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SYMPOSIUM ARTICLE: Tax Advice for the Second Obama Administration: Putting the Reign Back in Sovereign

NAME: Allison Christians*

BIO: * Allison Christians, H. Heward Stikeman Chair in Taxation, McGill University Faculty of Law. Thanks are due to the participants of the Pepperdine Law Review Symposium on Tax Advice for the Second Obama Administration, January 18, 2013, for their insightful comments, to the editors of the Pepperdine Law Review, and to Montano Cabezas, to whom I am indebted for his tireless efforts and consistent excellence in research assistance. This article is part of Pepperdine Law Review's January 18, 2013 Tax Advice for the Second Obama Administration symposium, co-sponsored by Tax Analysts.

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I. Introduction

In its first term, the Obama Administration signed into law two tax reforms, each designed to protect an increasingly vulnerable income tax base, and each of which had the potential to set a new and unprecedented course for no less than the regulation of the global economy by the nation-state. The first reform, known as the Foreign Account Tax Compliance Act (FATCA), sought to end global tax evasion through tax havens. [n1] The [*1374] second, a little-noticed two-page addendum to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), [n2] sought to end the contribution of American multinationals to corruption in governance by codifying the transparency principles of the global Extractive Industries Transparency Initiative (EITI). [n3]

Both of these regimes cast a vastly more global role for the nation-state in regulating its people and their resources. Each thus represents a move in the right direction, since a declining role for the state in the regulation of the global economy translates to the decline, disarray, and eventually the complete dismantling of income taxation as a viable means for raising revenue. But neither of these reforms has yet to fulfill its potential. First, each raises difficult questions about what the state can and cannot do to enforce disclosure and compliance. [n4] Failing to answer these questions impedes the implementation of each regime and aggravates the steady decline of taxpayer morale. [n5] Second, neither is broad enough: FATCA should be fully reciprocal while carving out Americans resident in other countries, [n6] and EITI should expand beyond the extractive industries to public companies more generally. By acknowledging and responding in a principled way to the obstacles that limit their effectiveness, a second Obama Administration could take significant steps to bring each reform to its potential, while ensuring that its scope focuses on the intended target in each case. This Article outlines how these proposals could be accomplished and makes the case that they should be attempted.

Part I provides the background for the discussion by describing the enactment of each reform, and exploring the legislators' expressed intentions as well as the political, social, and cultural context surrounding the reforms' enactment. Part II explores how each regime redefines the role of the [*1375] nation-state in the regulation of its taxpayers and their resources, and why a principled definition of that role is vital for the future of income taxation not only in the U.S., but also globally. Part III raises some of the difficult issues that require resolution for further advancement of the underlying goals outlined in Part II. The Article concludes with aspirations for a revived role for the nation-state in the regulation of the global economy and a renewed vigor for the protection of income taxation.

II. Background: Why These Reforms, and Why Now?

Income taxation is under grave threat. n7 Every nation-state in the world is both a participant and a potential victim in a global game of tax competition that erodes and undermines comprehensive income taxation wherever it is attempted. Each nation must safeguard its tax base against the aggressive maneuvering of its taxpayers, aided in their quest by too-easily manipulated rules and the complicity of foreign intermediaries - be they public or private - that stand to gain by being a mercenary in this global game. n8 At the same time, each nation benefits itself by embracing [*1376] mercenary behavior against other nations in order to capture as much global capital as possible, even if such action deprives other nations of revenue. n9

The story of FATCA and EITI in the United States is the story of a virtually pathological internal struggle on the question of whether and how to promote or prevent mercenary behavior, both within and beyond the state. Each reform represents an attempt to curb the mercenary instincts of foreign states and opportunistic U.S. taxpayers. FATCA tries to accomplish this goal by exerting control over foreign financial institutions, while EITI does so by exerting it over U.S. multinationals. This section describes the mercenary tendency and how FATCA and EITI respond in turn.

