furor Raises Specter of Global Tax Forum*, DAILY TAX REP. (Bureau of Nat’l Affairs, Inc., Wash. D.C.), Jan. 29, 2001, at G-4.

<sup>11</sup> See OECD, OECD PROJECT ON HARMFUL TAX PRACTICES: THE 2004 PROGRESS REPORT 9 (Feb. 4, 2004), <http://www.oecd.org/dataoecd/60/33/30901115.pdf> [hereinafter 2004 REPORT]; OECD, OECD PROJECT ON HARMFUL TAX PRACTICES: 2006 UPDATE ON PROGRESS IN MEMBER COUNTRIES 5 (2006), <http://www.oecd.org/dataoecd/1/17/37446434.pdf> [hereinafter 2006 REPORT] (discussing regimes that had been labeled as harmful had been abolished or were otherwise no longer deemed to be so).

<sup>12</sup> See OECD, About the OECD, [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html) (last visited Aug. 3, 2007)

<sup>13</sup> Perhaps predictably, much controversy surrounded the definitions settled upon by the OECD for what constituted “harmful” tax competition and the implications of that definition regarding which countries were targeted and which were not. E.g., Lawrence Speer, *Conservative Think Tanks Attack OECD on Offshore Tax Scrutiny During Forum*, DAILY TAX REP. (Bureau of Nat’l Affairs, Inc., Wash. D.C.), Nov. 15, 2005, at G-3.

<sup>14</sup> The OECD reports that compliance with the norms has been overwhelmingly achieved. See 2006 REPORT, *supra* note 11 (showing that most regimes that the OECD had identified as harmful had been abolished, amended to remove their potentially harmful features, or otherwise

these norms constitute international law? Certainly they did not emerge in the form of a treaty.<sup>15</sup> Instead, they were presented as a set of “recommendations and guidelines.”<sup>16</sup> The fact that compliance was observed in member and non-member states suggests that further analysis is needed to determine whether the guidelines have or may become law through some other process. For instance, some international tax scholars have argued that other forms of OECD

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no longer found to be harmful, and no new harmful regimes have been identified). An analysis of what is meant by compliance and whether and to what extent states have actually changed their behaviors or the OECD has changed its definitions would further illuminate the role of the OECD in promulgating international tax law.

<sup>15</sup> Most international law scholars acknowledge that international law exists and is found mainly in treaties, customary law, and general principles. *E.g.*, SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 65 (2006). Thus if the OECD had initiated its harmful tax practices initiative by means of a multilateral treaty, its nature as hard law would not likely be in question, and the form would be familiar to tax scholars since international tax coordination has traditionally been achieved mainly through this mechanism. In the United States, the “legal” nature of treaties is confirmed both by constitutional definition and, in the particular area of taxation, by acknowledgement in statutory law. *See* U.S. CONST. art. VI, cl. 2; I.R.C. § 7825(d)(1) (2007) (confirming that treaties are equal in legal force to other laws). As a technical matter, under United States law, the term “treaties” means only those agreements that are ratified by the executive branch with the advice and consent of two-thirds of the Senate. U.S. CONST. art. II, § 2, cl. 2. However, the United States routinely enters into other international agreements, including tax agreements, that were not advised and consented to by the Senate. For example, all United States social security and tax information exchange agreements, and most shipping income tax agreements, are non-treaty agreements. *See, e.g.*, Agreement Between the United States of America and Japan on Social Security, U.S.-Jap., Feb. 19, 2004, Temp. State Dep’t No. 05-246; Agreement for the Exchange of Information Relating to Taxes, U.S.-Isle of Man, Oct. 3, 2002, Temp. State Dep’t No. 06-151; Agreement for Reciprocal Exemption of Taxes on Income from the International Operation of a Ship or Ships or Aircraft, U.S.-Cape Verde, Mar. 16, 2005, Temp. State Dep’t No. 05-161. These so-called “executive agreements,” though not technically treaties, are (generally) considered to have the same legal effect. *See, e.g.*, American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States § 303 cmt. e (1987) (“The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty in every instance.”). *But see* Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1231-32 (1995) (arguing that the text of the constitution forecloses the possibility that the United States may enter into international agreements other than treaties). In this essay, I use the term “treaty” to connote both treaties and executive agreements.

