The Organization for Economic Co-operation and Development (OECD) has pioneered global governance in three areas of vital importance to international commerce: competition, foreign direct investment, and tax policy. The results have varied sharply; most national policy change has resulted from policy diffusion in which the OECD role was supportive but not critical. Greater consistency among states in competition policy has been thwarted by differing objectives, legal systems, administration, and penalties. The Multilateral Agreement on Investment (MAI) failed mainly because the problems it addressed lacked urgency. This contrasts sharply with some OECD tax activity that has focused on urgent needs for greater international policy congruence.

1 INTRODUCTION

Economic globalization demands national policy accommodation. That accommodation has generated growing anxiety about declining state autonomy. As Martin Elsig has noted, ‘the Uruguay Round agreement has increasingly led to the melting of nationally constructed buffer zones that coped with trade liberalization’ (Elsig, 2007, 76). A World Trade Organization (WTO) embrace of the ‘Singapore Issues’ of 1996 anticipating the Doha Round would have taken this process further. Those issues included competition and direct investment policy.

Tax policy is another highly sensitive area of critical importance to the governance of the global economy. The General Agreement on Tariffs and Trade (GATT) and WTO have always dealt with tax issues when they have been manifest as tariffs. Otherwise, however, international tax issues have generally been treated, if at all, only on a bilateral basis, despite their great protectionist potential in theory and in practice. Some observers have suggested a possibly expanded WTO role for this reason (Avi-Yonah and Slemrod, 2001). But tax avoidance and tax evasion are now far more urgent global governance issues, and they jumped to the headlines with the London G-20 conference of April 2009.
These three policy areas: competition policy, foreign direct investment policy, and tax policy, overlap in their critical importance to global business. They also stand at the cutting edge of global economic governance, and they have all been more seriously considered as policy issues by the OECD than by any other international organization. The OECD has therefore served as a vanguard for the rest of the world economy on these issues, and its very uneven achievements even among high-income states hold broader lessons for the future of global economic governance in these policy areas and beyond. Following a brief account of OECD activities, the article will examine OECD contributions in each of the three policy areas. The article concludes with an examination of developments across the three areas viewed as policy diffusion, institutionalization, and legalization.

2 THE OECD AND ECONOMIC GLOBALIZATION

The OECD, comprised of thirty-four economically advanced countries, now devotes some attention to virtually all public policy challenges facing the high-income countries except those in defence, culture, and sport (Henderson, 1996, 13; Marcussen, 2004, 107). The three policy areas considered here, however, relate very closely to the original purpose of the organization: the Marshall Plan-generated OEEC’s drive to make international trade and capital flows freer and the successor OECD’s goal ‘to contribute to the expansion of world trade on a multilateral and non-discriminatory basis in accordance with international obligations’ (Henderson, 1996, 11). Some OECD work on competition policy and taxation, and all of its work on foreign direct investment (FDI) has dealt with global governance construed as ‘processes and institutions, both formal and informal, that guide and restrain the collective activities of a group’ (Keohane and Nye, 2000: 12).

Global economic governance has often changed little, over long periods in the past. The onrush of globalization, however, has led to substantial national policy changes and their diffusion, the birth of new institutions, and changing levels of legal commitment to various policies and practices. OECD activity related to competition, Foreign Direct Investment (FDI), and taxation vividly

1 The inclusion of such states as Mexico, Turkey, and Chile may reflect projection and aspiration – and politics – more than the current level of economic development.

2 After years of relative neglect, the OECD is now receiving considerable scholarly attention (e.g., Mahon and McBride, 2008; Martens and Jacobi, 2010; Woodward, 2009).

3 A burgeoning scholarly literature has accompanied these changes. Major writing on policy diffusion includes Simmons and Elkans, 2004 and Simmons, Dobbin, and Garrett, 2006; on institutional design, Koremenos, Lipson, and Snidal, 2001; and on legalization, Goldstein, Kahler, Keohane, and Slaughter, 2000 and Abbott and Snidal, 2000.
illustrates all of these responses. More specifically, the OECD experience suggests how the embeddedness of national practice has interacted with the urgency of the perceived need for altered governance to produce collaborative outcomes that vary from information exchange to constraining agreement.

Kahler and Lake (2009) have argued that global economic governance takes place in three modes: supranational organizations, networks, and hierarchy, and they consider various ways that the three combine and co-exist. From this perspective, the OECD can be seen as a supranational organization with little formal power that incubates and supports a multitude of networks and sometimes develops legal templates. Decisions are taken by consensus. There has always been an element of hierarchy, but it has been informal: US primacy in the organization has declined sharply as the European states that make up twenty-four of its thirty-four members have used the OECD as an alternative forum for the discussion of issues critical for the European Union (EU) and the rest of Europe (Dostal, 2004; Marcussen, 2004, 122–125).

Much of the OECD’s overall work, including the three areas considered here, involves senior officials from Member States in a specific policy area, sometimes joined by non-member representatives, meeting in committees and supported by a large and well-qualified staff that includes nationals from member countries (OECD, 2006a, 5). Typical OECD activity aims to improve national economic performance by exposing national policy experts to cognate activity in other Member States and by the development of agreement about what constitutes ‘best practices’: the most effective ways to accomplish certain public policy goals. Most of this work relates to policy diffusion through learning. Progress implies greater similarity of policy simply because some approaches work better than others. But there are sharp limits on how far such comparing and ranking can go without generating political reaction. This is sometimes sorted out at the OECD itself; at other times OECD action generates negative political responses within the Member States. For example, many OECD positions related to social policy and the welfare state have generated strong controversy in recent years, much of it related to ‘neoliberalism’ (Mahon and McBride, 2008). Leaving problems of evidence aside, calling one policy direction

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4 A vast and growing part of the OECD overall authority rests on soft rather than hard law (Marcussen 2004:108–112). Abbott and Snidal (2000) argue that the ‘hardness’ of law can be evaluated in terms of obligation, precision, and delegation. They also argue persuasively that soft law should not be considered inferior to hard law; soft law may be both more feasible and more effective depending on the circumstances.

5 Or perhaps sometimes, through its less cerebral variant, emulation. These are two of the four mechanisms of policy diffusion identified by Simmons, Dobbin, and Garrett (2006). The others are competition and coercion, which are also illustrated by OECD experience elsewhere.
better than another typically suggests that some criteria are weighted more heavily than others, and concurrence is unlikely to be unanimous.

The OECD’s global governance activities have certainly aimed to improve domestic economic performance, but because they have largely focused on how states’ policies affected each other, ‘best practice’ as an objective has often been subordinated to some combination of compatibility and cooperation. Nonetheless, as will be seen, the prospect of autonomy-threatening change could only be postponed and not completely avoided.

3 COMPETITION POLICY

3.1 EARLY ACTIVITY

The notoriety of international cartels between the world wars generated a strong and almost universal interest in combating such monopoly power, but only the United States and Canada had adopted recognizable competition policies prior to World War II. The International Trade Organization, rejected by the US Senate in 1947 as a threat to US sovereignty (Odell and Eichengreen, 2000, 168), included language from the draft Havana Charter that obliged states to counter private restrictions on international competition (US Department of State, 1948).

The US insisted on competition policy in West Germany, but the laws chosen were only partly based on US experience. They were strongly influenced by German ordoliberalism, a reaction to the European experience between the wars and especially to Nazism. Ordo-liberalism sought power diffusion in the economy, and many ordoliberals also championed small and medium-sized businesses partly on social justice grounds (Gerber, 1998, 241). Such objectives often trumped a concern for economic efficiency (Ahlborn and Grave, 2006; Gerber, 1998, 7, 8, 239). Ordo-liberalism provided an alternative to the ad hoc administrative discretion to intervene in firm behaviour that previously prevailed across most of Europe. Ordo-liberalism became the most important indigenous European element to be incorporated into the competition articles of the Treaties of Rome in 1957 (Gerber, 1998, 173).