A. Tax Competition and the Mercenary Tendency of the Tax State

One way of looking at the post-Westphalian world is as a society of nations, divided along territorial lines, which are in direct competition with each other for the world's resources but enlightened enough to work with each other to prevent total war. In such a world, nations bind themselves and one another to the mast in international agreements with the intention of preventing the unwanted scenario of total destruction, but then engage in everyday acts of sabotage against these binds in order to advance their own interests at the expense of others. n10 In taxation, the tendency toward this "agree in form, defect in practice" behavior is manifested in the means by which states create and manipulate for their own benefit an evolving set of international standards and norms (sometimes but not always of their own making) around a global flow of information about economic resources and their owners. n11 Strategies that work to interrupt that flow to serve national [*1377] interests, especially in the name of competition, have been portrayed as appropriate and even justice-oriented by prominent tax scholars. n12

In such a world, using national competitiveness as a normative benchmark for a regulatory scheme can easily translate into advocacy for mercenary behavior by the state. This is illustrated in statements like those made by Congressman Paul Ryan in 2011:

We need to have a tax system that makes America a haven for capital formation. Let's make this country a tax shelter for other countries instead of having other countries be a tax shelter for America. This would ultimately raise revenues and promote economic growth. n13

The message is clear that although eradicating American tax evasion is a worthy goal for the state, facilitating tax evasion is the better strategy when it comes to foreign taxpayers and their home states. The sentiment is echoed in statements by legislators who oppose changing United States tax reporting rules on interest to ensure that the United States informs foreign countries about income earned by their taxpayers through United States financial institutions. For example, in opposition to a proposed expansion of such reporting in 2003, then-Senator Gordon Smith expressed his failure to understand "why we put the enforcement of other nations' tax laws as a priority at Treasury," and urged the Treasury not to "drive the savings of foreigners out of bank accounts in the United States and into bank accounts in other nations." n14 Private sector advocates similarly argue that interest reporting would "hinder tax competition between nations" and "help oppressive governments track down flight capital." n15

[*1378] National competitiveness also translates into a complementary form of mercenary behavior by the state - namely, the aggressive use of tax rate and base competition to entice multinational businesses. The former is well documented: corporate tax rates are in a clear and steady downward trend globally. n16 The latter, consisting of tax incentives, holidays, credits, and special deals for inbound investment, is less quantifiable in terms of size and impact but no less clearly a global trend. n17 Together, rate and base competition constitute another form of the race to the bottom, a beggar-thy-neighbor contest that leaves states worse off than they might be if they cooperated in setting - and adhering to - baseline standards for minimal taxation of business. n18

Competitiveness, however, cannot be easily dismissed as a national goal, even if it does promote various forms of mercenary behavior by the state. It must be readily acknowledged that the United States is just one country that must compete with all others for a share of global resources, including global capital. [n19] The U.S. has in many ways been a leader in [*1379] creating this competition, but it does not act independently of other countries. For example, the U.S. adoption of the portfolio interest exemption is credited with an immediate tidal wave of capital flight out of Latin America into the U.S. financial system and was followed by a global trend against portfolio income taxation. [n20] But the U.S. portfolio exemption was itself a response to similar exemptions in the Eurobond market. [n21] Similarly, the U.S. rules that allow multinational businesses to defer (indefinitely) any income taxes in the U.S. create the conditions for global tax rate and base competition by other countries. [n22] Since other countries have adopted similar deferral rules, any proposed change of course in the U.S. could put the U.S. at an instant disadvantage internationally. [n23]

Despite the inescapable fact of competition, the U.S. cannot afford to completely destroy its income tax base in a race to the bottom. It is a developed country whose citizens demand a certain level of government services, and these services must be paid for, generally with tax revenues collected more or less from its own taxpayers. [n24] The evidence of a century [*1380] of taxation in the modern state suggests that these taxpayers demand at least the patina of fairness in the taxes they are willing to accept. [n25] Blatant shirking of tax obligations, perhaps especially by those most able to bear the burden of taxation, is an assault on taxpayer morale that will eventually lead to the destruction of the entire tax system via noncompliance. [n26] Thus, even those who advocate for mercenary policies, such as Paul Ryan, argue that "there must be a decrease in the amount of tax shelters for people to park their income overseas." [n27] Moreover, as the world's largest economy, the United States may be one of only a few nations that can afford to restrict its own pace in the race to the bottom in order protect the tax base - even if that dulls its own edge in the global tax game. This leadership status does not make the national discussion over taxation easy, as anyone following U.S. tax policy over the past several years can readily attest. [n28]

[*1381] FATCA and EITI emerge as evidence of the internal struggle over how and to what extent the United States ought to move in the direction of embracing or rejecting the mercenary tendency both in its own policymaking and in that of its competitors. The passage of each reform suggests that there is at least some significant constituency in the United States that prioritizes protecting the income tax over blindly pursuing strategies that will ultimately destroy it. In order to understand the potentially precedent-setting role these legal reforms play in redefining the right and the duty of the nation state to regulate its taxpayers and their resources in a global economy, we must consider what the rules do in technical terms as well as what condition for change they were seen as necessary to fulfill when the first Obama administration brought them into being.