<sup>16</sup> The recommendations and guidelines were addressed directly to member states and encouraged non-member states to “associate themselves” with this guidance. 1998 REPORT, *supra* note 9, at 57, 59, 66. The OECD distinguishes its work from the EU Council’s 1997 Code of Conduct on business taxation, which also defines and identifies harmful tax practices within the EU, on the grounds that the OECD initiative reaches beyond the confines of membership and has a broader scope. *Id.* at 11. One scholar has likened the EU Code of Conduct to the “open method of coordination” framework introduced in more recent EU governance developments (which is sometimes described as soft law). *See* Claudio M. Radaelli, *The Code of Conduct against Harmful Tax Competition: Open Method of Coordination in Disguise?*, 81 PUB. ADMIN. 513 *passim* (2003).

guidance might constitute customary law.<sup>17</sup> Might the harmful tax practices guidance be framed as such?

Customary law is characterized by two fundamental elements: states uniformly comply with it (sometimes referred to as the objective element), and they do so out of a sense of legal obligation (sometimes referred to as the subjective element).<sup>18</sup> The role of each of these requirements in determining whether something is a customary law is the subject of extensive analysis in the international law literature, but the key seems to be that in order for a custom to be a law, it must be recognized by states as legally binding.<sup>19</sup> Whether the OECD's harmful tax practices guidance can be described as customary law depends upon whether state practice is sufficiently widespread and whether countries go along because of "a general legal obligation necessitating it."<sup>20</sup>

State practice seems insufficiently widespread to describe the OECD's work as customary law in this case since fewer than half of the nations in the world have been involved in the initiative and a number of states have registered their abstention.<sup>21</sup> The legal status of these tax norms may therefore depend on whether states sufficiently internalize them going forward. The OECD's current focus is "on monitoring any continuing and newly introduced preferential tax regimes identified by member countries."<sup>22</sup> If internalization is not occurring, the process of

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<sup>17</sup> See Avi-Yonah, *supra* note 2, at 483; Lepard, *supra* note 2, at 158; Thomas, *supra* note 2, at 125.

<sup>18</sup> See, e.g., INT'L LAW ASS'N, *supra* note 6, at 718; Michael Byers, *Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT'L L. 81, 83 (2001). Unlike treaty law, customary law emerges not from formal documentation but from state practice, pronouncements made by international bodies, and other informal processes. See Byers, *supra*.

<sup>19</sup> Customary law is described as binding even on those states that had no part in forming it, "because they choose to acknowledge its obligatory character." INT'L LAW ASS'N, *supra* note 6, at 741. There is an exception for so-called "persistent objectors"—states that, before a practice develops into a rule of general law, "persistently and openly" dissent from the rule. *Id.* at 738-39. Perhaps in keeping with this standard, some tax scholars have implied that in some cases, states may have to engage in persistent objection to prevent guidance from the OECD from becoming international law. Engelen, *supra* note 2, at 109; Tillinghast, *supra* note 3, at 581.

<sup>20</sup> INT'L LAW ASS'N, *supra* note 6, at 748 (citing the International Court of Justice ruling in the *North Sea Continental Shelf* cases: F.R.G. v. Den; F.R.G. v. Neth., 1969 I.C.J. 3 (Feb. 20)).

<sup>21</sup> States within and without the OECD that were identified as having harmful tax practices under the initiative number fewer than fifty of the world's countries. In addition, four of the OECD member states have abstained from the guidance and a number of non-member states are specifically identified by the OECD as noncompliant, as discussed below. See generally OECD, List of Harmful Tax Practices, available at [http://www.oecd.org/topic/0,3373,en\\_2649\\_33745\\_1\\_1\\_1\\_1\\_37427,00.html](http://www.oecd.org/topic/0,3373,en_2649_33745_1_1_1_1_37427,00.html) (last visited Aug. 3, 2007).

<sup>22</sup> OECD Project on Harmful Tax Practices, *2006 Update on Progress in Member Countries*, ¶ 16 (2006), <http://www.oecd.org/dataoecd/1/17/37446434.pdf>. Member states are explicitly permitted "to request a review of any newly introduced preferential tax regime." *Id.*

peer review may provide the requisite level of state practice in the future.<sup>23</sup>

