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**Tax Activists and the Global Movement  
for Development through Transparency**

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# Tax Activists and the Global Movement for Development through Transparency

Allison Christians<sup>©</sup>

## Abstract

*Activists around the world seek to expose a global system that fails to tax multinationals adequately and thus deprives governments of needed revenues, with profound effects for development in the world's poorest nations. These tax activists have sparked a global movement, with groups all over the world seeking progress for development in poor countries by demanding greater transparency about how and how much multinational companies pay taxes. In their quest for tax transparency, the activists are inserting themselves in an elite policymaking arena that has traditionally been closed both to them and to the governments of poor countries. Their demand for a voice in global tax policy decision-making makes a claim that the individuals and leaders that are currently involved in tax policy governance cannot be counted on to concentrate on distributing the tax burden in a way that comports with broader social values. In seeking such a voice, the activists will face enormous challenges and vigorous opposition. The alternative is acquiescence to a global status quo with which fewer and fewer are satisfied, a status quo that includes severe strains on governments and growing pressure on social systems in rich as well as poor countries. In this context, tax transparency seems a plausible starting point in the quest to understand and empower the engines of economic development and prosperity throughout the world.*

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## I. Introduction

Activists around the world are calling on governments to require public disclosure of information about how much and where in the world multinational companies pay taxes. Their goal is to awaken public attention to the systemic under-taxation of multinationals, to show that this under-taxation is connected to development failure in poor countries, and to convince lawmakers that the public has an interest in changing this paradigm. In their quest for tax transparency, the activists are inserting themselves in an elite policymaking arena that has traditionally been closed both to them and to the countries on whose behalf they seek change. Tax transparency challenges the tax policy norms developed within this arena, while the activists' demand for non-governmental participation in tax governance challenges the institutional foundations of contemporary international tax policymaking.

This chapter identifies and explores the rise of a global tax transparency movement, what it reveals about global governance in tax law, and how it seeks to alter the substance of tax policy norms and the process of tax policymaking. The discussion begins with a profile of the identity and goals of global tax transparency activists. It then examines three ways these activists have gone about the task of pursuing tax reform: appeal to multinational companies, appeal to national legislatures, and appeal to the international tax community through the institutional architecture of the Organization for Economic Cooperation and Development ("OECD"), a 34-member "rich nations' club".<sup>1</sup> It analyzes what these pathways to reform reveal about who defines tax policy in an economically, socially, and politically integrated world. The chapter concludes by exploring how worldwide demand for transparency and non-governmental participation in international tax policy decision-making could impact global tax governance.

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<sup>1</sup> See, e.g., Haig Simonian and Maria Fekter 'Iron Lady steeled for 'solid programme' to reduce debt', *Financial Times*, Sept. 27, 2011; James Arnold, 'What is the OECD For?' *BBC News*, Apr. 30, 2003. Available at: <http://news.bbc.co.uk/2/hi/business/2987887.stm>.

## II. Who are Tax Transparency Activists and What Do They Seek?

The past several years have produced a global financial crisis, coordinated cross-country bailouts of large financial and commercial interests, increasing budget gaps and attendant budget-cutting in rich countries, and increasing public concern about poverty and inequality around the world.<sup>2</sup> Over the same period, many multinational companies have reported record profits on their worldwide operations while apparently enjoying vanishing tax burdens.<sup>3</sup> International tax transparency activism has arisen as a global phenomenon against this backdrop.<sup>4</sup> Tax transparency activists seek to ask and answer the question: how is it that the world's largest profit centers are contributing so little to public revenue needs, especially in poor countries? This is an empirical question on the part of activists, an information quest rather than a call for change.<sup>5</sup> But normative goals clearly animate the quest. Uncovering and analyzing these normative goals begins with an exploration of how tax transparency activism came about.

### A. Origins of Tax Transparency Activism

The quest for tax transparency began as a campaign by a few discrete anti-corruption activist groups. It has grown into a global tax transparency movement with support around the world from nongovernmental organizations (NGOs), government officials, business representatives, and other members of "civil society"—loosely defined as individuals and groups with no direct political or economic stake in the tax rules that apply to multinationals.<sup>6</sup>

The first mover was Global Witness, a U.S. and U.K.-based watchdog group that is concerned about the connection between foreign investment, government corruption, and armed conflict in resource-rich but underdeveloped

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<sup>2</sup> For an overview, see, e.g., '2011 Revisited: Charting the Year', *The Economist*, Dec. 31, 2011. Available at: <http://www.economist.com/node/21542191>.

<sup>3</sup> See discussion *infra* at notes 48 to 51.

<sup>4</sup> For a discussion of the general nature and character of transparency initiatives, see Mark Fenster, 'The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State'. Available at: <http://ssrn.com/abstract=1918154>.

<sup>5</sup> It is by no means the first time tax information has been sought with respect to corporations in the United States or elsewhere. For a discussion of the U.S. experience with corporate tax disclosure as a national policy, see Richard D. Pomp, 'The Disclosure of State Corporate Income Tax Data', 22 *Capital University Law Review* 373 (1993).

<sup>6</sup> See, e.g., World Bank, *Civil Society Organizations*, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20127718~menuPK:288622~pagePK:220503~piPK:220476~theSitePK:228717,00.html>. The term civil society is ambiguous and is used inconsistently, sometimes including any nongovernmental member of society, including business and industry, and other times excluding profit-oriented enterprises. For a discussion, see Laura G Pedraza-Farin, *Conceptions of Civil Society in International Law-Making and Implementation: A Theoretical Framework*, at <http://ssrn.com/abstract=2017312>. In this chapter, references to civil society generally encompass the latter approach, that this designation encompasses members of society that are both nongovernmental and not primarily profit-oriented enterprises, such as businesses and industry groups.

countries.<sup>7</sup> In a 1999 report, Global Witness argued that government officials in Angola were diverting tax revenues from oil producers for personal gain, mainly by funding ongoing war, rather than using it for the public good.<sup>8</sup> Global Witness specifically blamed underdevelopment on corruption, and corruption on the lack of transparency regarding the tax and other payments made by multinationals to officials in Angola. The group sought international action to impose transparency on the ground that the public in Angola was unable to impose it themselves, due to social, political, and economic controls.<sup>9</sup>

Global Witness' 1999 report garnered widespread interest and support from individual activists and NGO and watchdog groups involved in monitoring the social justice aspects of natural resource extraction, including Bono, Mo Ibrahim, George Soros, Oxfam and Transparency International UK.<sup>10</sup> These activists formed a coalition to advocate for tax information disclosure. They issued further reports and launched two significant campaigns in 2002: Publish What You Pay (PWYP) and the Extractive Industries Transparency Initiative (EITI).<sup>11</sup> PWYP and EITI are interconnected initiatives that explicitly link confidentiality in tax payments and resource royalties to ongoing poverty in autocratic countries.<sup>12</sup>

As tax transparency developed into a global campaign through the PWYP and EITI coalition, other activists sought to expand these principles to all multinationals, in all industries. In 2003, Richard Murphy, a U.K. accountant, economist, and tax justice activist, issued a paper calling for broad PWYP-style disclosure rules for all publicly traded companies.<sup>13</sup> He sought disclosure of information about global corporate structure, inter-company prices, and tax payments made in every jurisdiction in which companies do business. Murphy later called these principles country-by-country reporting (CBCR), and he became an active proponent of the effort to introduce CBCR as a global policy reform measure.<sup>14</sup> A growing number of international NGOs became supporters

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<sup>7</sup> See Global Witness: About us, at [www.globalwitness.org/about-us](http://www.globalwitness.org/about-us).

<sup>8</sup> Global Witness, *A Crude Awakening*. Available at: <http://www.globalwitness.org/library/crude-awakening>

<sup>9</sup> *A Crude Awakening*, at 4.

<sup>10</sup> See, e.g., William MacNamara and Christopher Thompson, 'EU closer to US-style financial reform', *Financial Times*, Mar. 3, 2011. Available at: <http://www.ft.com/intl/cms/s/0/32b8327e-45ce-11e0-acd8-00144feab49a.html#ixzz1FcKOUAYW>.

<sup>11</sup> The founding members of PWYP also included The Catholic Overseas Development Agency, the Open Society Institute, and Save the Children UK. Publish What You Pay, History. Available at: <http://www.publishwhatyoupay.org/about/history>; EITI, History of EITI, at <http://eiti.org/eiti/history>.

<sup>12</sup> See, PWYP, About 'Objectives'. Available at: <http://www.publishwhatyoupay.org/about/objectives>.