B. Monitoring Taxpayers Through Third Party Reporting

FATCA came into force as part of the Hiring Incentives to Restore Employment Act (HIRE Act), which was signed into law by President Obama on March 18, 2010. [n29] The HIRE Act was a jobs bill that included payroll tax holidays and other credits for employers. FATCA was unrelated to this purpose, but was included in the form of revenue-raising "Offset Provisions." [n30] This is a bit of a canard: although the Chair of the House [*1382] Budget Committee claimed that the HIRE Act was a responsible piece of legislation that was "fully paid for ... by cracking down on overseas tax havens," [n31] in fact the relatively paltry sums projected to be raised under FATCA could do little by way of offset, even if they had been implemented right away. [n32]

FATCA arose directly in response to publicity surrounding well-known and venerable foreign institutions, most especially in Switzerland, that have helped U.S. customers hide income and assets from the IRS. [n33] The publicity [*1383] continues, reinforcing the need for the protection of the U.S. tax base against erosion through criminal activity. [n34] Thus FATCA is cast in a defensive role against the potential mercenary behavior of foreign states that provide the regulatory cover for U.S. taxpayers to evade their tax obligations at home.

The sponsors and supporters of FATCA have stated a persuasive case for the expansion of IRS efforts against mercenary behavior, namely, the blatant efforts of foreign banks to deliberately seek out American elites and help them evade their tax obligations to the United States. [n35] As Senator Carl Levin explained:

The reason for this strong approach was seen dramatically in hearings before the Permanent Subcommittee on Investigations. A July 2008 hearing, for example, showed how two foreign banks, UBS AG of Switzerland and LGT Bank of Liechtenstein, used a variety of secrecy tricks to help U.S. clients open foreign bank accounts and hide millions of dollars in assets from U.S. tax authorities. One 2004 UBS document indicated that 52,000 U.S. clients had Swiss accounts that had not been disclosed to the IRS. UBS estimated that those hidden accounts contained a total of about $

18 billion in cash, securities, and other assets. In order to defer a criminal prosecution against the bank by the U.S. Department of Justice, UBS admitted that it had participated in a scheme to defraud the United States of tax revenues, paid a $ 750 million fine, and agreed to stop opening accounts that are not disclosed to the IRS. UBS also agreed to reveal the names of a limited number of U.S. accountholders, although the bulk of the 52,000 still may [*1384] escape U.S. tax enforcement actions due to Swiss secrecy laws that continue to conceal their identities. [n36]

Accordingly, FATCA's central goal is "rooting out individuals hiding their money in bank secrecy jurisdictions." [n37] This is to be accomplished by imposing new reporting requirements on foreign financial intermediaries serving U.S. persons. Because these foreign financial intermediaries are not themselves U.S. persons, FATCA is enforced via a gross basis 30% withholding tax on any payment made to any foreign financial institution (expansively defined) that does not comply with U.S. reporting requirements. [n38] In broad strokes, compliance involves identifying any customer that may be a U.S. person, and either reporting details about their financial activities directly to the IRS or closing their accounts. Failure to comply on an ongoing basis will result in 30% withholding of any U.S. source payment to the foreign financial institution. [n39]

FATCA thus contemplates the tracing of virtually every payment of U.S. source income to an ultimate owner, with various exceptions involving public companies, central banks, and other institutions. [n40] This imposes enhanced information gathering and withholding requirements on virtually all payors of U.S. source income, wherever they are located. It is an enormous and ambitious project in terms of data production, gathering, filtering, and transmission, as well as in terms of creating the legal means by which foreign entities can directly report to the IRS despite domestic financial privacy and confidentiality laws that would otherwise obstruct such information flows. As with most legislation, difficult problems arose as the IRS and the targeted institutions began to implement the regime and U.S. taxpayers began to understand the ramifications of the legislation, especially on the over six million U.S. citizens who reside permanently in other countries. [n41] Some of these unresolved difficulties have delayed [*1385] implementation, and continue to garner criticism. [n42] These issues and potential avenues to solution are discussed in Part IV, below.