However, even if practice is already or becomes sufficiently widespread, the OECD's guidance seems to lack the general legal obligation (*opinio juris*) associated with customary law because the guidance is by its terms commendatory rather than obligatory. Two observations indicate that the requisite *opinio juris* is lacking. First, to the extent the international tax norms developed in the OECD initiative do constitute customary law, Luxembourg and Switzerland are apparently the only states that had an opportunity to, and did, exercise persistent objection to prevent the law from applying to them.<sup>24</sup> Having failed to persistently object, all other states would theoretically be bound by the OECD guidance if it in fact constituted customary law.<sup>25</sup> Yet Belgium and Portugal abstained from 2001 and later progress reports, and a number of non-member states are specifically identified by the OECD as noncompliant.<sup>26</sup> This suggests that the guidelines do not constitute customary law because states refuse to acknowledge its obligatory character.<sup>27</sup> Second, much of the observed compliance has occurred via the formation of treaties.<sup>28</sup> This suggests that the norms are probably not customary law, since states would not be expected to enter into treaties if they thought an existing law already applied.<sup>29</sup>

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<sup>23</sup> The OECD guidance thus serves as the mechanism to identify a breach and the permission to impose sanctions. The global reach also suggests that the initiative does not limit itself to a specified region or type of country, so the norms probably also do not constitute local or regional customary law.

<sup>24</sup> 2004 REPORT, *supra* note 11, at 4 n.1.

<sup>25</sup> *See, e.g.*, INT'L LAW ASS'N, *supra* note 6, at 27-28.

<sup>26</sup> 2001 REPORT, *supra* note 10, at 4 n.1; 2004 REPORT, *supra* note 11, at 7-9 (listing states with tax regimes deemed to be potentially harmful).

<sup>27</sup> This seems especially inconsistent with customary law since both Portugal and Belgium participated in the norm creation in earlier Reports.

<sup>28</sup> *See, e.g.*, Press Release, OECD, OECD Welcomes Tax Information Exchange Agreements Between the Netherlands Antilles and Australia and New Zealand (Feb. 3, 2007), available at [http://www.oecd.org/document/26/0,2340,en\\_2649\\_37427\\_38044186\\_1\\_1\\_1\\_37427,00.html](http://www.oecd.org/document/26/0,2340,en_2649_37427_38044186_1_1_1_37427,00.html) (last visited Aug. 3, 2007) (lauding new tax information exchange agreements between member and non-member states as "marking further progress in international efforts to implement the principles" of the harmful tax practices initiative).

<sup>29</sup> *See, e.g.*, INT'L LAW ASS'N, *supra* note 6, at 43-48 (stating that treaties rarely codify customary international law since "it would not be worth the parties' effort" to enter into such an agreement, and since by their terms, most treaties are concluded in an effort to "improve an existing (legal) state of affairs," and providing as an example that, "even though there are very many bilateral extradition treaties, it would be wrong to assume that there is a duty to extradite in the absence of a treaty.").

The OECD harmful tax practices guidance thus seems to fall short of international law in the formal sense of treaty or custom. Yet states feel compelled to adhere to the recommendations and guidelines, perhaps not least because there are—at least potentially—real consequences for failure to comply.<sup>30</sup> If the OECD initiative is not law, it nevertheless creates a strong degree of obligation among member and non-member states alike. This sense of obligation makes it difficult to simply dismiss the guidance as “not law.”<sup>31</sup>

To resolve this problem, we may again consult the international law literature, which suggests that the distinction between something that is or is not hard law may not be binary but may present a spectrum or continuum based on theories about obligation and its attendant features.<sup>32</sup> Some international law scholars use the term soft law to describe some norms that may not themselves constitute law but seem to have effects that evoke a legal process or form. The international law literature frames soft law as norms that are not thought of as law per se but compel a law-like sense of obligation in states. If a soft to hard law continuum exists, it seems to be characterized by a sense that the less we are inclined to equate a practice or pronouncement with a legal obligation, the more a label like soft law seems appropriate.

The category of soft law thus seems to offer a third way between the potentially uncomfortable position of describing the OECD guidance as “law” and therefore implying states must comply with it, and the potentially unrealistic position of describing it as not law at all, despite evidence that countries do in fact comply with it, often against their self-interest or will (or both). But describing OECD guidance as soft law does not simplify the analysis of how international tax law develops.

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<sup>30</sup> See 2000 REPORT, *supra* note 10, at 24-26.

<sup>31</sup> Critics have characterized the OECD’s work in this area as essentially coercive in nature, featuring demands and threats, and inuring compliance under duress. See, e.g., Richard Hay, *OECD Report on “Level Playing Field” Imminent*, MANAGING PARTNER (Aug. 9, 2006), available at <http://www.mpmagazine.com> (search for “OECD”; then follow “Cover Story: Bahamas and Cayman” hyperlink) (last visited Aug. 3, 2007).