Japanese antitrust law was imposed by the US occupation authorities with little local enthusiasm or even comprehension (Matsushita, 1993). Only a few other states had competition policies as late as 1980. Most poor countries first

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6 The language was drafted by Harvard economist Edward S. Mason. The US withdrew support from a 1952 UN attempt to gain agreement on the competition policy sections of the Charter on the grounds that it was premature: too few states had such policies that meaningful implementation appeared unlikely (Sell, 1998, 143).
considered competition policy as a means of controlling foreign firms as part of the ‘New International Economic Order’ of the 1970s (Hudson, 1977). As dirigisme gave way to liberalization in the 1980s and 1990s, the United Nations Conference on Trade and Development (UNCTAD) assistance that was first sought mainly to bring multinational corporations to heel was redirected to devise policies covering competition over the entire domestic market. In addition, virtually all of the states born from the collapse of Soviet power soon developed competition policies (Kovacic, 1998). By the early years of the twenty-first century, more than one hundred competition law regimes were in place.

3.2 Substance and enforcement

The competition sections of the Treaties of Rome address the three major problems targeted as early as the US Sherman Act of 1890: collusion (e.g., cartels), amalgamation (e.g., mergers), and exclusion (e.g., predatory pricing), and subsequent national laws almost everywhere address these concerns in some way. In addition to Brussels’ overriding concern to break down barriers among Member States, the content as well as the administration of most EU and Member State law reflects a mix of motives: the continuing economic health of specific firms, the preservation of a sufficient number of firms to maintain rivalry, and economic welfare as understood by economists. It took the ‘antitrust revolution,’ of the 1970s, heavily influenced by the ‘Chicago School’ of economics, to gain precedence for the welfare criterion in US policy (Gifford and Kudrle, 2006, 426). This left other OECD states with far larger elements of protection and rivalry in the policy mix.

Differing emphases in competition policy have been pursued with quite different structures of enforcement. The US system remains nearly unique in lodging most enforcement with the civil and criminal courts, in the large role

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7 For a persuasive account of the two phases of policy among poor countries and the transition between them, see Sell, 1998, 141–173; 198–212.
8 Much of the great flurry of competition law adoption in the 1990s was strongly linked to access-assurance in preferential trade agreements and may have involved little activity. See Cernat, 2005.
9 There is an ambiguity about “welfare.” Most economists would prefer that competition policy follow the usual Kaldor-Hicks approach to economic policy and maximize the size of the pie leaving other policies to sort out who gets pieces of varying sizes. Non-economists and policy makers on both sides of the Atlantic typically see the welfare of the consumer in a particular market as the appropriate criterion, however, and both the EU and the US are now committed to that standard.
played by private litigation, and in its use of criminal penalties. The latter feature, in particular, has complicated international cooperation. EU practice has been far more influential globally: administrative, rather than criminal, sanctions are enforced by a largely independent body whose decisions can be appealed through the courts (Kudrle, 2006).

3.3 THE OECD CONFRONTS NATIONAL DIFFERENCES

Although some early OEEC and OECD measures necessarily involved competition issues connected with the removal of barriers to trade and investment, specific activity began in 1967 with the founding of the Competition Law and Policy Committee. The Committee started with a typical OECD agenda: exchanges of views and experience with competition laws and policies, the promulgation of best practices, adoption of recommendations, and peer reviews. However, this approach proved increasingly frustrating over the following two decades. Attempts to find substantive agreements on issues such as franchising or predatory pricing proved slow and nearly futile, and the repeated reviews of national policies, based on self-assessment, were seen as ineffective and self-justifying. According to a leading authority, the competition committee greatly increased its productivity in the 1990s by accepting differences and focussing on the documentation of national experience with the varied elements of policy. The OECD shifted from working on one competition policy topic over a number of years to sharing experiences through a number of roundtables each year. Periodic reviews of selected countries’ competition and regulatory reform policies replaced annual national reviews (Jenny, 2003, 981–988).

The typical OECD pattern of best practice and benchmarking seems to have been largely abandoned, based on two features of competition policy that distinguish it from most other OECD policy areas. First, on matters of substance, the United States saw itself as unambiguously ahead of its partners and regarded its OECD participation on competition policy matters largely as outreach. The US competition policy system has remained largely self-contained, self-adjusting, and largely exempt from direct political interference for many decades. Its champions have believed they had little to learn from others. Second, although committee meetings are conducted in private and personal accounts are rare, national representatives, in general, appear to have concluded that their own laws

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10 Private cases were 93% of all antitrust cases brought before federal district courts between 1970 and 1989 (Viscusi, Harrington, and Vernon, 1995, 65).
11 Japan created another model by lodging enforcement with the executive and relying heavily on warnings rather than immediate sanctions.
12 See, for example, Foer, 2001; Crane, 2009.
and practices were so deeply embedded in unique experience – including the hard-won ascension of the EU Commission over the most important competition practices of its Member States – that foreign evaluation was either futile or counterproductive.¹³

Some policy convergence has taken place, although largely for reasons quite apart from OECD deliberation and agreement. The EU has declared its intention to move policy away from formal restrictions and towards economic effects. The change has been supported by a great expansion of economic relative to legal personnel involved in case selection and procedures (Neven, 2006). This doctrinal change parallels a shift begun earlier in the United States: Instead of declaring a policy illegal ‘per se’ because of certain formal characteristics, the context of the activity is considered to see if it might contribute more to efficiency than to the restriction of competition.

Most European competition economists strongly favour abandonment of objectives other than consumer welfare and, as is the case throughout the OECD, view competition policy almost indistinguishably from their US counterparts. Policy movement, however, is constrained by EU legal precedent and perhaps, also, by resistance to using an economist’s definition of efficiency as the sole criterion for competition policy. In some quarters, the failure of competition policy to balance variety, quality – and even the welfare of competitors – alongside a measure of efficiency is seen as a retreat from European values (Economides and Lianos, 2009; Wigger, 2007).

Developments in Japan offer a sharp contrast with both the US and the EU. More than a decade of foreign pressure starting in the 1980s aimed at increasing penetration of the Japanese market but resulted in little effective policy change. Only after the turn of the new century and years of virtual economic stagnation did the Koizumi government declare the need for a ‘competition culture’ to replace the previous ‘harmonization culture’, and a more vigorous pursuit of competition policy (Uesugi, 2004, 2). Opinions differ about how much Japanese policy has subsequently changed.

Virtually all countries now embrace the ‘effects doctrine’ first enunciated by the US in 1945. This implies, for example, an extraterritorial right to condemn a merger of foreign firms producing entirely abroad, if it is deemed likely to raise domestic prices. Transatlantic conflict over the Boeing-McDonnell Douglas (1997) and GE-Honeywell mergers (2001) involved precisely the kind of

¹³ The intra-EU variation in policy that fuels so much OECD discussion in other areas (Mahon and McBride, 2008; Martens and Jakobi, 2010) was therefore very much reduced; national laws now deal mainly with relatively minor competition matters, and national competition authorities have administered EU law since 2004.
deep-seated difference in legal precedent and underlying assumptions that so quickly drove the OECD away from finding common ground.\textsuperscript{14}

Conflict in a few areas has not prevented substantial cooperation in others. Largely apart from the activities of the OECD, there has been greatly increased member cooperation on a number of enforcement matters, particularly attempts to control international cartels (Connor, 2009). Nevertheless, the OECD has made tangible contributions to mutual understanding and information provision. The competition committee oversaw the approval of a recommendation on cooperation as early as 1967. A 1995 update suggests specific consultation and support activities including notification of actions affecting other members and measures of positive comity.\textsuperscript{15} There are also annual member self-reports of activity to the OECD and special studies of particular competition and regulation problems. As part of an OECD opening to non-Member States and global stakeholders, it has overseen an annual Forum on Competition since 2001 (Woodward, 2008, 90).