C. Empowering Civil Society Through Transparency

EITI addresses a different but related question involving international tax planning and offshore jurisdictions. The focus of EITI is international tax avoidance by multinationals, but not primarily to protect the U.S. tax base (although it could certainly have that effect in the future). Rather, EITI is aimed at curbing the potential for U.S. multinationals to engage in or facilitate corrupt practices by foreign governments in resource-rich but economically poor countries. [n43]

The roots of the U.S. legislation rest in a global movement that began more than a decade ago, when an international resource industry watchdog group identified the global under-taxation of multinational companies in the extractive sector as a key component of corruption and development failure in resource-rich countries. The group called for transparency as a remedy, to be launched and monitored through voluntary participation by governments and multinational companies. EITI grew to encompass a number of participants, and led to pressure on governments to adopt "Publish What You Pay" (PWYP) principles in line with EITI standards. [n44]

[*1386] Like FATCA, EITI was enacted as an add-on to an unrelated bill after failing passage as a stand-alone act. In this case, the legislation emerged in the form of a two-page addendum to the Dodd-Frank Wall Street Reform Act of 2010, a bill aimed at addressing the causes of the financial crisis. [n45] The reform had previously been submitted to Congress in the form of the Energy Security through Transparency Act of 2009, [n46] but failed after extensive lobbying by the U.S. oil and gas industry. [n47] Again, like FATCA, the inclusion of EITI in a long, complex, and contested bill ensured its passage with relatively little debate and discussion; indeed, commentators suggested that the extractive industry was completely caught by surprise when it discovered that EITI had passed. [n48]

The effect of EITI was to revise and expand SEC rules for the disclosure of corporate tax payments by targeted companies. Under the legislation, extractive industries would report more information about their global corporate structures, intercompany transactions, and payments of any kind of tax to all foreign governments. EITI thus supplemented an existing international regime that attempts to prevent corporate bribery of elected officials, which is codified in the Foreign Corrupt Practices Act of 1977 (FCPA). [n49] EITI, however, is broader than the FCPA in that the latter was intended to end illegal payments of bribes, kickbacks, and the like to government officials, while EITI focuses on all payments to foreign governments, including legal ones.

The idea behind EITI is to expose worldwide corporate tax payments for two reasons: first, to ensure that the recipient governments are honest with their own peoples about revenues under their control; and second, to expose the effect of global tax competition on revenues. The first goal explicitly aims at accountability in foreign state governance: the targets are [*1387] unscrupulous officials who may divert payments meant for national revenues to their own private offshore accounts. The second is an indirect response to perceptions among various activist groups that income tax systems of rich countries are becoming increasingly generous to multinationals and elites, and in turn increasingly burdensome on the working class in societies across the globe. [n50]

As in the case of FATCA, the sponsors and supporters of EITI stated the case for corporate tax transparency forcefully and with conviction by casting it in terms of U.S. interests. The argument is that Americans have an interest in knowing precisely what our public companies pay in fees, taxes, fines, and other payments, to all of the governments of all of the nation-states in which they operate. [n51] Failing to disclose this information on a global basis both distorts the decisions of U.S. stakeholders and encourages multinational companies to engage in behavior that would not be supported by a knowing public.

The accountability sought in EITI made an important step toward corporate tax transparency, but like FATCA, EITI also fell short of its potential. It did so not by being too broad in drawing its target for reform, but rather the converse, by restricting itself to one industry, albeit one with documented issues of corruption in foreign governance efforts. EITI has demonstrated that American shareholders and a broad range of stakeholders have good reasons to want accountability and transparency in the fiscal affairs of their public companies, in all sectors. The arguments made for transparency in the extractive sector could and should be marshaled to expand EITI to require corporate tax disclosure by all public companies, in all industries.

However, as in the case of FATCA, opponents of corporate tax transparency have raised objections that have impeded the implementation [*1388] of EITI and may ultimately destroy it, as well as any chance for its future expansion. Immediately after EITI's passage became news, the oil and gas industry in the U.S. engaged in an aggressive campaign to prevent the implementation of the law by forestalling the issuance of necessary regulations, which were due to be in place by April 17, 2011 [n52] but only emerged on August 22, 2012. [n53] Failing to prevent the issuance of those regulations, industry representatives filed a lawsuit against the SEC to eliminate the law in its entirety. [n54] The complainants include associations whose members have publicly expressed support for EITI as a voluntary initiative. [n55] The issues raised by these opponents and their impact on EITI's [*1389] future are discussed together with those impeding the development of FATCA in Part III, below.