<sup>13</sup> Richard Murphy, 'Reporting Turnover and Tax by Location, Association for Accountancy and Business Affairs Limited', 2003. Available at <http://www.richard.murphy.dial.pipex.com/A%20New%20International%20Accounting%20Standard.pdf>.

<sup>14</sup> Murphy has employed traditional media, such as articles and editorials in mainstream newspapers, as well as online and social media to advance his views on tax justice. See Tax

of CBCR, including some of those that had already been already active in PWYP, as well as The Task Force on Financial Integrity and Economic Development,<sup>15</sup> The Tax Justice Network,<sup>16</sup> ActionAid UK,<sup>17</sup> and Christian Aid.<sup>18</sup>

Expanding the movement for tax transparency beyond the resource (extractive industry) sector enabled CBCR proponents to identify broader connections between the taxation of multinationals, development in poor countries, and the fiscal health of countries in general. While Global Witness and the resource sector activists identified corruption as the main perpetrator of fiscal problems and under-development in poor countries, CBCR activists seek to connect both the underdevelopment of poor countries and the deteriorating fiscal situation in rich and poor countries alike to the systemic under-taxation of multinationals.<sup>19</sup> This frames under-taxation of multinationals as not only a problem for poor countries, but a global problem that threatens the ability of all countries to tax effectively. Moreover, it frames the problem as one that is not limited to corruption or lack of compliance on the part of business or government, but rather it as a rule of law problem, located in the foundational tax structure that every nation employs. CBCR activists thus characterize confidentiality in tax transactions among multinationals and governments as a generalized problem for development, whether or not these transactions involved legal payments and whether or not they were connected to corruption per se.

Some of these groups embraced tax transparency for its own sake, as a guard against “venal states and unscrupulous officials.”<sup>20</sup> Others, such as ActionAid UK and Christian Aid, began to include tax transparency as a cause, packaged with other appeals to justice and human rights, including “just and democratic governance,” to be pursued on a global basis.<sup>21</sup>

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Research UK, <http://www.taxresearch.org.uk/Blog/>; The Tax Justice Network, [www.taxjusticenet.org](http://www.taxjusticenet.org).

<sup>15</sup> Task Force on Financial Integrity and Economic Development, <http://www.financialtaskforce.org/about/overview/> (“a consortium of governments and research and advocacy organizations [that] focuses on achieving greater transparency in the global financial system for the benefit of developing countries”).

<sup>16</sup> Tax Justice Network, [www.taxjusticenet.org](http://www.taxjusticenet.org). The Tax Justice Network is a British-based organization that was founded by Richard Murphy and John Christensen in 2003. See Memorandum and Articles of Association, [http://www.taxjustice.net/cms/upload/pdf/TJN\\_Memorandum\\_Filed.pdf](http://www.taxjustice.net/cms/upload/pdf/TJN_Memorandum_Filed.pdf)

<sup>17</sup> ActionAid UK, ‘How to Stop Tax Dodging’, [http://www.actionaid.org.uk/102021/how\\_to\\_stop\\_tax\\_dodging.html](http://www.actionaid.org.uk/102021/how_to_stop_tax_dodging.html).

<sup>18</sup> Christian Aid: ‘Accounting for Change: Shifting Sands’, November 2010. Available at: <http://www.christianaid.org.uk/images/accounting-for-change-shifting-sands.pdf>.

<sup>19</sup> See, e.g., Christian Aid, *supra* n. 18 at 1.

<sup>20</sup> Fenster, *supra* n. 58 at 3.

<sup>21</sup> See, e.g., ActionAid UK, ‘Annual Report 2010’ at 9. Available at [http://www.actionaid.org.uk/102636/where\\_did\\_your\\_money\\_go\\_in\\_2010.html](http://www.actionaid.org.uk/102636/where_did_your_money_go_in_2010.html) (adding tax disclosure to its list of causes that include advocacy on behalf of women’s rights, rights to education, security, and food).

## B. Informational and Political Goals.

The immediate goal of the tax transparency movement is to expand public knowledge about the global profits earned by multinationals, but the ultimate goal is to spur widespread tax reform movements as societies react to the knowledge so obtained. Activists seek to present as an empirical fact a global fiscal compromise that systemically allows multinationals to escape taxation in ways that are foreseeable and expected if not deliberately intended by lawmakers. CBCR activists may uncover corruption and noncompliance by business and by government as a feature of this global compromise, but that is not the only or perhaps even the primary target. Instead, they seek to expose the legal and institutional structure that allows multinationals to escape taxation even under full compliance with all applicable tax laws. This is a substantive expansion of the transparency goals sought under the PWYP regime. There, the goal is to expose collaborations between business and governments that foster corruption and noncompliance with tax laws; under CBCR, the goal is also to expose collaborations between business and governments that foster undertaxation of multinationals as a matter of systemic design.

The chosen mechanism for knowledge expansion is to overcome existing rules that either safeguard the confidentiality of tax information or otherwise introduce complexity in ways that impede assessment of a company's financial situation even when information is publicly available. The confidentiality and complexity to be overcome lies in current legal disclosure standards, which require multinationals to publish only limited and piecemeal information about their operations. No one country requires multinationals to provide a globally comprehensive picture of their geographic operations, inter-company transfers, or tax payments.<sup>22</sup> As a result, multinationals use various complex financial strategies and multijurisdictional structures to locate profit in ways that are often difficult (practically or politically) for their home or headquarters countries to track, and all but impossible for the public to monitor or understand.<sup>23</sup>

Tax transparency is offered as the solution to this systemic problem. For example, under CBCR standards, multinational companies would disclose their worldwide geographic locations, the names of all of their subsidiaries in these locations, their market and inter-company commercial and financial transactions, their labor costs and employee numbers, their assets in each country, their tax assessments and payments in each country, and additional technical tax details.<sup>24</sup>

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<sup>22</sup> See, e.g., Lynnley Browning, 'Insight: Microsoft use of low-tax havens drives down tax bill', *Reuters*, July 27, 2011. Available at: <http://www.reuters.com/article/2011/07/27/us-microsoft-tax-idUSTRE76Q6OB20110727>.

<sup>23</sup> Richard Murphy, 'Country by Country Reporting: Holding Multinational Corporations to Account Wherever They Are', June, 2009. Available at: [http://www.financialtaskforce.org/wp-content/uploads/2009/06/Final\\_CbyC\\_Report\\_Published.pdf](http://www.financialtaskforce.org/wp-content/uploads/2009/06/Final_CbyC_Report_Published.pdf).

<sup>24</sup> See, e.g., Christian Aid *supra* note 18 at 2 (setting out specific information to be disclosed); Tax Justice Network, 'Country-By-Country Reporting: How To Make Multinational Companies More Transparent', March, 2008. Available at [http://www.taxjustice.net/cms/upload/pdf/Country-by-country\\_reporting\\_-\\_080322.pdf](http://www.taxjustice.net/cms/upload/pdf/Country-by-country_reporting_-_080322.pdf).

CBCR is thus not tax policy reform but instead is accounting disclosure reform, to be implemented through securities regulations applicable to large public corporations in their home-base countries.<sup>25</sup> Most governments already collect some of this information, such as inter-company pricing practices and actual tax payments made by companies to the home government even if they do not permit its public disclosure. But tax transparency activists also seek information that governments do not necessarily collect, sometimes notoriously so, such as chains of corporate ownership, the identity of beneficiaries, and the payment of taxes to foreign countries.<sup>26</sup>

The legal challenge for achieving disclosure is whether any of this information, whether currently collected by governments or not, constitutes “[p]ublic business [that] is the public’s business,” as to which the public has “the right to know.”<sup>27</sup> In most cases, national corporate privacy laws suggest that it is not: tax information is typically protected from public scrutiny by strict confidentiality rules.<sup>28</sup> Certain persons who are deemed to have a “material interest” in a specific taxpayer’s return, such as, in the case of corporations, “any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation,” are entitled to obtain such returns.<sup>29</sup> However, public disclosure of any information obtained under this exception is prohibited, even if lawfully obtained by the shareholder. The prohibition cannot be overcome by freedom of information requests.<sup>30</sup> Placing new reporting requirements under securities compliance rules rather than within the tax code would overcome this problem.<sup>31</sup> Accordingly, it is within securities regulations, and not tax codes, that tax transparency activists seek to counter the confidentiality status quo as a matter of both government policy choice and business practice.