3.4 Relations with the WTO and other international actors

Competition committee members worked with trade officials on joint action that informed WTO discussions on the Singapore Issue of Trade and Competition (Melamed, 1999, 430). Outside of the OECD, however, the EU pushed for a competition policy component in the Doha Round that was opposed by the United States. US competition authorities resisted compromising their standards and procedures with those of other states, and they did not trust the market penetration objectives of their trade- oriented compatriots (Hoekman and Kostecki, 2009, 596). In contrast, the EU Commission had been emboldened by its own success in developing a central policy to dissolve private economic barriers among Member States (Büthe, 2007). A WTO role would have enhanced the Commission’s standing; it speaks on behalf of the EU as a whole in the WTO instead of sharing a voice with member countries, as is the case in the OECD.

Local institutions, resource allocations, and decisions about competition policy are extremely difficult to impose or even to monitor from abroad. The EU, therefore, understandably envisioned a modest WTO role: the Commission proposed little beyond transparency, non-discrimination by firm nationality,

\textsuperscript{14} The EU’s 2000 attack on the pricing practices of Intel against its major rival, Advanced Micro Devices, Inc. (AMD), also suggests the doctrine’s reach, but the Federal Trade Commission subsequently lodged quite similar complaints against Intel (Bona, 2010).

\textsuperscript{15} This is also urged in a major study concerning the threat of hard core cartels (OECD, 1995a; 1998b; 2000).
procedural fairness, and a commitment to combat hard core cartels. The US countered the European initiative by sponsoring an International Competition Policy Advisory Committee (ICPAC) of American experts that came out against a WTO role, advocating instead for a ‘virtual’ organization to deal with cross-border competition issues. This resulted in the loosely structured and lightly funded International Competition Network (ICN) (Budzinski, 2004; Djelic and Kleiner, 2006), which involved the OECD as one of many partners. The OECD joined the WTO, UNCTAD and private practitioners as Non-Governmental Advisors in the ICN on an equal footing with other participants, which include official representatives of as many countries as choose to participate (von Finckenstein, 2002).

Drezner (2007) has argued that differences between the EU and the US on international regulatory matters typically lead either to stasis or forum-shopping, and some of both can be seen in this episode, which can be seen as a duel between the EU’s attempt to absorb some competition policy into the structure of liberal internationalism and the US’s counter-proposal to extend trans-governmentalism (Maher, 2002, 113).

The ICN served EU interests as well as US interests. Both powers sought coordination and streamlining of national merger approval, a central substantive focus of the ICN. Only a few mergers were controversial anywhere, but compliance with highly varied national approval requirements was enormously expensive and time-consuming for US and EU multinational firms.16

Although the EU cooperated fully with the ICN, it continued to support some role for the WTO. This position faced opposition not only from the US but from most low-income countries, which were suspicious of new policy initiatives after feeling short-changed in the Uruguay Round. Many developing countries, for example, would resist losing the right to discriminate in favour of domestic firms on competition policy issues. At all events, WTO deliberations appear to have mainly involved the clarification of national positions rather than a search of possible means of reconciling them (Evenett, 2007). Competition policy was dropped from the Doha Round’s consideration in April 2004. The OECD was already encouraging more participation in its affairs by non-Members, particularly the larger developing countries, by the time the ICN was founded, and it was also providing direct support for many competition agencies beyond its membership (Melamed, 1999, 430). The OECD also collaborates with the World Bank to assist new competition agencies.

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16 The US and the EU were also deeply committed to another major ICN activity: ‘missionary work’ to assist newly founded competition agencies to function properly and to serve as effective advocates within their governments for a greater reliance on market forces.
3.5 Minimal achievement in competition policy governance

The OECD’s usual pointed evaluation through benchmarking and peer review found little success in competition policy and was largely abandoned. The differing assumptions underlying initial policies, differing legal systems and established jurisprudence, and differing competition enforcement mechanisms presented insurmountable barriers.

Antitrust within the OECD can be seen as policy diffusion based initially on a combination of coercion and emulation. Although the Competition Committee has commissioned, discussed, and approved many valuable studies of the highest quality on a range of technical and administrative issues, only in recent decades has there been much indication of policy change based on learning or competitive concerns, and even then the incorporation of foreign practice has been quite limited. The OECD has encouraged formal positive comity measures to sharpen global governance in competition policy, but they have been only intermittently embraced and have not closely matched actual agency cooperation. That cooperation is heavily constrained by differing confidentiality standards and legal penalties (Jenny, 2003).

The OECD has coordinated and supported outreach to low-income countries and economies in transition and has collaborated with other organizations towards the same end. Such activity also has a long history in bilateral relations and on the part of other organizations, especially the United Nations, which began outreach of policy principles quite similar to those of the OECD as early as 1980 (Lee, 2004). OECD members benefit from competition policies in non-Member States that are congruent with their own. Such development leads to more tractable and efficient markets for both foreign and domestic firms and also to more effective cooperation on matters such as cartel surveillance. Successful outreach to lower-income countries can be interpreted as some combination of coercion, aimed at states seeking closer ties or greater economic assistance from the EU, the US, and other international organizations, and emulation: competition policy, however nominal, is part of the apparatus of the modern state.

The growing partial convergence in some areas of competition policy among the OECD countries and beyond has many sources. EU membership and ambitions for it explain much of what is observed. But the EU itself appears to be moving towards the US in some areas, as are Japan and South Korea. A noticeable shift towards US practice within the OECD may reflect some learning by participants in OECD activities, but the main cause has certainly been a growing belief, in most rich and poor states, that competition policy can contribute to an efficient economy. This has contributed to some convergence by
increasing the influence of economists with their common education and socialization (Neven, 2006; Vickers, 2007).

4 FOREIGN DIRECT INVESTMENT POLICY

The Havana Charter’s blueprint for the International Trade Organization, noted in the competition discussion, also urged states not to discriminate ‘between foreign investments’ (US Department of State, 1948), but the central foreign direct investment (FDI) policy problems were then seen as largely stemming from firm behaviour – notably cartel practices – and not the practices of host governments. Post-war direct investment took place in hosts that varied widely in their treatment of foreign investors. Because FDI is based on logic similar to that of trade, most schemes for FDI liberalization have envisioned transparency, non-discrimination (most-favoured-nation and national treatment), and binding commitments to block backsliding.

US firms dominated FDI increases in the early post-war period, but despite exchange controls, other major home countries, notably the U.K., also allowed for the growth of their outward FDI (Bergsten, Horst, and Moran, 1978, 32–40). Multinational corporate activity from many states grew more rapidly following the end of the Bretton Woods system and the easing of capital controls; it has accelerated in the recent past. From 1990 through 2006, inflows of FDI grew 60% more rapidly than international trade in goods and services; it grew at a stunning 30% from 2004–2007 before the global downturn dampened the pace of expansion.

4.1 EARLY OECD ATTEMPTS AT LIBERALIZATION

The OECD played a major role in the liberalization of investment in its Code of Liberalization of Capital Movements (OECD, 1961, periodically updated) and its Code of Liberalization of Current Invisible Operations (OECD, 1960, periodically updated). Liberalization of both capital movements and earnings were intended to facilitate the international expansion of business, although both portfolio and direct investment were affected (Henderson, 1996, 15–17).

However, the capital movement instrument explicitly allowed adherents to list restricted sectors, and the extent of compliance with the codes as written appears to have varied widely across the OECD membership.