III. What Role for the Nation State?

Having drawn a framework of a world in which states are drawn into and at the same time threatened by mercenary behavior, FATCA and EITI may seem obviously necessary to protect the claim of the state, as a matter of right, to its income tax base. But, as a threshold matter, we cannot identify either mercenary or protective behavior by the state unless we can first assert that the state's claim is appropriately and fairly made. In other words, before we can assess the merits of any tax base-protecting scheme, we must make the case that the tax base in question "belongs" in some justifiable way to the claiming state. [n56] Only after staking a defensible claim over people and resources can we then determine whether the state's ability to defend its claim is in fact threatened by globalization, and in turn how particular legislative reforms assist or hinder that ability.

A. Drawing the Boundaries of the Tax State

One of the enduring problems for those who study international taxation from a normative perspective is that states have constantly and consistently failed to assert a comprehensively justifiable definition for the taxing jurisdiction. [n57] This is perhaps not surprising when we see that the very definition of jurisdiction as applied to the nation-state is a subject of great controversy. [n58] Having failed in the initial definitional endeavor, states [*1390] therefore consistently fail to solve problems caused when assertions made by competing states overlap and conflict. [n59] This is again understandable: defining the state's jurisdiction over resources and people is not by any means a straightforward task; moreover, it involves social, political, and cultural understandings that defy quantifiable responses. [n60] The rightful claim of the state over revenues (through taxation or otherwise) has been a matter of vigorous contest throughout the history of the nation-state. [n61] Involving, as it does, an assertion of one jurisdiction as against all others in the international society of states, any claim to a superior right to tax seems fundamentally incompatible with a world in which people and resources are subject to equally compelling claims with little but geopolitical power to serve as arbiter. [n62]

Tax policymakers have tried to address the problem of allocation between equally legitimate claims by instituting prioritizing rules, under [*1391] which nations voluntarily cede their right to tax to others, according to a loosely organized set of standards. This work began in 1920 with the formation of the International Chamber of Commerce (ICC) - described as "the organized private traders of the world," who took it upon themselves to draw up a framework for identifying a "primary" right to tax. n63 In 1921, the ICC adopted a resolution that the taxing jurisdiction turned on the nature of the tax, with distinctions being made between "super" and "normal" taxes. n64 However, the U.S. rejected this resolution and endorsed closer adherence to the U.S. system, which assigned jurisdiction on two bases - namely, the residence of the taxpayer and the source of the income. n65 The U.S. prioritized the latter over the former in the case of conflict. n66 The ICC synthesized the views of the U.S. and fourteen other countries and, in 1923, produced a resolution in Rome; later that year, the League of Nations began to take over the discussions relating to this issue and used the Rome resolutions as a basis for discussion. n67 The ICC continued to influence the League throughout its work on tax issues, n68 and it continues to heavily influence the League's successor body, the OECD, today. n69

Today, the international tax order - if an order exists at all - continues to be defined by the principles expressed in the early twentieth century, [*1392] which reside in an amorphous body of law, quasi-law, and non-law sources that often resist clear categorization. n70 The quasi-legal, quasi-ordered nature of the international tax "regime" has led scholars to embrace pragmatic solutions to international conflicts involving residence and source countries, and to justify those solutions with various appeals to normative theories. n71 All of the proposed theories have consistently failed to provide a normative position that holds up under scrutiny. n72 They have similarly failed to explain how states actually behave, as opposed to aspirational assertions by government officials. n73 That has been a loss for international taxation in many ways, perhaps not least of which is that it has served to foster resignation among scholars to a world of self-serving decision-making by states, with virtually no tools for addressing perceived violations of any international order. n74

Perhaps the clearest example of the lack of a definable order and the concomitant lack of tools to detect or prevent jurisdictional violations arises in the assertion by the United States of its tax jurisdiction over U.S. citizens and holders of permanent resident status wherever they live. n75 This assertion of jurisdiction is readily acknowledged to violate the residence principle, which is so ubiquitous internationally that it has been called "customary [*1393] international law." n76 Yet the anomaly persists as an intractable and unresolvable feature of the international tax landscape. n77 The assertion is commonly traced to a U.S. Supreme Court decision, Cook v. Tait, n78 which asserted that:

The basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. n79

Because the jurisdictional question has not been resolved internationally, there appear to be few means by which any kind of legal challenge would stand against virtually any assertion of jurisdiction by the U.S. - or, by extension, by any other country that might seek to broaden its [*1394] own jurisdictional reach. n80 The best that can be offered for analytical purposes is the theory of "jurisdictional reasonableness." That theory asserts that any basis of jurisdiction asserted by a forum state must "take into account the sovereign interests of other states, yet at the same time ensure that the interests of the forum state and of the international community are sufficiently heeded." n81 The theory draws upon related international law concepts, including principles of nonintervention and sovereign equality, which try to ensure that states do not use their uneven geopolitical powers to assert jurisdiction over affairs under the domain of other states. n82 This in turn implies that jurisdictional assertions should be studied to ensure they do not create the means for economic coercion and intervention. n83

It should be clear that any attempt, using these concepts, to restrict a state's jurisdictional claims would be difficult or impossible to resolve on the merits, and that for now at least, geopolitical power remains the only explanation for the assertion of tax jurisdiction by states. This sets the stage for thinking about the state as generally unconstrained in any legal sense from asserting virtually any jurisdictional reach. The tax state is thus a matter of flexing political muscle, both domestically (in policy decision making) and internationally (in implementing policy choices).

Within this paradigm, any particular state's reach may be seen as [*1395] justifiable by one state but not another, according to each state's interpretation of prevailing international norms. Reuven Avi-Yonah has argued that what is deemed appropriate changes over time through the universal acceptance of practices by key states, especially the United States. n84 This suggests that the tax state amounts to little more than the assertion of its power: what a state should or should not do becomes a question of what a state can or cannot do as a matter of administrative capacity and relative political might in the international community.

B. Is the Tax State Threatened by Globalization and Technological Change?

If we conclude that there are apparently few or no legal limits to the taxing jurisdiction of the state, the next question is whether the state is otherwise constrained in its reach. There is no doubt that many or most states are so constrained, mainly by the need to follow in the paths set by other, more powerful states. [n85] But some nations are clearly leading the way in international taxation. An important question for these states is therefore whether they, too, are constrained to act in the face of economic globalization. This may be framed as a question of whether leader states are victims of the global order in which they find themselves, or whether they are in fact or could be, if they chose, masters of such order.

In the international legal literature, the framing of the state as a potential victim of globalization is an ongoing theme. Some authors cast the state as an already weak regulatory institution that is steadily weakening against globalization, which is in turn seen as an independent overwhelming force beyond the control of the state. [n86] But an opposite view is equally propounded that the state is the ultimate architect of globalization and therefore inherently capable of exercising control over and within it, including over people and their resources. [n87] International tax scholars seem to fall in both camps, but there appears to be more support for the former [*1396] view. [n88] We seem to have the distinct feeling in the tax community that the state is losing its grip over people and resources, that ever more draconian measures must be instituted to regain control, but that ultimately the state will always fail in the face of creative and determined opposition to its rule. [n89]

This generally pessimistic view frames the state in its exercise of taxation in an essentially defensive position, ultimately failing to keep order over people and resources that it should - in principle - control. [n90] That is the idea conveyed by the use of terms like "erosion" to describe how planning strategies undertaken by millions of individual actors, including - but not limited to - tax evasion, impact the tax system as a whole. [n91] The challenge for international tax law is to define the people and resources over which the state can and should exercise control, in order to justify measures taken to defend that right.

One response is that the U.S. jurisdiction to tax is curtailed by globalization, because its citizens undertake transactions and activities in places, and sometimes move themselves to places, that are beyond the reach of the U.S. tax authority. That has been a common theme of tax scholarship that predicts the erosion of the fiscal state due to avoidance and evasion by taxpayers. [n92] Certainly, ample evidence in support of the proposition can be marshaled from academic and media coverage of what now appears to be a rampant epidemic of tax dodging by U.S. multinationals and wealthy individuals. [n93]

But both FATCA and EITI seriously undermine the notion that the U.S. is threatened by globalization and technological change. Each regime, in different ways, is an assertion by the U.S. that it not only has the jurisdictional authority to trace its resources no matter where in the world they are located, but that it also has the capacity to do so. If these assertions are correct, then it cannot be said that the U.S. is defeated by globalization or technological change as a matter of either legal reach or practical capacity, [*1397] but rather that in the past it has simply not exercised the full measure of its ability to regulate. [n94] FATCA and EITI thus stand as evidence that the decision of the state not to regulate - in the case of any state with administrative capacity similar to that of the U.S. - must be attributed to political choice rather than capacity. [n95]