<sup>32</sup> See, e.g., C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850 (1989); see also, e.g., David M. Trubek et al., “Soft Law,” “Hard Law,” and *European Integration: Toward a Theory of Hybridity*, University of Wisconsin Law School Legal Studies Research Paper Series, Paper No. 1002 (Nov. 2005), available at <http://ssrn.com/abstract=855447> (last visited Aug. 3, 2007) (suggesting that a hybrid approach, seeking both hard and soft elements, is needed in analyzing issues of international law). However, some scholars reject the notion of a continuum and argue that law is necessarily a binary concept. See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581 (2005); see also, e.g., Klabbers, *supra* note 5.

Instead, the description opens up an important inquiry regarding who is involved in shaping tax norms.<sup>33</sup>

As a few tax scholars have noted, describing something as law, whether hard or soft, creates expectations about how countries may behave.<sup>34</sup> If the OECD is described as a source of soft law, nations may be expected to comply with its guidance even if they are not legally obligated to do so. It thus seems imperative to closely examine the process by which international tax norms develop, especially in discrete circles, and disperse globally.

A number of trans-governmental networks are engaged in similar and sometimes overlapping work in the area of international taxation,<sup>35</sup> and tax scholars are grappling with the fact that some of these networks are producing norms that seem binding.<sup>36</sup> Applying a soft law analysis to the activities of these networks highlights important issues about the relative degrees of participation of different states in the process of international tax norm creation.<sup>37</sup> Soft law is sometimes praised for its flexible, bottom-up approach, which may allow states to adapt to their diverse circumstances and lower the cost of contracting between states.<sup>38</sup>

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<sup>33</sup> See, e.g., Terence C. Halliday and Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447, 451 (2006) (“Whether the agents are global or local, the question of agency compels us always to ask whose norms are being globalized and thus to recognize that any global norm may be some party’s globalized localism.”).

<sup>34</sup> See, e.g., Avi-Yonah, *supra* note 2, at 11 (international tax laws might invalidate domestic judicial decisions regarding allowable tax strategies); Tillinghast, *supra* note 3.

<sup>35</sup> For examples, see the following: the OECD’s work on other issues such as transfer pricing, the UN’s work on international tax matters, the Council of the European Union’s work on harmful tax practices, and the International Monetary Fund’s work on tax reform, especially in developing countries.

<sup>36</sup> See, e.g., Avi-Yonah, *supra* note 2, at 10-16; see generally David A. Ward, *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process*, 60 BULL. INT’L TAX’N 97 (2006) (discussing whether international law requires states to follow the OECD Commentaries); Maarten J. Ellis, *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process—Response to David Ward*, 60 BULL. INT’L TAX’N 103 (2006); Engelen, *supra* note 2, at 105.

<sup>37</sup> For example, the successful diffusion of a particular tax norm may represent “the global triumph of a particular actor’s localism that vests advantage in that actor [and] marginalizes rival conceptions as outmoded localisms.” Halliday & Osinsky, *supra* note 33, at 456. The inquiry raises questions that have been the subject of much attention in other international regulatory contexts regarding how participation shapes the global institutional agenda. See, e.g., D. Daniel Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, University of Wisconsin Law School Legal Studies Research Series, Paper No. 1034 (Feb. 2007), available at <http://ssrn.com/abstract=961380> (last visited Aug. 3, 2007) (providing an example in the international antitrust area).

<sup>38</sup> Trubek et al. describe soft law as capable of promoting “transformative processes of norm diffusion, persuasion, and learning that have a positive impact on policy outcomes by allowing a wider spectrum for deliberation in the governing process.” Trubek et al, *supra* note 32, at 13.

On the other hand, it may serve as a mechanism for key actors to achieve agendas with particularized benefits.<sup>39</sup>

Determining the extent to which international tax law is emerging outside of traditional hard law mechanisms is therefore a preliminary step toward understanding how this law will develop in the future and who will take part in shaping it. It may not always be clear why countries adopt certain tax practices, but it seems important to seek clarity in identifying and defining the principles we use to explain what role actors in international and transnational organizations can, do, and ought to play in the formation of tax law. In the end, the short message of this essay is that the labels do matter: they illuminate the need for further analysis regarding the legitimacy of institutional authority and expectations and, fundamentally, the transformative impact of globalization on national tax law-making.

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<sup>39</sup> See, e.g., Halliday & Osinsky, *supra* note 33.