Some observers have noted that the OECD thrust appeared at variance with the sympathy for capital controls favoured by the architects of the Bretton Woods system (Williams, 2008, 118), but Helleiner (1994, 95) stresses that Keynes and White favoured flows of productive – as opposed to speculative – capital and that the OECD’s main concern was reviving direct investment.
In the face of massive post-colonial nationalizations the OECD attempted to put FDI into poor countries on a new footing with its Draft Convention on the Protection of Foreign Property of 1967. Most low-income countries at that time insisted that foreign investment disputes be settled in their own courts and opposed the Convention. Nevertheless, the Convention became the basis for the EU model Bilateral Investment Treaty (BIT) (OECD, 2006c), and one writer claims that the OECD may have played ‘the most important role’ in the international legal system surrounding FDI by ‘being a key provider of legal materials’ (Julliard, 2001, 3), although the first OECD model BIT of 1962 was anticipated by earlier US bilateral treaties (Williams, 2008, 124). While these BITs form the main body of effective international law that controls the current FDI regime, the World Bank developed the dispute resolution institution, the International Centre for the Settlement of Investment Disputes, that anchors the regime with effectively delegated authority. By 2006, there were more than 2,500 such treaties (UNCTAD, 2006, 26).

The OECD took a major step to advance FDI non-discrimination in 1976 with its Declaration on International Investment and Multinational Enterprise developed by the Committee on International Investment and Multinational Enterprise (CIIME) (OECD, 1976). The Declaration committed to national treatment, the avoidance of conflicting requirements on direct investors, transparency in the use of incentives and disincentives, and voluntary guidelines for the behaviour of multinational firms. The Declaration recognized exceptions by sector and was non-binding. The OECD also set up a continuing survey of the actual extent of national treatment by Member States, and it adopted an instrument in 1979 declaring that members should report on ‘significant official incentives and disincentives to international direct investment’. In 1991, another declaration was made that ‘conflicting requirements’ between home and host countries be discussed in the CIIME.

The voluntary Guidelines for Multinational Enterprises of 1976 responded to the coordinated attacks on multinational business from poorer countries as part of the New International Economic Order (Hudson, 1977; Sell, 1998, 9–39); these have been periodically revised over the ensuing decades. The first Guidelines largely codified what most major firms were already doing except for

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19 These are the International Centre for the Settlement of Investment Disputes (1965) and the Multilateral Investment Guarantee Agency (1985). Elkins, Guzman, and Simmons’ (2006) recent analysis of the development of BITs does not mention the OECD.

20 All OECD law is ‘soft’, but ‘Decisions’ and ‘Recommendations’ are more binding than ‘Declarations.’ For a concise discussion, see Woodward, 2009, 70–72.

21 Unless otherwise noted, the factual material in the following three pages is drawn from Graham (1996, 69–78; 104–15), Kobrin (1998), Henderson (1999), Graham (2000, 15–35).
some additional disclosure requirements. The United States denied that the
Guidelines had any legal standing.

4.2 The MAI Fiasco

The Trade Related Investment Measures (TRIMs) agreement of the Uruguay
Round largely confirmed or clarified previous GATT positions on direct
investment practices related to trade and did little to deal with restrictions on
FDI per se. Moreover, service provision in foreign states typically requires FDI,
but the new WTO’s General Agreement on Trade in Services (GATS), which
was developed with the continuing assistance of the OECD (Drake and
Nicolaides, 1992), provided only limited sector-specific investment liberalization
that often merely codified countries’ existing policies. The Uruguay Round’s
overall impact on entry liberalization remained modest, and most of the OECD’s
rhetorically-embraced liberalization remained unrealized.

The US pushed its OECD partners to adopt a legally binding national
treatment instrument in 1991, but a stalemate, particularly between the US and
Europe, quickly developed. All parties accepted closure on national security
grounds, but the US was reluctant to interfere with the policy discretion of its
constituent states, and some European countries insisted on investment screening,
particularly for cultural industries – as did Canada. Only a broader agenda on
FDI with concomitantly greater latitude for bargaining seemed to offer the
prospect of success.

The OECD trade ministers decided to develop a Multilateral Agreement on
Investment (MAI) in 1995. According to E. M. Graham’s careful study, the MAI
was originally intended to establish national treatment for incoming investment,
to create standards for the treatment of foreign investors under unforeseen
circumstances such as expropriation, to eliminate the ability of governments to
set onerous entrance requirements (for local supply, investment partners, exports,
or employment), and to establish a dispute settlement mechanism available to
both government and firms.

The MAI aimed to bring FDI liberalization to a new level of legality by
introducing stronger obligation, greater precision, and specific delegation (Abbott
and Snidal, 2000, 423). A multilateral treaty was envisioned to which non-OECD
members could accede.

The high-income countries chose the OECD as the venue for MAI
development because so much consideration had already been given to many of
the relevant issues, and it was thought that the industrial countries were
sufficiently like-minded for real progress to be possible. But even initial ambitions
were sharply limited. Nearly all OECD members were actively seeking more
incoming investment across much of their economies, yet neither tax issues nor other investment incentives were to be addressed. This was a critical limitation because immediate national economic interest tempts states to use incentives, and their complexity and low transparency generate a prisoners’ dilemma dynamic in the absence of agreed restraint.  

Another feature of the MAI plagued its development. The impetus for agreement came not from the highest political levels in government but from the trade ministries. Indeed, most politicians in most member countries knew nothing of the MAI until opposition developed in parts of civil society. This obscurity reflected an overall situation in which the negotiators could not really deal across the broad range of investment issues nominally on the table because they were frozen into their countries’ initial positions without easy recourse to higher political power.

The US shook the negotiations in 1996 with offensive unilateralism on FDI as part of its attempts to isolate and punish Cuba (the Helms–Burton Act), Iran, and Libya. These measures appeared to privilege US investors above others. But EU members also dimmed prospects for agreement by proposing that regional economic integration organizations such as their be permitted to offer more favourable investment opportunities to members than to outsiders, which could be used to increase discrimination. And France and Canada continued to press for exemption of vaguely defined cultural industries.

By the time talks on the MAI were suspended, it had not yet been established whether exceptions to the MAI strictures would actually be negotiated or if countries would simply list them in the final agreement. And there was no agreement on whether any new exceptions could be added after the MAI was put in place – the absence of a defined ‘standstill’ would have left the agreement far more limited than the trade model upon which it was based.

Popular opinion attributes the project’s failure to strong non-governmental organization (NGO) opposition. This was important, but factors internal to the negotiations have led some commentators to conclude that the NGO role may have been little more than a coup de grâce for an unpromising venture.

The major issue that galvanized NGO opposition to the MAI grew from the resolution of a NAFTA dispute that was widely interpreted to force special compensation to foreign investors when their fortunes were threatened by

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22 For a comprehensive account of investment incentives, their inefficiency, and the formidable challenges of reducing them, see Thomas (2011).

23 Woodward (2008, 83) writes that the OECD was obliged to dilute the treaty and allow endless exemptions for individual states’ following the mobilization of civil society, but Graham argues that the most important of these were already in the draft text that ignited the furore and that the fracas itself was not a decisive factor in preventing a more liberal treaty.
environmental legislation. A similar legal situation was understandably anticipated for the MAI. Most experts agree that the ‘takings’ section in NAFTA was poorly drawn, and subsequent US trade pacts include more carefully crafted language (Hufbauer and Schott, 2005, 159).

Ralph Nader’s Public Citizen argued that the low public profile of the negotiations up until that time amounted to a corporate conspiracy against the public. In fact, international business, which was originally quite supportive of the MAI, had increasingly lost interest as it became clear that the emerging text would likely do little but codify the status quo and could even result in more discrimination. The MAI was moribund when the French finally withdrew their support in 1998.

The failure of the MAI suggests the near impossible odds any substantial FDI agreement faced in the WTO. Both the EU and the US tried to push the Singapore issue discussions towards extending the FDI access provisions of the GATS to more sectors, and the US wanted openness to both portfolio investment and direct investment as had been proposed in the MAI (Evenett, 2007, 395). Investment issues were withdrawn from the Doha agenda in July 2004 along with competition policy (Hoekman and Kostecki, 2009, 594).24

The MAI affair changed attitudes at the OECD by demonstrating the advantage of participation by civil society beyond the long-standing institutionalized roles for business (the Business Industry Advisory Committee) and labour (The Trade Union Advisory Committee) (Woodward, 2008). Civil society representatives now meet annually with persons designated by the OECD as ‘National Contact Points’ to discuss the implementation of the Guidelines (West, 2004, 10). An NGO coalition, OECD Watch, has presented regularly at the Annual Roundtable on Corporate Responsibility (http://oecdwatch.org/) under the auspices of the Investment Committee.