Transparency proponents suggest that numerous constituencies would use the information gathered through more comprehensive tax disclosure requirements to make better-informed market decisions. Perhaps the primary intended audience for this use of tax transparency is investors, who would ostensibly have more information to make informed choices with respect to investing in “unstable regimes, tax havens, war zones, and other sensitive areas.”<sup>32</sup> In the United States, giving shareholders access to corporate tax

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<sup>25</sup> Richard Murphy, ‘Why is Country-by-Country financial reporting by Multinational Companies so important?’ Available at <http://www.taxresearch.org.uk/Documents/CountrybyCountryReporting.pdf>.

<sup>26</sup> See, e.g., Kelly Carr and Brian Grow, ‘Special Report: A little house of secrets on the Great Plains’, *Reuters*, June 28, 2011.

<sup>27</sup> Fenster, *supra* note 58 at 19.

<sup>28</sup> In the United States, for example, tax information is protected pursuant to federal statute, with high penalties for disclosure. IRC § 6103. Canada has a similar rule. See Canada Income Tax Act of 1985 §§ 239(2.2), 241.

<sup>29</sup> IRC 6103(d)(e)(1)(D)(iii).

<sup>30</sup> 5 U.S.C. 552(b)(3)(exception from Freedom of Information Act disclosure for information otherwise protected by statute).

<sup>31</sup> See, e.g., Steven Mark Levy, *Federal Money Laundering Regulations, Banking, Corporate and Securities Compliance*, Ch. 10.04, 2003, rev.2011. ‘How The FBAR Is Used’.

<sup>32</sup> Raymond Baker, Foreword, in Murphy, *supra* n. 23 at 4.



information by making corporate tax returns public records was an early feature of the modern corporate income tax, but it was quickly overcome under pressure from business lobbyists.<sup>33</sup> Reviving tax transparency as a matter of shareholder interest places the issue squarely within the corporate social responsibility paradigm, in which activists hope to alter what they perceive as negative corporate behavior by enlisting the power of public and consumer opinion.<sup>34</sup> Similarly targeted constituencies include workers, suppliers, and customers, who would have more information about the social attributes of entities with which they seek to transact.<sup>35</sup> Although opponents of transparency often dismiss this appeal, recent empirical research suggests that the market responds positively to firms that are identified as meeting corporate social responsibility goals.<sup>36</sup>

Even so, the appeal to the market for information raises the specter that information flow can have unintended consequences on the behavior of market participants. In the brief historical U.S. experience with corporate tax disclosure, opponents argued that publishing corporate tax returns failed to increase revenue, encouraged tax evasion,<sup>37</sup> and served to give business rivals something of value to the detriment of the taxpayer.<sup>38</sup> A similar phenomenon is seen in the corporate social responsibility world. For example, a campaign that successfully induces change in one company or region may fail because another company or region “pick[s] up where their more socially responsible competitors had left off, and even significantly improv[es] their profitability vis-à-vis their foreign competitors as a result of their decision not to adopt and adhere to corporate codes of conduct.”<sup>39</sup> No empirical data has been compiled to determine the extent to which these potential costs would outweigh the potential benefits of disclosure.

Transparency advocates have not articulated direct solutions to these potential unintended consequences, but this may be because market participants are not the only audience, and may not even be the primary audience, for tax transparency. Instead, the broader audience for the information to be gathered through tax transparency appears to be an informed taxpaying public that uses its

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<sup>33</sup> See, 44 Congress Rec. 4000 (1909) (Senate debate in the Payne-Aldrich Tariff Act of 1909, the predecessor of the current U.S. corporate income tax system); Pomp *supra* note 5 at 387-388 (discussing the efforts of the Illinois Manufacturing Association to prevent corporate tax disclosure).

<sup>34</sup> See, e.g., Christen Broecker, ‘Better the Devil You Know: Home State Approaches to Transnational Corporate Accountability’, 41 *New York University Journal of International Law and Politics* 159 (2008).

<sup>35</sup> Murphy *supra* note 23 at 14-16; see also Lisa Misol, ‘Private Companies and the Public Interest: Why Corporations Should Welcome Global Human Rights Rules’, *Human Rights Watch, World Report 2006*.

<sup>36</sup> See, Ioannis Ioannou and George Serafeim, ‘The Impact of Corporate Social Responsibility on Investment Recommendations’, *Harvard Business School Working Paper* 11-017. Available at: <http://www.hbs.edu/research/pdf/11-017.pdf>.

<sup>37</sup> Pomp *supra* note 5 at 392, citing Sidney Ratner, *Taxation and Democracy in America* (1967).

<sup>38</sup> ‘Cost of Publicity Scored in Treasury’, *New York Times*, Sept. 3, 1925 at 1 (citing Treasury Secretary Andrew Mellon).

<sup>39</sup> Broecker, *supra* note at 174.

collective political influence to name and shame multinationals as specific contributors to underdevelopment. CBCR thus identifies “stakeholder groups,” such as those supporting PWYP and CBCR, as the primary users of information, who will use it to “monitor corrupt practices, corporate governance, tax payments, and world trade flows.”<sup>40</sup> CBCR also identifies citizens in developing countries, who would have more oversight with respect to who owns the companies that are trading in their countries, and what these companies are actually paying in taxes.<sup>41</sup> The clear goal is to activate social pressure both on multinationals that seem to avoid paying an appropriate share of taxation on a global scale, as well as on governments that seem to avoid insisting that such a share be paid. As one extractives industry representative put it, “morality has entered the tax lexicon and ... the naming and shaming of companies in the media, ... are difficult [developments] for multi national companies.”<sup>42</sup>

### C. Precedent for the Power of Public Engagement.

There is reason to anticipate that tax transparency would provoke negative public reaction. One example is found in the copper mining industry in Zambia, where the government has been collecting revenues of just 0.6% of profits each year.<sup>43</sup> A leaked tax audit that led to the publication of this low tax burden on a highly profitable industry created moral pressure on mining operators in Zambia, who were quickly labeled “tax dodgers” in the media.<sup>44</sup> Strictly speaking, these companies were not dodging tax, but were compliant with the tax rules imposed upon them by Zambia. The problem is that these obligations seemed too low in the mind of the public. The under-taxation of its mining industry thus generated moral pressure on Zambia’s government itself: media stories about the low taxation of the copper mining companies created embarrassment for the country and the government faced institutional pressure from the International Monetary Fund to address the situation.<sup>45</sup>

While Zambia’s low tax rates on copper mining provided a specific point of focus for development-oriented activists, the connection of the under-taxation

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<sup>40</sup> Raymond Baker, ‘Foreword’, in Murphy supra note 23 at 4.

<sup>41</sup> CBCR opponents reject these claimed benefits, as discussed below.

<sup>42</sup> Paul Skinner, ‘Managing the Tax Affairs of a Multi National Company in a Globalising World’ (Notes of Speech delivered January 10, 2006), at [http://www.riotinto.com/media/18435\\_presentations\\_2311.asp](http://www.riotinto.com/media/18435_presentations_2311.asp).

<sup>43</sup> See, SCIAF, Zambia. Available at: [http://www.sciaf.org.uk/where we work/africa/zambia](http://www.sciaf.org.uk/where_we_work/africa/zambia); Counter Balance, ‘The Mopani Copper Mine,’ Zambia: ‘How European Development Money has Fed a Mining Scandal’. Available at: <http://www.counterbalance-eib.org/wp-content/uploads/2011/03/Mopani-Report-English-Web.pdf>.

<sup>44</sup> See, Joint press release by Centre for Trade Policy and Development (CTPD), Counter Balance, Eurodad, Oxfam, Tax Justice Network, Mopani Copper Mines is dodging taxes in Zambia, Feb. 10, 2011. Available at [http://www.ctpd.org.zm/index.php?option=com\\_content&view=article&id=133:mopani-copper-mines-is-dodging-taxes-in-zambia&catid=66:blogs&Itemid=124](http://www.ctpd.org.zm/index.php?option=com_content&view=article&id=133:mopani-copper-mines-is-dodging-taxes-in-zambia&catid=66:blogs&Itemid=124)