4.3 Modest steps at coordination and outreach

In the period since the MAI debacle, the OECD has continued to refine the instruments already discussed (Williams, 2008) and launched a ‘Freedom of Investment Project’ in 2007 aimed to protect openness in the face of national temptations to promote ‘strategic industries’ (OECD, 2007a) and a study of the relation of direct investment to sovereign wealth funds (OECD, 2008).25

24 Of the remaining Singapore issues, transparency in government procurement was also dropped while trade facilitation was retained (Evenett, 2007, 399).
25 There has also been continuing refinement of the OECD Anti-bribery Convention passed in 1997 (OECD, 1997, 2009).
The OECD celebrates the importance of peer review for the development of investment policy (Houde, 2006), but it appears that most recent peer review has been directed either at new OECD members or at those nine outside states that have embraced the Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Chile, Slovenia, Estonia, Latvia, Lithuania, Israel, and Romania). These states apparently decided that adherence could provide a signal – if only a fairly weak one – that they were permanently committed to an FDI regime similar to that of the most liberal states. The CIIME also oversees impressive research on FDI and compiles high-quality data on the FDI activity of its members, although UNCTAD’s worldwide scope has led to its pre-eminence as a general source of information on global FDI.

In response to the UN Monterrey Consensus on Financing for Development, the OECD developed a Policy Framework for Investment presented in 2006 that included recommendations in ten policy areas (OECD, 2006c). Prepared in conjunction with the World Bank and UNCTAD, the Framework involved consultation with sixty countries and aimed to mobilize both foreign and domestic investment.

4.4 Achievements and Limits in the Governance of FDI

The OECD promoted increased openness to FDI even in its earliest days, and it has continuously sought to prod both its members and other states towards greater liberalization. It has conducted inventories of state practice and used its expertise to support liberalization efforts at the WTO. It produced a model document for settling investment disputes at the height of poor-country opposition to foreign firms that laid the groundwork for subsequent bilateral investment treaties. It has served as a rich-state forum in political disputes with low-income countries, and, after most of those states shifted their policies towards the attraction of FDI, it offered advice both under its auspices and in cooperation with other organizations.

Although the OECD has provided valuable support for more liberal direct investment, policy diffusion within its membership has been overwhelmingly driven by two forces: the determination of major corporations to expand their markets and a general belief by national governments, based on both learning and competitive concerns, that such outward expansion as well as inward penetration increases domestic prosperity. For example, in 2006, over half of US exports took place within corporate networks (Moran, 2011, 106). Parallel

26 The reviews consider both investment restrictions and broader investment climate issues (Houde, 2006, 133).
prosperity concerns have also led to liberalization in non-member countries, but coercion has also been important. Many states have been pushed towards openness by lenders and aid providers.

Despite growing liberalization, there has been remarkably little comprehensive research about just how much restriction and selective encouragement reduce efficiency and growth within the OECD (Graham, 2000) or elsewhere. It is therefore unsurprising that varying degrees of sectoral closure — typically driven by protectionist economic interests — have been retained in all OECD states and in nearly every other country as well. Moreover, doubts about the ability to enforce a ‘level playing field’ have made states cautious about yielding the right to offer special attractions to foreigners.

The OECD has carefully delineated what a non-discriminatory regime should look like, but states have apparently never believed that their own shortfalls — or those of their trading partners — were causing major economic damage. This helps explain the modesty of the OECD’s liberalization impact despite the clarity of the goal. It also casts light on the fragility of the MAI project. The MAI increasingly appeared likely to leave so many established economic interests undisturbed that liberalization gains came into question. The episode’s main result seems to have been the generation of substantial public opposition within OECD countries — a rare occurrence in the three areas examined here. Piecemeal liberalization has continued as part of both unilateral prosperity-seeking national adjustments and regional trade agreements.

5 INTERNATIONAL TAXATION

The OECD has devoted attention to tax issues from its earliest days. Much activity of the Committee on Fiscal Affairs (CFA) facilitates innovation and best practices that would be of great value even if national economies were economically isolated from each other. Nevertheless, the OECD’s most respected tax activity has been the development of the model international tax treaty that has influenced nearly every bilateral treaty in the world (OECD, 2006b, 3).

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27 This is changing. For a review of the literature on FDI and development, see Moran, 2011.
28 As with competition policy, problems with entry through FDI into Japan turn more on practice than law. For example, the structure of ownership of Japanese firms makes takeovers very difficult, typically forcing ‘greenfield’ investment. Foreign entry into most other national markets is typically accomplished by the purchase of established firms.
29 Comparative material on member systems is largely drawn from the surveys of national economies, which are conducted by the OECD Economics Department and not by the Centre for Tax Policy and Administration (CTPA) which supports the CFA. The CFA oversees the development of many valuable specialized studies and widely used comparative material on member revenue.
Taxation looms as a huge and visible policy area throughout the OECD, where the share of Gross National Product (GNP) collected by all governments ranges from under 30% in the US, Japan and South Korea to just under 50% in Denmark and Sweden. Empirical research in recent decades has contributed a foundation for substantial policy adjustment (Porter and Webb, 2004, 17; Swank, 2006). An open economy brings special challenges. When states act independently, they may reduce efficiency by taxing the same activity twice, although such action may shore up domestic tax collection. Alternatively, states may employ unusually low home tax rates to lure foreign factors of production – or claims of activity – with various effects on home tax revenue. When states act in isolation, each can pursue policies that leave them all worse off than if they cooperate. And when they cooperate they must determine the division of total tax revenues between the state that is the site of economic activity (source) and the productive factors’ ownership state (residence).

5.1 The OECD Model Tax Treaty

The OECD model Convention on Double Taxation of Income and Capital of 1963 (OECD, 1963) became the starting point for more than two thousand bilateral treaties, and it is regarded by many observers as the OECD’s most important contribution to international economic relations. Yet, in most respects, it differs little from treaties on the same subject going back to the 1920s. By 1928, the League of Nations, strongly influenced by US practice and the advice of some of its officials, had issued a model bilateral income tax treaty. This document embodied what came to be called the ‘1920’s compromise’ between countries that exported and imported different types of capital: it assigned the taxing of business income to the infrastructure-providing source (host or investment-receiving) country and passive investment income to the residence (home or investment-sending) country (Graetz, 2001, 262). The ‘compromise’ was very favourable to international business because it provided host states an additional incentive to attract FDI: tax revenues that might have gone to the home country with a different convention went to the host country instead.

National as well as special interest considerations make the success of the model treaty unsurprising. Developed states saw the overseas success of their firms as an important element of national prosperity, and, despite varying restrictions on incoming direct investment, governments understood that a high level of tax commonality within the OECD could avoid double taxation and reduce firm transaction costs. A state’s embrace of the model treaty as a baseline also signalled its willingness to participate on terms similar to those of other major states. Finally, while saving on negotiation costs, use of the model treaty
preserved national flexibility for addressing the specific circumstances of every bilateral bargain. The model treaty has drawn extensive commentary over the years, and both the treaty and the commentary are widely used by national courts (Cockfield, 2006, 142).

The source norm for the corporate income tax developed before poor countries found their voice, yet it fit their interests. The United Nations’ model tax treaty, which first appeared in 1980, incorporates most of the OECD’s work; it differs mainly by employing language that makes it easier for the source country to broaden its income claims (Kosters, 2004). Bilateral tax treaties between an OECD state and a lower-income country frequently contain language drawn from both models.

5.2 Transfer pricing and electronic commerce

A growing post-war FDI tax challenge also had roots in the interwar period; it concerned ‘double non-taxation’ rather than double taxation (Rixen, 2008). The valuation of intra-firm transactions holds major tax implications, so ‘transfer pricing’ was first dealt with by the League of Nations in 1933, again based largely on US practice (Carroll, 1939). The accepted principle is straightforward: tax liability should be based on the pattern of profits across jurisdictions that would result from intra-firm prices mimicking the ‘arm’s length’ prices of independent buyers and sellers. Parallel with its work on the model treaty, the OECD has drawn on interwar practice to play a pivotal role in the continual discussion, refinement, and promulgation of transfer pricing practices as reflected in its Transfer Pricing Guidelines (OECD, 1979; 1995b; 2010).

International business working through the BIAC opposed US Treasury attempts beginning in the 1980s to deploy special techniques to limit the firm discretion that was resulting in increasing tax losses. In addition, non-US governments feared that the new practices would shift profits into the US at their expense. The result was compromise (Durst and Culbertson, 2003; Webb, 2006, 111–114) reflected in the new OECD Transfer Pricing Guidelines of 1995 (OECD, 1995b). Further refinements were made between 2002 and 2009 (OECD, 2010). The corporate shifting of profits, particularly to tax havens, continued to grow (Clausing and Avi-Yonah, 2007, 8–9; Sullivan, 2004).

A new challenge emerged quickly in the 1990s: electronic commerce moved from oddity to pervasive reality (Kudrle, 2010; Cockfield, 2006; Li, 2003). The OECD began comprehensive discussions in 1997, and in 1998 it produced new template material for possible bilateral tax treaties that attempted to extend previous principles to new issues such as the classification of income from electronic commerce and the role of servers as possible ‘permanent
establishments’ that can trigger source taxation. The process involved major developing countries and has been claimed unique because policy boilerplate at the global level was developed prior to the emergence of relevant national policies. This inspired the claim that the OECD had become ‘an informal world tax organization’ (Cockfield, 2006), although the US and some other states engaged in simultaneous policy adjustments at the national level rather than following the OECD’s lead.

5.3 THE HARMFUL TAX COMPETITION PROJECT

The OECD Ministers’ decision to study various types of possibly ‘harmful’ tax competition in 1998 was ratified by the G-7’s Lyon Summit. The CFA set up a task force in 1997 that resulted in the Harmful Tax Competition (HTC) report of 1998 (OECD, 1998a). HTC seemed to signal a new determination by the high-income countries to coordinate their attack on both (illegal) evasion and (legal) avoidance of personal and corporate income taxes.

The timing and emphasis of the project reflected the tax concerns of the OECD’s overwhelmingly European membership. Ireland had emerged as the fastest growing country in Europe partly by ‘ring fencing’: using systematically more favourable corporate tax advantages for foreigners than for domestic firms. Bank secrecy in Luxembourg, Belgium, and Austria gave EU residents elsewhere the opportunity to evade taxes on earnings from their savings. And nearly all EU states had some special advantages for non-national business investors that could be construed as violating a level playing field. Tax competition within Europe — and not just with the rest of the world — appeared to threaten European national budgets.

The HTC report condemned two broad categories of unacceptable tax practice: ‘tax havens’ and ‘harmful tax regimes’. HTC defined ‘tax havens’ as having little or no tax on relevant income and one or more of the following: a lack of effective exchange of information, a lack of transparency, and ‘insubstantial’ activity attached to the claim of haven location. ‘Harmful tax regimes’ within the OECD were identified by an additional criterion that deviates from the final one for tax havens. Instead of requiring that the activity be ‘substantial’, the standard was the absence of ‘ring fencing’. This intra-OECD part of the project, while it received relatively little attention, envisioned for the first time that members criticize each other’s tax policies multilaterally (Webb, 2004). The title was immediately attacked by many on the right as revealing the true colours of a would-be cartel and was subsequently known within the OECD as ‘Harmful Tax Practices’. This project has been carefully considered from a number of perspectives. See Easson (2004), Webb (2004), Sharman (2006), and Kudrle (2008b).
All but two of the ‘regimes’ identified were ultimately removed, modified, or found innocuous. The tax havens were threatened with possibly punitive joint action by OECD members, and a special forum was established to draw up a list of offending jurisdictions and to implement agreed action plans. The OECD was apparently surprised both by the loud protests of unfairness and neo-imperialism from the tax havens and by the eagerness of many of them to reach an early agreement. Following strong pressure from the international business community, the demand for ‘substantial’ activity was soon effectively removed through artful changes in stated demands (Kudrle, 2006).

The Bush administration supported only the part of the OECD effort that aimed at tax evasion, and the already-eviscerated “no substantial activities” criterion was formally dropped. Treasury Secretary O’Neill also expressed concern that OECD’s posture in HTC towards the tax havens had been unusually ‘condemnatory’ and ‘aggressive’. The OECD project subsequently demanded only that the tax havens make a public declaration to move towards transparency – notably the collection and exchange of tax information – and treated non-recalcitrant tax havens as ‘partners’ in its HTC deliberations.

The tax havens gained assurance that they would not be subject to ‘coordinated defensive measures’ until they were taken against a similarly offending OECD country (OECD, 2001). While this can be seen as a triumph of ‘appropriateness’ over ‘consequences’ – in this case apparently fairer treatment over sheer power – two considerations deserve attention. First, only retaliation under OECD auspices was qualified (Gouldner, 2004, 1191–92), which may help explain the increasing compliance of the tax havens over the following several years. Second, the revision increased intra-OECD pressure on the initial abstainers from the project, Switzerland and Luxembourg.

The US had not taxed foreign interest in the US nor had it collected information on such earnings since 1986. Bush administration proposals to satisfy both OECD information-sharing demands and European aspirations to reduce EU tax evasion infuriated much of the American right and led to delay. Some Republicans even attempted to withdraw US funding from the OECD (Baucus and Grassley, 2004). Intentions to cooperate were revived by the Obama administration.

The attacks of 11 September 2001 shifted tax haven discussions towards issues far greater than fiscal loss and increased the prominence of the Financial Action Task Force on Money Laundering (FATF), set up by the G-7 in 1989, which increasingly focussed on terrorist finance and made demands very similar to those of the HTC project. More and more tax havens declared their cooperation with the OECD, a model tax information agreement was developed,
and only five holdouts remained by 2004 (OECD, 2004). The financial collapse of 2008 and highly publicized tax evasion schemes on both sides of the Atlantic moved the OECD information demands to the agenda of the London G-20 meeting in April 2009, which, in turn, brought the final holdouts on board and called some other states on the carpet. This looks like a prime example of the ‘issue attention cycle’ operating in international regulatory politics.

Although HTC ultimately gained agreement on the principle of information gathering and exchange that had previously been flatly rejected by most tax havens, the OECD’s cost was unnecessarily high. The failure to think through the practical and political difficulties of trying to control corporate activity in the tax havens alienated international business and resulted in improvised revisions that could not have entirely restored its confidence. And the awkward sequence of demands followed by solicitude towards the tax havens ill-befitted a de facto world tax organization.

Another aspect of the episode has been subject to much discussion. The OECD has always anticipated the possibility of automatic exchange of tax information internationally and has done work on the technical identification requirements necessarily for its facilitation (OECD, 2006). Nevertheless, such automatic information exchange was rare in bilateral tax treaties, which covered states with highly varied traditions of financial privacy. The model tax information agreement did not go beyond the commitment to provide tax information on request.

Recent innovative OECD activity on tax secrecy demonstrates how the organization is attempting to maintain and extend its influence without radically changing the character of its membership. An organization comprised of only thirty-four countries lacks prima facie legitimacy as an organ of global governance. Moreover, the OECD is under considerable pressure from its current members to prove its continuing value and now relies on voluntary contributions.