<sup>45</sup> Mutale Kapekele, ‘Government saving face on mine tax issue’, *The Zambia Post Online*, June 15, 2011, at [http://www.postzambia.com:3128/post-read\\_article.php?articleId=21201](http://www.postzambia.com:3128/post-read_article.php?articleId=21201); IMF urges Zambia to up mine taxes to fight poverty, *Lusaka Times*, March 5, 2010, at <http://www.lusakatimes.com/2010/03/05/imf-urges-zambia-to-up-mine-taxes-to-fight-poverty/>

of multinationals to deteriorating fiscal conditions in the rich world is creating a more generalized pressure on a global scale. The emerging international prominence of the tax transparency movement coincides with other grassroots efforts, such as the “Uncut” and “Occupy” movements, which have mobilized public agitation against the rules that allow multinationals to escape their tax obligations.<sup>46</sup> UK Uncut began as a protest against the propensity of some of the European Union’s richest citizens and corporations to legally escape their tax obligations even as governments were calling for major social program cuts to counter mounting fiscal crises.<sup>47</sup> Momentum quickly spread throughout the world with affiliated Uncut groups forming at the national level in the United States, Canada, Europe, and Australia, as well as at the sub-national level with affiliate state- and city-based groups.<sup>48</sup> The Occupy movement picked up on and further expanded the social influence of the rhetoric and ideas from the Uncut movement, making the taxation of multinationals a front page news item.<sup>49</sup>

These groups have been responsible for public protests involving hundreds of thousands of individuals responding to media reports of under-taxation of businesses juxtaposed with large cuts to social programs.<sup>50</sup> Because

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<sup>46</sup> See, e.g., Cristobal Young, ‘Momentum for a Millionaire’s Tax’, *Boston Review*, December 7, 2011. Available at

[http://www.bostonreview.net/BR36.6/cristobal\\_young\\_occupy\\_movement\\_future.php](http://www.bostonreview.net/BR36.6/cristobal_young_occupy_movement_future.php); Allison Kilkenny, ‘We’re Not Broke’: The Movement That Helped Spark Occupy Wall Street, *The Nation*, Jan. 13, 2012, <http://www.thenation.com/blog/165635/were-not-broke-movement-helped-spark-occupy-wall-street>.

<sup>47</sup> UK Uncut, <http://www.ukuncut.org.uk/>.

<sup>48</sup> For a few examples, see US Uncut, <http://www.usuncut.org/>; Canada Uncut, <http://canadauncut.net/>; Australia Uncut, <http://www.facebook.com/pages/Australia-Uncut/191927247514953>; Portugal Uncut, <http://portugaluncut.blogspot.com/>; Greece Uncut, <http://www.facebook.com/greeceuncut>; US Uncut Wisconsin, <http://www.facebook.com/usuncutwi>; US Uncut Wisconsin-Milwaukee, <http://www.facebook.com/pages/US-Uncut-WisconsinMilwaukee/199736063379233>; US Uncut Florida, <http://www.facebook.com/pages/US-Uncut-Florida/136622739740210>. US Uncut was formed after a small group of activists in the United States heard about the UK Uncut Movement and decided to join the protest. Interview with Joanne Gifford, cofounder of US Uncut, Sept. 21, 2011, notes on file with the author; see also Dominic Rushe and Matthew Taylor, UK Uncut inspires US groups to attack cuts and tax avoidance, *The Guardian*, Feb. 25, 2011. Available at <http://www.guardian.co.uk/uk/2011/feb/25/uk-uncut-us-groups-cuts>. For the article that inspired the movement in the United States, Johann Hari, ‘Vision: Everyday Brits Are in Revolt Against Wealthy Tax Cheats -- Can We Do That Here?’, *AlterNet*, Feb. 5, 2011. Available at: [http://www.alternet.org/teaparty/149806/vision%3A\\_everyday\\_brits\\_are\\_in\\_revolt\\_against\\_wealthy\\_tax\\_cheats\\_-\\_can\\_we\\_do\\_that\\_here/](http://www.alternet.org/teaparty/149806/vision%3A_everyday_brits_are_in_revolt_against_wealthy_tax_cheats_-_can_we_do_that_here/).

<sup>49</sup> Kilkenny, *supra* note 46.

<sup>50</sup> See, e.g., Jerome E. Roos, ‘100,000 rally against austerity in Portugal — in pictures’, *Roarmag.org*, <http://roarmag.org/2011/10/100000-rally-against-austerity-in-portugal-in-pictures/>; US Uncut Minnesota, ‘Occupy Wall Street Movement Reports 80 Arrested Today in Protests’, *ABC News*, Sept. 24, 2011. Available at: <http://usuncutmn.blogspot.com/2011/09/occupy-wall-street-movement-reports-80.html>; Rae Gomes, ‘Love the iPhone, Hate the Tax Cheat: US Uncut Protests Apple, and Apple Gets Aggressive’, *AlterNet*, June 8, 2011. Available at: [http://www.alternet.org/vision/151252/love\\_the\\_iphone,\\_hate\\_the\\_tax\\_cheat%3A\\_us\\_uncut\\_protests\\_apple,\\_and\\_apple\\_gets\\_aggressive\\_/](http://www.alternet.org/vision/151252/love_the_iphone,_hate_the_tax_cheat%3A_us_uncut_protests_apple,_and_apple_gets_aggressive_/).

of tax confidentiality, journalists often cannot clearly demonstrate the fact of nonpayment of taxes, nor why taxes are underpaid despite reported profits, and it is likely that many of the protestors have little or no understanding of the tax rules at play. In one case, a company representative for GE, one of the major names implicated in the Uncut protests, felt compelled to respond to the criticisms but offered incoherent and contradictory explanations, leading to increased confusion with little resolution in the public discourse.<sup>51</sup> This kind of interplay may explain why so much protest has been activated by anecdote: publication of stories about that involve allegations of tax dodging by well-known global companies such as Verizon, Apple, and Google. Bono, one of the supporters of EITI and PWYP, has himself been the target of public scrutiny in response to publication of his own group's offshore tax avoidance strategies.<sup>52</sup>

Through these anecdotes, the tax transparency movement brought international tax avoidance to prominence in the public imagination. The rise of the movement itself illustrates that continued tax confidentiality has social costs, not least of which is a crisis of confidence in the tax system itself. Public protest may also take other, less publicly visible forms, such as an increase in direct appeals to governing representatives.<sup>53</sup> The surge of public interest in the tax transparency, uncut, and occupy movements suggest that the public will likely react with anger to the information disclosed through tax transparency. On the other hand, there is some concern that the publication of tax information will act as an information guide to other taxpayers, who will be emboldened to increase their own legally-sanctioned tax avoidance strategies as a result.

The tension between confidentiality and compliance has long been a subject of tax policy debate. In an early US example, Horace Greeley argued that

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<sup>51</sup> David Kocieniewski, 'G.E.'s Strategies Let It Avoid Taxes Altogether', *New York Times*, March 24, 2011. Available at [http://www.nytimes.com/2011/03/25/business/economy/25tax.html?\\_r=1&scp=3&sq=ge&st=cse](http://www.nytimes.com/2011/03/25/business/economy/25tax.html?_r=1&scp=3&sq=ge&st=cse); Jake Tapper, 'General Electric Paid No Federal Taxes in 2010', *ABC News*. Available at: <http://abcnews.go.com/Politics/general-electric-paid-federal-taxes-2010/story?id=13224558>. For a discussion of GE's contradictory responses, see Kim Peterson, GE Chief Defends Company's 2010 Tax Bill, *MSN Money*, April 1, 2011, at <http://money.msn.com/top-stocks/post.aspx?post=a0b9a8f0-4c1a-4387-b76f-dc71e05e90d0> (reporting that GE'S Jeffrey Immelt stated that "[l]ike any American, we do like to keep our tax rate low ... but we do it in a compliant way and there are no exceptions," but that "the company appeared to contradict itself. First, spokeswoman Anne Eisele told AFP that 'GE did not pay U.S. federal taxes last year because we did not owe any.' But the same spokeswoman told Business Insider that GE did pay U.S. federal income tax in the form of prepayments -- and when the final 2010 tax bill is determined this fall, the company may have to pay more.").

<sup>52</sup> Adam Gabbatt, 'U2 Glastonbury tax protest: activists condemn 'heavy-handed' security', *The Guardian*, June 25, 2011. Available at <http://www.guardian.co.uk/music/2011/jun/25/u2-bono-tax-protest-glastonbury>.

<sup>53</sup> In the United States, there is evidence of such increased "citizen advocacy" over the past decade. Congressional Management Foundation, *Communicating With Congress: How Citizen Advocacy is Changing Mail Operations on Capitol Hill* (2011), at [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/cwc-mail-operations.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/cwc-mail-operations.pdf) ("most congressional offices have seen a 200%–1,000% increase in constituent communication volume in the past decade.")

the U.S. civil war-era practice of publishing income tax information “has gone far toward equalizing the payments of income tax by the rogues with that of honest men.”<sup>54</sup> Those in favor of protecting privacy argue that increased disclosure of tax information would provide taxpayers with both incentive and a roadmap to decreasing their own taxes, while impeding the ability of governments to maintain an image of the tax system as an even-handed instrument of the rule of law.<sup>55</sup> Those in favor of more transparency argue that tax information disclosure either increases or has negligible effects on compliance.<sup>56</sup> Insufficient empirical evidence has been marshaled to support a clear answer to the question. An experiment with greater disclosure might provide a source of data for necessary analysis, but the contemporary public discourse over tax transparency suggests that lack of empirical evidence will not impede strong advocacy on either side.

Having asserted a need for transparency to create public oversight and participation in future tax reforms, the question for activists is how best to achieve disclosure. Longstanding national protections for confidentiality of tax and financial data present legal obstacles to reform, while an entrenched and organized constituency with high stakes in preserving the status quo present political obstacles. Activists need to navigate ways to overcome these. They also need to determine whether their goals can be achieved by overcoming the legal and political obstacles in only one or a few countries, or whether global reforms are necessary, and if the latter, how this can be achieved in a world of independent sovereign states. The strategies invoked by tax transparency activists to date illuminate these ongoing challenges.

### III. Three Pathways to Reform

Tax transparency activists have taken three distinct yet interrelated pathways to tax information disclosure. First, they have tried to overcome political obstacles to disclosure by appealing directly to multinational companies, seeking voluntary adoption of global disclosure commitments. Second, they have tried to overcome legal obstacles to disclosure by appealing to national legislators to enact new disclosure laws that circumvent existing confidentiality rules. They have done this both in the countries that serve as headquarters for multinationals (typically rich countries) and those that serve as hosts for multinational activities (especially in the extractive industries, typically very poor countries). Finally, they have tried to overcome both political and legal obstacles by appealing to the international tax community, namely, an elite global network of tax officials and international business interests that define global tax policy in

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<sup>54</sup> Richard F. Janssen, ‘Income Tax Snooping Through History’, *Wall Street Journal*, May 6, 1970.

<sup>55</sup> See, e.g., Joshua Blank, ‘In Defense of Tax Privacy’, 61 *Emory Law Journal* (2011) (focusing only on individual, not corporate, taxpayers).

<sup>56</sup> See, e.g., Stephen Mazza, ‘Taxpayer Privacy and Tax Compliance’, 51 *University of Kansas Law Review* 1065 (2003); Marjorie E. Kornhauser, ‘Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?’, 18 *Canadian Journal of Law and Jurisprudence* 1 (2005).

the form of “soft” tax law—norms and standards delivered through models, reports, and guidance.

### **A. Appeal to Multinationals: Voluntary Compliance.**

The first pathway to tax transparency is to identify the multinational taxpayer itself as the best source of tax information. The 1999 Global Witness report took this approach, calling upon resource-rich countries, companies engaged in the extraction of minerals and fossil fuels, and industry watchdog groups to work together to end the secrecy that fostered corruption.<sup>57</sup> EITI and PWYP, the initiatives that ultimately arose from Global Witness’ advocacy work, both seek voluntary disclosure on the part of multinationals regarding payments made in connection with extraction activities, including tax and royalty fees.<sup>58</sup>

Transparency activists have had some success in their direct appeal efforts. Rio Tinto, one of the world’s largest mining conglomerates, was an early adopter of PWYP standards and its directors attribute its commitment to transparency to the theory that transparency translates into greater profitability in the long term. As one director put it, “We do subscribe to EITI; we subscribe to open transparent taxes. We have actually been the first of the big mining companies to publish our taxes on a country by country basis. And again educate and inform everyone about the benefits of stable fiscal regimes, leading to stable investment regimes, leading to more spending.”<sup>59</sup> The World Bank reports that “Fifty of the world’s largest oil, gas, and mining companies support and participate in the EITI process—through their operations in implementing countries, their international commitments, and their industry associations.”<sup>60</sup>

Appealing to companies to voluntarily disclose their own tax practices may make transparency initiatives more palatable to those concerned with confidentiality as a legally protected right, but voluntary disclosure presents major challenges in terms of verifying that the information divulged is both truthful and comprehensive.<sup>61</sup> The lack of enforcement mechanisms implied by voluntary compliance is likely to lead to under-reporting of information that may be interpreted as negative by the public, and over-reporting of the converse. If

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<sup>57</sup> A Crude Awakening at 13.

<sup>58</sup> EITI and PWYP both supplement the international movement to eliminate corporate bribery of elected officials, which in the U.S. culminated in the Foreign Corrupt Practices Act of 1977 (FCPA). EITI and PWYP are broader than the FCPA in that FCPA is intended to end illegal payments of bribes, kickbacks, and the like to government officials, while EITI and PWYP focus on all payments to foreign governments, including legal ones.

<sup>59</sup> ‘Rio Tinto 2011 Interim Results, Q&A Transcript.’ Available at: [http://www.riotinto.com/documents/FinancialResults/Rio\\_Tinto\\_2011\\_Interim\\_Results\\_QA\\_transcript.pdf](http://www.riotinto.com/documents/FinancialResults/Rio_Tinto_2011_Interim_Results_QA_transcript.pdf).

<sup>60</sup> The World Bank Group, ‘Voices of Transparency’, World Bank (2011). Available at: [http://siteresources.worldbank.org/INTOGMC/Resources/EITL\\_Final\\_Brochure.pdf](http://siteresources.worldbank.org/INTOGMC/Resources/EITL_Final_Brochure.pdf).

<sup>61</sup> Thus while Rio Tinto advertises its EITI-compliant partnerships with Mongolia, Guinea, and Mozambique, the media in Zimbabwe reports that Rio Tinto has not extended the same efforts there. See ‘Rio Tinto 2011 Interim Results’, *supra* note 59 at 9; Veneranda Langa, ‘Mining Companies Should Divulge Earnings’, *Newsday Zimbabwe*, Aug. 29, 2011. Available at <http://www.newsday.co.zw/article/2011-08-29-mining-companies-should-divulge-earnings>.

voluntary disclosure becomes a marketing exercise, the activists' goals would not be realized. One way to mitigate this result is to enlist the voluntary cooperation of governments in overseeing the voluntary disclosure, in partnership with the multinationals. EITI activists have sought this cooperation by appealing to legislators in the U.S., Canada, Australia and elsewhere to enact PWYP standards on a national basis.

### **B. Appeal to National Legislators: Unilateral Adoption of Standards.**

A decade after the initial Global Witness Report, PWYP activists appeared to achieve success in achieving national legislative reform that would mandate transparency. In early 2009, the Canadian Parliament considered Bill C-300, "An Act Respecting Corporate Accountability for the Activities of Mining, Oil, or Gas Corporations in Developing Countries."<sup>62</sup> Later that year the U.S. Senate considered a similar bill, entitled the "Energy Security through Transparency Act of 2009."<sup>63</sup> Both bills called for regulatory disclosure reform on the order of the PWYP principles as well as cooperative effort by the government through international institutions and the EITI to gain international consensus in disclosure rules.

After extensive lobbying by the extractive industries in each country, both bills failed.<sup>64</sup> Nevertheless, in 2010, the U.S. Congress passed a PWYP initiative in the form of a two-page addendum to the Dodd-Frank Wall Street Reform Act, a bill designed to compensate for the lax regulation that had been pinpointed as the cause of the 2008-2009 economic crisis in the United States.<sup>65</sup> Commentators suggest that the extractive industry was caught by surprise by the inclusion of PWYP in the Bill.<sup>66</sup> The industry has since engaged in an aggressive

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<sup>62</sup> John McKay, John McKay's Bill C-300 on Corporate Accountability Passes 2nd Reading, Moves to Committee Stage, April 23, 2009, at [http://www.johnmckaymp.on.ca/newshow.asp?int\\_id=80507](http://www.johnmckaymp.on.ca/newshow.asp?int_id=80507).

<sup>63</sup> S.1700, Energy Security through Transparency Act of 2009, 111<sup>th</sup> Congress, 1<sup>st</sup> Session, Sept. 23, 2009. Available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.1700>.

<sup>64</sup> For an overview of the Canadian mining industry response to Act 300, see Fasken Martineau, 'Sharp criticism for Bill C-300: Lawyers tell parliamentary committee Private Member's Bill threatens Canada's minerals industry'. Available at: <http://www.fasken.com/firm-opposes-bill-c-300-in-ottawa/>; Prospectors and Developers Association of Canada (PDAC), 'Corporate Social Responsibility in the Mineral Industry', *Issues & Advocacy*, Available at: <http://www.pdac.ca/pdac/advocacy/csr/index.html> (explaining the role PDAC played in opposing the passage of Act 300). For an overview of the U.S. mining industry opposition to S.1700, see Ken Silverstein, 'As Oil Pours Into Gulf, Oil Industry Fights Anti-Corruption Measure', *Harpers*, May 11, 2010. Available at: <http://harpers.org/archive/2010/05/hbc-90007021> (explaining the opposition of the American Petroleum Institute, a trade association that represents the U.S. oil and gas industry).