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31 The 2002 EU Savings Directive added another complication. A compromise on bank secrecy that allowed a transition period from withholding taxes to automatic reporting for Austria, Belgium, and Luxembourg and that also involved the still-blacklisted non-EU tax havens of Andorra, Liechtenstein, Monaco (and San Marino), seemed to leave some European jurisdictions with greater bank secrecy than most tax havens acceded to, again generating a barrage of criticism from tax haven defenders. Belgium began automatic exchange in 2010.

32 Mattli and Woods (2009, 26–28) revive this idea from Anthony Downs to consider international regulation. Issues appear on the agenda and are either resolved or recede depending on a host of political circumstances. The concept rings true, but its usefulness is limited by its contingency – in this case to particular constellations of vivid transgression, cyclic economic distress, and chronic budgetary problems.

33 One observer close to the unfolding HTC conflicts noted that if persons with greater political acumen had been involved at the outset, ‘coordinated defensive measures’ among other issues would have been handled very differently. Moreover, the failure to include some major non-OECD offshore operations such as Singapore and Hong Kong in the initial dragnet looked like the pragmatic power calculation that it was.
for 30% of its budget (Woodward, 2009, 107). A substantial expansion of membership threatens the efficiency of deliberation as well as the feasibility of developing a common viewpoint by increasing the range of national experience informing deliberations. In addition, smaller or poorer members would add more cost than revenue. These challenges admit to no easy solution, but in the tax area, creative steps have been taken.

The London G-20 meeting of 2009 greatly amplified the HTC project and brought essentially complete nominal compliance. The G-20 is a much more broadly based group than the OECD states, and the agreement-supervising Forum is now comprised of more than one hundred members (OECD, 2011) and is funded by the participating states on a scale related to national ability to pay. So, despite earlier setbacks, the OECD seems to have created something that looks like a world tax organization after all. The Forum has embraced the standard OECD practice of peer review for its tax information gathering and exchange activities and expressed a determination to evaluate the compliance of any jurisdiction, whether it cooperates or not. It has stipulated that the adoption of country reports cannot be blocked by that country, and it has countered the criticism that the bilateral system disadvantages small and poor states, putting forward a revised version of the multilateral Convention on Mutual Administrative Assistance on Tax Matters developed by the OECD and the Council of Europe in 1988. The original document allowed national variation in matters related to information, but the new version, presented in 2010, contains all the core requirements of the model bilateral information agreements, covers a broader range of taxes, allows for joint tax investigations, and automatic information exchange (Saint-Amans and Russo, 2010). Adopting states can therefore avoid the complications of bilateral agreements. The revised convention has been predictably pummelled from the American right (Mitchell, 2011).

Despite the OECD’s nimbleness in adjusting its tax evasion strategy, there is no evidence yet of success in meeting the substantive goal of actually reducing evasion. In either its bilateral or multilateral form, information gathering and sharing are plagued by incentive compatibility problems. Many states have no incentive for anything but compliance crafted to avoid retaliation. Moreover, there will be resistance to the automatic sharing of information with adherents lacking high standards of probity (Society of Trust and Estate Practitioners, 2010).

The OECD cooperated with the World Bank, the International Monetary Fund and others to launch the International Tax Dialogue (ITD) in 2002 to encourage and facilitate discussion of tax matters among national tax officials, international organizations, and a range of other key stakeholders (www.itdweb.org). The ITD’s purpose and approach both look similar to the International Competition Network. The ITD’s principal presence is a website
with links. It facilitates technical assistance and sponsors periodic conferences. The OECD also conducts outreach to over seventy non-members and oversees a number of Multinational Tax Centres around the world (OECD, 2006b, 13).

5.4 Achievements and limits in tax policy governance

The OECD’s model tax treaty and associated commentary, the transfer pricing guidelines, and the treaty revisions to address electronic commerce contributed significantly to the development of foreign economic policy in most of the world’s states. One can see path dependence from interwar beginnings preserved by deep uncertainty at the level of Member States. Most states could not have calculated national gains or losses from the consensus documents; they did see the clear advantage of agreement.

These governance developments could suggest that the OECD did little more than provide the venue for the ratification of interwar practice largely developed by the United States. But this ignores the considerable achievements connected with the reconciliation of differences, especially over transfer pricing and the incorporation of electronic commerce into the model. Counterfactuals are difficult, but the outcomes observed are hard to imagine without the kind of organizational infrastructure and expertise that the OECD provided.

The HTC initiative differed sharply from the treaty work. Here, diverging national interests within the OECD could be seen more clearly, and this led to early abstentions from the plan by the greatest beneficiaries of non-transparency, Luxembourg and Switzerland. But most states saw clearly that a failure to act collectively meant lower tax collection with no corresponding gain.

Coercion – first heavy-handed and then more nuanced – was used successfully to force the designated tax havens and other states to cooperate on a demand for information collection and exchange. This achievement, boosted by the terror threat and then given final impetus by the world economic crisis, is real and significant, although it may still prove to be a triumph of principle more than practice.

Universal acquiescence to the principle of information collection and sharing on tax matters may not stop substantial evasion. Early quantitative evidence suggests no discernible impact. This cannot surprise, given the lack of incentive for many jurisdictions to comply more than nominally with their agreements, the ease with which the ownership of overseas financial assets can be

34 This susceptibility bears a strong parallel to a strand of the motivation described by DiMaggio and Powell (1983) in their development of ‘mimetic isomorphism’ in institutional choice.

35 This signalled their intention not to implement recommendations.
disguised, the very low chance of being prosecuted, and the modest penalties for violation (Kudrle, 2008a).

If the current popular anger about tax evasion sustains a high profile in the issue attention cycle, other policy initiatives might be attempted that could include a network of automatic information exchange among some states and the levying of withholding taxes against others (Kudrle, 2009). The withholding tax could be remitted to investors upon appropriate evidence that taxes which were due on the earnings had been paid elsewhere. Properly designed, the new regime could also assist poor countries in their attempts to control tax evasion and capital flight, but such a massive change would also generate strong opposition.

The growing problems of transfer pricing could generate another disjunctive change. The Zedillo Report to the United Nations in 2001 suggested a shift from an arm’s length approach to the use of a formula (of some mix of assets, employment, and sales) for the jurisdictional assignment of the international corporate income tax base as a long-run goal (United Nations, 2001), and some observers regard such a change as inevitable (Weiner, 2007). The US could move unilaterally (Clausing and Avi-Yonah, 2007, 18), but it seems far more likely that the matter would be taken to the OECD. Both, a shift away from the present system and the precise formula agreed, would have serious distributional consequences across the OECD as well as the rest of the world. In principle, formula apportionment could garner broad support in poor countries: any probable formula would reward more populous countries more than the present system, and lower-income countries have had even less success with controlling transfer price manipulation than have the rich (Baistrocchi, 2005). Although the enhanced role of the G-20 increases the feasibility of such a radical change, it would again present a major test for the OECD.

6 DIFFUSION, INSTITUTIONALIZATION, AND LEGALIZATION

The demands of economic globalization considered here have generated national policy changes, attempts at new international institutions, and steps towards changing legalization. The OECD has been a constructive facilitator in much of this activity and has pioneered global economic governance in areas that other international organizations have avoided.

6.1 POLICY DIFFUSION

Most OECD activity related to competition and FDI, and taxation has been driven by and, in turn, has facilitated policy diffusion. The burst of competition
policies, both within the OECD and the rest of the world, resulted from initial coercive impositions by the US on Germany and Japan, and later by the Treaty of Rome, which essentially imposed a hybrid of US and German policy on ever-larger parts of Europe. The last two decades have seen the EU move closer to the US practice based on learning and competitive concerns, but this has been sharply circumscribed by differing social values and legal procedures. The experience of Japan suggests the same conclusion. Despite heavy pressure from both the EU and the US over many years, there was little change until the Japanese government saw the national need to develop a ‘competition culture’. The OECD largely abandoned attempts to forge similarity, and the US was so unwilling to compromise its practices that it shunned even a minor role for the WTO.