<sup>65</sup> H.R. 4173, 'The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010', section 1504; see also Publish What You Pay, The Cardin-Lugar Amendment (Dodd-Frank 1504), <http://www.publishwhatyoupay.org/about/stock-listings/cardin-lugar-amendment-dodd-frank-1504>.

<sup>66</sup> See, e.g., Daniel Firger, 'Lifting the Resource Curse: Will Dodd-Frank Do the Trick?'. Available at: <http://industry-news.org/2010/09/28/daniel-firger-lifting-the-resource-curse-will-dodd-frank-do-the-trick-2/>; Rebekah J. Poston and Carine M. Williams, 'Extraction and Compliance: New

campaign to prevent the implementation of the law by forestalling the issuance of necessary regulations, which were due to be in place by April 15, 2011 but are still forthcoming.<sup>67</sup> Such regulations, if they are ever issued, are now expected to eviscerate the disclosure requirements to such an extent as to make them ineffective. However, the news of successful passage of legislation in the United States, no matter how toothless in the absence of regulatory implementation, created some international momentum in Europe<sup>68</sup> and is bolstered by the recent adoption by Australia of a pilot EITI program entitled the “Mining for Development Initiative.”<sup>69</sup>

There is precedent for disclosure of at least some tax details in the United States, historically at the federal level but also based upon state practice. Nationally, the public has had varying levels of access to tax information throughout U.S. history, with current standards of confidentiality being the most restrictive.<sup>70</sup> While the U.S. states generally reflect the federal stance, the state of Wisconsin stands out as an exception.<sup>71</sup> Specifically, for a \$4 fee per disclosure, any resident of Wisconsin may obtain information about the amount of net income tax or gift tax reported by another Wisconsin individual or corporation.<sup>72</sup> The law presents a few barriers to disclosure. First, the requesting person must provide the exact name and address of the company for which the information is requested, so that existing confidentiality surrounding these details

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Reporting Requirements for Issues Involving Oil, Natural Gas or Minerals’, *Thomson Reuters Accelus*, November 3, 2010. Available at: <http://www.complinet.com/dodd-frank/news/analysis/article/extraction-and-compliance-new-reporting-requirements-for-issuers-involving-oil-natural-gas-or-minerals.html>.

<sup>67</sup> See, e.g., Rep. Barney Frank *et al*, Letter to the Securities and Exchange Commission, Feb. 12, 2012, at <http://www.sec.gov/comments/s7-42-10/s74210-162.pdf> (correspondence from “Members of the U.S. House of Representatives who support the extractive industry revenue transparency provision,” expressing their concern that “the Commission is far behind in meeting the statutory deadline” and stating that “[m]oreover, we are aware of efforts by industry to press the SEC to throw out a year and half of important work and start the rulemaking process anew, or to release a watered down rule that does not reflect the statutory language as well as the legislative intent of Section 1504”).

<sup>68</sup> See, e.g., William MacNamara and Christopher Thompson, ‘Shell chief’s warning on Dodd-Frank’, *Financial Times*, March 2, 2011. Available at: <http://www.ft.com/intl/cms/s/0/f5dcb758-450a-11e0-80e7-00144feab49a.html#axzz1a4W6lVt8>.

<sup>69</sup> Commonwealth of Nations, notes on 2011 Commonwealth Heads of Government Meeting, Perth, 28-30 October 2011, at <http://www.dfat.gov.au/intorgs/commonwealth/index.html>; Press Office, Prime Minister Julia Gillard, Launch of Australia Mining Initiative, at <http://www.pm.gov.au/press-office/launch-australian-mining-initiative>.

<sup>70</sup> See, Congressional Research Service, ‘Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code of 1954 and its Predecessors (1974)’; Pomp *supra* n. 5.

<sup>71</sup> No other state has a general disclosure rule like Wisconsin’s, but a few states have restricted disclosure rules. For example, Iowa and Maine permit limited disclosure for legislative research purposes, and in Massachusetts, information about whether an individual or company has filed a tax return in the state can be obtained upon request (no actual return data may be disclosed, however). See, Robert Ellis Smith, *Compilation of State and Federal Privacy Laws 65-66*, 2002, 2011 Supplement.

<sup>72</sup> Wisconsin State 71-78 (2).



will prevent any tax information from being revealed.<sup>73</sup> Second, the information so obtained may not generally be divulged to another person, effectively preventing the publication of tax information received under request.<sup>74</sup> Yet the statute makes clear that nothing prevents the disclosure of information lawfully obtained from being published in a newspaper or spoken in a public address.

In practice, even this bare minimum of tax disclosure illustrates how information enables advocacy. In Wisconsin, public interest advocates employed the disclosure rule to demonstrate that many well-known and well-respected companies with a heavy local presence do not pay any taxes to the state.<sup>75</sup> To comply with the statute, the advocates have employed public speaking as a primary medium, relying on journalists to take an interest in the stories sufficient to publish the underlying data. This exposure, despite its limitations, attracted the attention of national journalists, who used the information as a means of exploring the distribution of tax burdens within the state as well as in the United States as a whole.<sup>76</sup>

While it is difficult to measure the social and political impact of the kind of advocacy seen in Wisconsin and throughout U.S. history, the example illustrates the concept that peer pressure can be a powerful tool for change. It is not surprising, then, that tax transparency advocates have identified another source of peer pressure as a target for their advocacy campaigns, namely, the international community of tax experts associated with the OECD.

Despite its exclusive membership, this institution's work on tax matters has made it a de facto world tax organization, and it asserts itself as a provider of "soft law"—internationally accepted standards that may lack the force of law but nevertheless compel law-like adherence by both member and non-member states.<sup>77</sup> The OECD's central role in creating global tax policy lies in its unique institutional capacity for facilitating networking among elite national tax officials and professionals.<sup>78</sup> Its main contribution is to produce nonbinding norms around which nations can converge.<sup>79</sup> The OECD accordingly describes itself as

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<sup>73</sup> This barrier is similar to a specific information request made under a tax treaty or tax information exchange agreement with another country. See, e.g., Lee A. Sheppard, 'Don't Ask, Don't Tell, Part 4: Ineffectual Information Sharing,' 122 *Tax Notes* 1411 (Mar. 23, 2009); Michael J. McIntyre, 'How to End the Charade of Information Exchange,' 56 *Tax Notes International* 255-268 (October 26, 2009).

<sup>74</sup> Wisconsin State 71-78 (1) ("This subsection does not prohibit publication by any newspaper of information lawfully derived from such returns or claims for purposes of argument or prohibit any public speaker from referring to such information in any address").

<sup>75</sup> See, Institute for Wisconsin's Future, Who Does Not Pay Taxes, at <http://www.wisconsinsfuture.org/>.

<sup>76</sup> See, David Cay Johnston, 'Wiping Out Wisconsin Taxes', *Reuters*, Aug. 26, 2011. Available at: <http://blogs.reuters.com/david-cay-johnston/2011/08/26/wiping-out-wisconsin-taxes/>.

<sup>77</sup> See Allison Christians, 'Hard Law, Soft Law, & International Taxation', 25 *Wisconsin International Law Journal* 325 (2007).

<sup>78</sup> See, e.g., Yariv Brauner, 'An International Tax Regime in Crystallization', 56 *Tax Law Review* 259 (2003) (identifying the OECD as the key source of international coordination).

<sup>79</sup> OECD, *The OECD's current Tax Agenda 2008 74-75* (2008); see also Sophie Ashley, 'OECD May detract from UN TP work', *Transfer Pricing Week*, May 17, 2011; Tax Justice Network,

a “market leader in developing [tax] standards and guidelines.”<sup>80</sup> As the world’s foremost source of “soft” tax law, the OECD appears to be the most likely forum from which tax transparency activists could launch a global campaign.

### **C. Appeal to The International Tax Community: Engaging Soft Law.**

The first signs that CBCR advocates sought international attention emerged in the U.K. in 2009, when the U.K. tax minister, Stephen Timms, introduced the concept of CBCR to a tax conference audience. He presented CBCR as a relatively new, grassroots issue that was gaining sufficient interest that international policy makers ought to consider it.<sup>81</sup> Timms argued that in order for CBCR to have a serious chance of being implemented by national governments, it would require international discussion.<sup>82</sup> Subsequently, after an Anglo-French Summit, the British Prime Minister and French President referred CBCR to international debate within the OECD.

The OECD responded by including CBCR on the agenda of a January 2010 meeting of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. U.K. tax minister Stephen Timms used the 2010 meeting of the Global Forum to support discussion of CBCR by the OECD on the grounds that “there should be transparency about where companies earn their profits and where they pay their tax.” Timms stated that the OECD ought to issue multinational guidelines through a process of discussion among governments, multinationals, and civil society, in order to define a standard that would then become globalized through the OECD’s soft law channels.<sup>83</sup> As a result, by mid-2010, CBCR had arrived on the international stage. Its presence on the OECD’s tax agenda launched the activists and their goals into the public consciousness, and prompted a swift response from the international community.

The OECD set up a task force to discuss the issue of CBCR. However, prior to the first meeting, the OECD published a critique of CBCR by William Morris.<sup>84</sup> Morris, the director of tax policy at General Electric company (GE) and a well-known international tax lobbyist, is highly visible within the OECD transnational tax network.<sup>85</sup> GE has been labeled by the media as an aggressive

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OECD May detract from UN work, May 19, 2011. Available at: <http://taxjustice.blogspot.com/2011/05/oecd-may-detract-from-un-work.html>; Tax Justice Network, UN versus OECD: Not a football match, June 23, 2011. Available at: <http://taxjustice.blogspot.com/2011/06/un-versus-oecd-not-football-match.html>.

<sup>80</sup> OECD, *The OECD’s current Tax Agenda 2008*, *supra* n. 79.

<sup>81</sup> ActionAid UK takes much of the credit for inciting Timms to this action. See, *supra* n. 17.

<sup>82</sup> Stephen Timms, ‘Remarks, at OECD Tax & Development Conference’, Paris, January 27, 2010.

<sup>83</sup> Timms, *supra* note 82.

<sup>84</sup> William Morris, ‘Is Country-by-Country Reporting the Answer?’, *OECD Observer* 278, March, 2010.

<sup>85</sup> Morris is Senior International Tax Counsel and Director of Tax Policy at GE. In addition, Morris is the Vice Chairman of the Business & Industry Advisory Committee (BIAC) to the OECD, a member of the Tax Policy Group of Business Europe, Chairman of the European Tax Policy Forum, and, most recently, Chairman of the Tax Committee at the Confederation of British Industry, “the UK’s top business lobbying organization” according to its own website. Mr.

tax dodger over several years, so perhaps it is not surprising that its senior tax advisor would take a strong position in opposition to a reform proposal which might force his company to divulge information about the company's tax planning strategies.<sup>86</sup> The publication of Morris' criticism two months prior to the initial meeting of the task force appears to have served mainly as a framing exercise for the OECD's subsequent work.<sup>87</sup>

Morris introduced several arguments in opposition to CBCR. Each of these arguments reflects those made by the extractive industry in its campaign against PWYP, with adjustments to counter specific goals Morris identified as being those of CBCR advocates. Morris' first argument was for the futility of additional disclosure. CBCR would be futile, he argued, first because governments and the public already knew whatever they needed to know about industry tax practices, so that CBCR would not reveal anything new, and second because even if additional information should come to light, poor countries would be too administratively feeble to make effective use of it.<sup>88</sup> Morris highlighted the futility of the regime against the unnecessarily burdensome compliance costs it would entail. These costs would be unsupported in his view, since companies already generally try to get compliance "right."<sup>89</sup> This statement echoes those made by extractive industries representatives, including corporate officers who have voluntarily adopted PWYP in their own reporting and advocate on its behalf more broadly.<sup>90</sup>

Morris then argued that CBCR poses a risk that firms will "respond."<sup>91</sup> While he did not state what response was anticipated, the implication was clear: if one country adopts CBCR, multinationals will flee to another country that does not. This argument has been used consistently by lobbyists to resist tax reform efforts in myriad contexts in the United States.<sup>92</sup> It was also put forth by the

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Morris previously served as the Associate International Tax Counsel in the Office of Tax Policy of the U.S. Treasury from 1995 until 2000, where he worked on international tax issues including deferral rules.

<sup>86</sup> See, *supra* note 51.

<sup>87</sup> See, e.g., Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (1974); David Snow and Robert Benford, 'Framing Processes and Social Movements: An Overview and Assessment', 26 *Annual Review of Sociology* 11 (2000); Kim Fisher, 'Locating Frames in the Discursive Universe', 2 *Social Research Online* 3. Available at: [www.socresonline.org.uk/2/3/4.html](http://www.socresonline.org.uk/2/3/4.html); Michael T. Maher, 'Framing: An Emerging Paradigm or a Phase of Agenda Setting', in Stephen D Reese, *Framing Public Life: Perspectives on Media and our Understanding on the Social World* (2001).

<sup>88</sup> See, Morris, *supra* n. 84.

<sup>89</sup> *Ibid.*

<sup>90</sup> See, Skinner, *supra* n. 42.

<sup>91</sup> *Ibid.*

<sup>92</sup> See, e.g., 'Impact of U.S. Tax Rules on International Competitiveness: Hearing Before the H. Comm. on Ways and Means', 106th Congress 64 (1999) (statement of Fred F. Murray, Vice President for Tax Policy National Foreign Trade Council, Inc.). Available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_house\\_hearings&docid=f:66775.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_house_hearings&docid=f:66775.pdf).

extractive industries in the United States and Canada to terminate the 2009 PWYP legislative efforts in these two countries.<sup>93</sup>

There is a basic internal inconsistency in this argument. Either CBCR will be futile, unnecessary, and useless to shareholders and governments alike, or it will be so effective and useful that it will cause multinationals to realize they can no longer expect to pay nominal or no taxes in these countries. Both cannot be simultaneously true. Given the level of industry opposition to disclosure, the success of CBCR appears to be the more likely case.

It seems problematic that the OECD would preemptively attack CBCR using its newsletter as a platform for industry self-interest presented as observation or commentary. But perhaps what is most striking about Morris' article is the way it frames the issues surrounding CBCR so narrowly. There is no acknowledgement in this article of the reasons why CBCR advocates seek disclosure reform as a substantive matter, and why they seek an oversight role for civil society in international tax matters as a procedural one. By placing the focus purely on estimated costs and predicted outcomes of increased disclosure for companies and, perhaps, governments, the article misses completely the more fundamental significance of the CBCR movement for transparency in global tax policymaking. This frames the debate about disclosure within the narrow confines of expected behavioral responses of firms and governments to rule change, and refuses to engage with the potentially much more important social and cultural impact that occur upon the increased availability of information about the taxation of multinationals.

This narrow framing is particularly troublesome in its apparent impact on subsequent OECD study of the subject, which consistently treats the potential social and cultural impacts of CBCR as unnecessary or impossible to assess and therefore not worthy of detailed study. Two months after the OECD Observer article was published, the OECD convened a working group to discuss the issue, and tasked a drafting group to report on the dialogue. The 38-page report, called a "preparatory note," repeated the narrow focus of the Morris article, discussing at length the predicted costs and outcomes of revised disclosure rules and raising but immediately leaving aside "the issue of whether greater transparency could aid public debate on appropriate tax policy" for the reason that this impact would be "very difficult to assess" because the political discourse would involve "differing arguments, [that] can be used more or less responsibly."<sup>94</sup> The note presents this description as self-evident, and does not explain why the social or cultural impact of information disclosure would be any more or less difficult to assess, or more or less prone to differing arguments than the debate about how disclosure would impact firms or governments or both. The preparatory note was

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<sup>93</sup> See, Fasken Martineau, *supra* n. 64 (detailing Canadian mining industry opposition to PWYP in Canada); Ken Silverstein, *supra* n. 64 (detailing U.S. extractive industries opposition to PWYP in the United States).

<sup>94</sup> OECD Informal Task Force on Tax and Development, Preparatory Note from the Sub Group on Transparency in Reporting Financial Data by Multinational Corporations, March 17, 2011, available at [www.oecd.org/dataoecd/57/4/47521678.pdf](http://www.oecd.org/dataoecd/57/4/47521678.pdf).

then re-issued as a 46-page report, which purported to present a more detailed consideration of the issue.<sup>95</sup> The report in fact added very little to the analysis, repeating almost verbatim the entirety of the preparatory note, and therefore again dismissed as incapable of assessment the social and cultural aspects of disclosure advocacy, without further comment.