Competition policy development outside the OECD has generally been nominal. In many cases, it has been little more than a gesture to trading partners in regional pacts who demanded some assurance that border protection would not simply be replaced by private constraints with the same effect. Alternatively, where national efforts in lower-income countries have been more substantial, they have often been affected by development goals that disadvantage foreigners. This may be inevitable, but it cuts against the national treatment norms that underlie most visions of competition policy as an element of global governance. Most non-OECD countries opposed WTO involvement in competition policy as yet another potential threat to policy autonomy.

The permission and encouragement of both outgoing and incoming foreign direct investment in every state rests heavily on foreign and domestic business lobbying. But the case for greater openness was easy to make: FDI appeared as an indispensable link with the world economy that promised greater trade competitiveness and general prosperity. This was true in both rich and poor countries, although coercion by aid providers and lenders also played a role in the latter. Nevertheless, the particular situations of various states have generated politically durable resistance to the opening up of various sectors to FDI. Moreover, virtually every OECD member, as well as most other countries in the world, retains various fiscal enticements for incoming foreign direct investment into some sectors.

Policy diffusion explains much of the OECD’s tax activity as well. Agreement and adherence to the model treaty as well as to the transfer guidelines and approaches to electronic commerce can be assigned to learning and competitive considerations among OECD members and beyond.

The HTC project was very different. Here, the failure to meet a minimum standard was seen as a systemic threat, and the standard was simply forced on many states through coercion. Although some OECD members were originally
given special dispensation, the engagement of the global community has increased pressure on those states as well.

6.2 INSTITUTIONALIZATION AND LEGALIZATION

Beyond promoting diffusion, the OECD has also sponsored or cooperated in generating new international institutions in all three areas. Institutions can be defined as ‘explicit arrangements, negotiated among international actors that prescribe, proscribe, and/or authorize behaviour’ (Koremenos, Lipson, and Snidal, 2001, 762), and this characterization is so closely bound to the degree of legalization that the two subjects may usefully be considered together.36

US and developing-country opposition blocked any WTO role in competition policy, and the ICN is about as minimal an arrangement as could be devised. The ICN’s characteristics match the modesty of the ambitions reflected in its design. Its membership is open to all and its scope is to ‘encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. There are annual meetings and workshops, but there is no rule-making. This simplicity largely obviates other features that define institutions such as control, centralization, and flexibility (Koremenos, Lipson, and Snidal, 2001).

The ICN has made limited progress towards competition policy cooperation by providing technical assistance while focussing on the simplification of merger approvals and by increasing the effectiveness of joint action on cartel detection without insisting on a particular stance on competition policy measures. Similarly, the annual OECD Forum on Competition is utterly different from the taxation Forum. It is open to global participation, but it parallels the ICN by concentrating on discussions about matters of general interest to competition policy enforcers. This Forum is just a meeting.

International legal developments on competition policy are almost entirely derived from broader cooperative instruments related to mutual legal assistance or trade agreements (Gerber, 2010, 108). Among the high-income countries, most cooperation has taken place on an agency-to-agency basis independent of any legal obligation. Cooperation will almost certainly grow on cartel issues but probably without any formal framework. Any specific structures would almost immediately confront legal difference. Formal agreement aimed at competition policy compatibility is even less likely than on cooperation. Few experts see specific competition policy agreements in the future, despite possibly growing

36 Cf. ‘We understand legalization as a particular form of institutionalization ...’ Abbott and Snidal, 2000, 401.
disputes between the US and EU, particularly in high-technology industries. If increased compatibility develops, it will come only slowly from observed policy experience on specific issues.

Institutional and legal developments in FDI related to OECD activity have been far more extensive than in competition policy. The Draft Convention on Foreign Property, which became part of the EU Bilateral Investment Treaty, the Declaration on International Investment and the Multinational Enterprise, the Guidelines for Multinational Enterprises and the various versions of the unsuccessful Multilateral Agreement on Investment all have institutional significance. Some might doubt the importance of the Declaration and the Guidelines, but the latter has been employed rhetorically by those interested in seeking firmer commitments to global corporate responsibility. In the legalization approach proposed by Abbott and Snidal, however, both score low in the three areas of precision, obligation, and delegation. In sharp contrast, the BITs – and the planned MAI – are quite detailed in their content and specific in their obligation. Moreover, they include adjudication by the World Bank’s International Centre for the Settlement of Trade Disputes.

In tax policy, the International Tax Dialogue undertaken cooperatively with the IMF and World Bank has much of the exiguous character of the ICN. In sharp contrast, the OECD tax treaty has served as a baseline both for the slightly different model UN alternative and for the volumes of commentary that have resulted from the thousands of ensuing bilateral treaties. These treaties rank high in legalization dimensions: they are quite clear about obligation, they are precise in content, and they include specific steps for dispute resolution. Unfortunately, the treaties also permit much abuse. Increasing amounts of world wealth have shifted to tax havens either through secrecy or transfer price manipulation. The OECD started to address these problems in the late 1990s, but the explicitly corporate element of tax haven activity was soon abandoned, and the information exchange element may well prove inadequate to bring tax evasion to politically acceptable levels. Nevertheless, the OECD has elaborated the Global Forum on Transparency and Exchange of Information for Tax Purposes into a substantial institution with a high level of legalization. The organization is open to all states, has a very clearly defined purpose that closely resembles the initial OECD demands, has a steering group of fifteen members and a peer review group of thirty (with rules for rotation) and a mechanism for regular peer review of every state’s progress in meeting the Forum’s purposes. No state can veto a review unfavourable to itself, and retaliation for non-cooperation is actively discussed and anticipated.
7 CONCLUSION

Competition, foreign direct investment, and taxation policy all pose challenges to global governance, but the OECD experience demonstrates that their amenability to cooperative resolution differs dramatically. Few knowledgeable observers ever envisioned an extensive international regime for competition, but intra-OECD differences were not softened, and non-members rejected even a meagre commitment to non-discrimination. There have been much greater ambitions for increased governance in taxation and direct investment. In the latter case, however, the absence of OECD agreement rested on substantial differences in perceived national interest coupled with a widespread lack of urgency for reform. All ambitions were dashed by a campaign of alarm from within the OECD that not only stopped the MAI but also reinforced the suspicions of poorer countries about heightened corporate power.

The fight against tax evasion has evolved very differently. Only a couple of OECD members saw their net interests threatened by the proposed regime of information gathering and exchange, and the extended membership of the Forum, operating at the behest of the G-20, greatly increased the political pressure for openness. In addition, unlike the global governance situation in competition and FDI policy, which lack formal institutional progress largely because they lack urgency, the current regime for both corporate and personal income taxation can be seen as serious and worsening. One plausible scenario, for the corporate income tax, envisions a slow demise driven by competitive rate reductions around the world. If that outcome is to be avoided, the OECD is the most obvious venue for policy rethinking, yet nothing in its relatively harmonious tax deliberation history prepares it for a task such as incubating a shift to formula apportionment.

Whatever happens on the corporate tax front, the OECD’s apparent determination to pursue the fight against tax evasion faces a very uncertain future. There will inevitably be serious disputes about the adequacy of information provision upon request, more pressure for automatic exchange, and frustration about inadequate information collection and processing. The last problem will, in turn, open the door for reprisal against ineffective cooperators. All of this will put the OECD at the centre of controversy for an indefinite period and will likely test the organization as never before.

Most data suggest this demise has not yet begun, but the outcome would be welcomed by most economists because the corporate income tax is generally regarded as a disaster in terms of equity, efficiency, and efficient administration. Nevertheless, the corporate tax raises about 10% of total revenue for cash-strapped OECD governments.
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