This narrow frame is an unfortunate outcome for those interested in the connection between taxation and development, since it intentionally omits, and perhaps even prevents, any discussion about what may be the most important aspect of law and legal change, namely, the social or cultural context in which the law constantly redefines itself. By confining the CBCR discussion to the behavioral impacts of firms and governments, the discussion locks out the very group that is animating the call for change, and chooses to ignore the reasons for this group to seek access as a procedural matter. As a result, the OECD treatment of the subject of transparency entirely and willfully omits all discussion of the oversight role being demanded by civil society as well as why civil society is demanding this role at all. This is a loss for international tax policy discourse, and it particularly underscores the problem of under-representation of poor countries in the soft tax law regime. The underlying goals of the CBCR movement deserve closer inspection, as they hold a key to understanding global tax governance.

#### **IV. Implications for Global Tax Governance.**

In their quest to seek an active participatory role for civil society in matters of international tax policy, tax transparency activists have revealed some enduring structural problems in the development of international tax policy discourse. They have shown that the concerns of poor countries are all but ignored, and they have revealed the extent of control wielded by multinational companies over the global tax policy environment. These characteristics create an institutionally-enforced narrowness in international tax policy perspectives.

CBCR proponents seek to alter this institutional structure at the international soft law level, but as they try to move the OECD forward in constructive dialogue, they illustrate the inherently exclusive nature of the OECD, with full participation limited to officials and tax professionals from the world's richest countries. Despite its claim to international consensus, the OECD's main feature is its exclusive membership.<sup>96</sup> Poor countries have always been excluded from full participation.<sup>97</sup>

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<sup>95</sup> Oxford Centre for Business Taxation, *Transparency in reporting financial data by multinational corporations*, July 2011.

<sup>96</sup> The membership includes the United States, U.K., Canada, Australia, and Western Europe, but no countries in Africa, and very few in South America and Asia. OECD, *Members and Partners*, [http://www.oecd.org/document/25/0,3746,en\\_36734052\\_36761800\\_36999961\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/25/0,3746,en_36734052_36761800_36999961_1_1_1_1,00.html)

<sup>97</sup> In the past, many poor countries were excluded from direct participation because they were viewed as represented through their colonial ties to Europe.

In recent years the OECD's exclusivity evidently became problematic: it was no longer plausible to claim to be the voice of international consensus when its membership excluded some of the world's biggest and most dynamic economies, including China, India, and Brazil.<sup>98</sup> In 2007, the OECD decided to invite some non-member countries to limited and tightly prescribed participation. This was effected through a multi-tier system, in which some countries, such as Brazil, China, and India, would be invited into "enhanced engagement" with the organization, while others would be invited to "observe" various OECD projects either on an ad hoc basis or regularly, according to internally determined criterion.<sup>99</sup> The OECD suggests both that these roles are similar to full participation, and that in some cases, this level of participation could lead to full membership. The former claim cannot be verified, since OECD meetings are not currently open to observation by the press or other disinterested observers. However, it is clear that accession to full membership has not to date been granted to any of the countries that have been invited to participate on a limited basis, and the view of commentators is that non-member countries can hope for no more than "second tier" status in the institution.<sup>100</sup>

If the marginalization of poor countries is a troubling factor of OECD exclusivity, it is, at least visibly so; by contrast, the marginalization of civil society is another, less obvious aspect of OECD exclusivity. Because it originated as a quasi-governmental organization, the OECD has traditionally limited direct participation by NGOs in its work. It created two internal institutions, the Business and Industry Advisory Counsel to the OECD (BIAC), and the Trade Union Advisory Council to the OECD (TUAC), as liaison groups, tasked with representing the voice of business and labor, respectively, in OECD discussions.<sup>101</sup> In tax policy matters, however, BIAC—currently headed by William Morris—has taken a dominant role, while TUAC has been generally silent.<sup>102</sup>

This has left most OECD tax working parties composed solely of rich-country government officials and business representatives. To the extent that government's job is to represent the voice of civil society, which presumably includes workers, the working party model theoretically represents all viewpoints. But in practice, it is clear that business interests take precedence and are most heavily represented in OECD discussions. This is clear from

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<sup>98</sup> Allison Christians, 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20', 5 *Northwestern Journal of Law and Social Policy* 19 (2010).

<sup>99</sup> See OECD, *Members and Partners*, *supra*; OECD Global Relations, *Non-member participation in formal OECD bodies*, [http://www.oecd.org/pages/0,3417,en\\_36335986\\_36339055\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36335986_36339055_1_1_1_1_1,00.html).

<sup>100</sup> Arthur Cockfield, 'The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges', 8 *Yale Journal of Law and Technology* 136, 185-186 (2006).

<sup>101</sup> OECD, *Relations with Business and Labor*, [http://www.oecd.org/document/53/0,3746,en\\_2649\\_34495\\_1910965\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/53/0,3746,en_2649_34495_1910965_1_1_1_1,00.html).

<sup>102</sup> See, Christians, *supra* n. **Error! Bookmark not defined.** (discussing the makeup of OECD working groups and committees).

conversations with industry insiders; it is also suggested by the authorship of many OECD-commissioned reports.

Tax transparency activism is significantly undermining the OECD's claim to universality in consensus building. In demanding a seat at the bargaining table where the OECD intended to discuss CBCR, CBCR activists implicitly expressed a concern about who in society is represented by OECD participants, including the government officials charged to act in the interest of their countries as a whole. Thus CBCR proponents "conceptualized the state as something distinct from the public, as an entity that at once represents its citizens but is distant from them."<sup>103</sup>

Tax transparency activism ultimately challenges two assumptions that had heretofore legitimized the OECD's work: first, that government officials represent civil society in their countries, and second, that government officials are working toward the OECD's stated mission, "to promote policies that will improve the economic and social well-being of people around the world."<sup>104</sup> If the first of these assumptions held true, there might be little need for civil society to intervene in OECD deliberations. The fact that CBCR advocates seek a place for themselves in OECD deliberations distinct from their country representatives suggest that the first assumption is not held by a growing number of people, including those who are directly represented through the membership of their countries in the OECD.<sup>105</sup> OECD reports on the transparency initiative simply do not engage with this issue.<sup>106</sup>

Whether and how the inclusion of civil society in OECD discourse also advances the cause for poor countries in the soft tax law order remains to be seen. If the representativeness of civil society by national officials is challenged, the assumption that the OECD is working toward universally beneficial policies also seems vulnerable. If so, the presence of civil society from rich countries serves to underscore just how imperative it is that either the OECD create a way for poor countries to meaningfully participate in OECD activities, or that the OECD relinquish its grip on international tax in order to allow a more inclusive forum to take its place.<sup>107</sup> To the extent that the message of tax transparency activism is the same message poor countries would bring if they were able to participate as full members in international tax policy circles, transparency advocates may serve in a temporary proxy role for direct participation by poor countries in the OECD.

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<sup>103</sup> Fenster, *supra* n. 4, at 17.

<sup>104</sup> About the Organisation for Economic Cooperation and Development, [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html).

<sup>105</sup> See, e.g. Steve Chamovitz, The Illegitimacy of Preventing Civil Society Participation, 36 BROOK. J. INT'L L. 891 (2011) ("In my view, the value-added from NGOs on the international plane is that they correct for the pathologies of governments and [international organizations]").

<sup>106</sup> See *supra* text at notes 97-98.

<sup>107</sup> See, Christian Aid *supra* n. 18, at 5 (if an international tax transparency standard is perceived "as an imposition from the North, it may serve to undermine trust, and points to the need for the genuine engagement of these countries in developing a standard.").

## **V. Conclusion**

The tax transparency movement seems to fundamentally demonstrate, in a way that other tax policy reform efforts have not, that pressure on the system must be applied from without. The movement suggests that individuals and leaders currently involved in tax policy governance cannot be counted on to concentrate on distributing the tax burden in a way that comports with broader social values. It remains to be seen whether awakening public attention to multinational tax planning will provoke sufficient political attention to compel paradigmatic change.

For such change to take place, activists would need not only to activate the release of relevant and usable tax information, but also to engage scholars to examine this data and establish the extent to which and the reasons why multinationals are under-taxed. They would need to indelibly connect that under-taxation, and the policies that create it, to development failure in poor countries. Finally, they would have to convince lawmakers in rich countries and poor countries alike that the public has an interest in changing this paradigm. Each of these steps will present enormous challenges and many will involve vigorous opposition. The alternative is acquiescence to a global status quo with which fewer and fewer are satisfied, a status quo that includes severe strains on governments and growing pressure on social systems in rich and poor countries. In this context, tax transparency seems a plausible starting point in the quest to understand and empower the engines of economic development and prosperity throughout the world.