Under this rubric, FATCA and EITI introduce a new role for the state in directly regulating people and institutions that are not necessarily within its jurisdiction as traditionally understood. In the case of FATCA, the perceived threat is that financial institutions, if left to their own devices, will engage in tax base-eroding practices rather than tax base-protecting ones, and that the only way to protect the tax base is to expand the state's oversight to any entity that provides services to people who are supposed to be included in the tax base. Fishing expeditions, in the past dismissed as inappropriate by the OECD, [n96] are the mainstay of this regime. [n97] In the case of EITI, the target is U.S. multinationals with respect to their tax relationships with foreign governments, and the perceived threat is that U.S. companies will take advantage of weak foreign laws and lawmakers to unfairly exploit people and resources in other countries in the absence of external intervention. [n98]

Both FATCA and EITI may be seen as expansionary policies, broadening the nation-state's regulatory jurisdiction in the face of its feared decline under the twin pressures of globalization and technological advancement. [n99] This is a significant development in the global tax order [*1398] given dire predictions about the continued efficacy of the state, bounded by its territorial reach and administrative capacity, in regulating the affairs of people and resources that are not so bounded. [n100] Most international tax scholarship continues to suggest that states cannot act unilaterally to achieve tax goals on a global basis due to legal and administrative barriers - that cooperation is necessary to implement a comprehensive income tax base. [n101] But FATCA and EITI demonstrate that the U.S. (at least) has the capacity to regulate people and resources to an extent that may have seemed unimaginable not too long ago. [n102] The conclusion is that contrary to conventional wisdom, a single state can in fact enforce a comprehensive, worldwide income tax system.

C. How FATCA and EITI Re-Assert the U.S. Tax Jurisdiction

In the case of FATCA, the expansion of the U.S. regulatory jurisdiction is being accomplished over both its own taxpayers and all the financial institutions in the world that may serve them. [n103] The mechanism involves new reporting and withholding provisions that apply directly to any purveyor of U.S. source income to any U.S. person, wherever either such party may be, anywhere in the world. [n104] This is both a rather startling revelation of the U.S. capacity to manage data and an explicit rejection of the century-old international practice of state-to-state information gathering and exchange on a bilateral and, more recently, multilateral basis. It is also a rejection of foreign financial privacy and confidentiality laws that prevent financial institutions from disclosing information about clients and customers beyond their own governments. [n105]

The information-sharing regime has been slow to evolve and subject to much criticism for its continued tolerance of privacy regimes that aid and abet tax evasion around the world. [n106] The United States has taken inconsistent positions on both financial privacy and the multilateral approach to information sharing. [n107] This is evidenced by its initial contribution and [*1399] later outright rejection of OECD developments on the matter. [n108] It is also evidenced by the long-standing practice of shielding U.S.-based information that would help other countries enforce their own tax laws. When scandals like UBS exposed the cooperative approach to information gathering and exchange as a charade, FATCA may well have been viewed as the only rational response to a public outraged by a relentless parade of international tax evasion perpetuated by society's wealthiest members. [n109]

EITI's expansion of corporate regulation presents another important break from tradition. [n110] In supporting greater transparency of the foreign fiscal affairs of U.S. multinationals in the resource extraction sector, EITI's supporters have argued that corporate shareholders are interested in knowing what U.S. companies pay in taxes to other governments on a country-by-country and even project-by-project basis. [n111] Stakeholders currently lack access to this information due to 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. [n112] The confidentiality and complexity to be overcome lies in legal disclosure standards that require multinationals to publish only limited and piecemeal information about their operations. [n113] Furthermore, no one country requires multinationals to provide a globally comprehensive picture of their geographic operations, inter-company transfers, or tax payments. [n114] 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 [*1400] headquarters countries to track, and all but impossible for the public to monitor or understand. [n115]

In this manner EITI, like FATCA, introduces a jurisdictional claim for the state that collides with existing confidentiality and privacy laws. In this case, the laws in question do not shield the taxpayer from the state - if they so chose, states could already extract all of the EITI-related information from public companies as part of their annual tax reporting requirements. Instead, the privacy in question shields the global tax-planning activities of multinational companies from the view of the public. [n116] The legal question is whether this kind of information constitutes "public business [that] is the public's business," as to which the public has "the right to know." [n117] The passage of EITI answers this question in the affirmative, and therefore - again in the same vein as FATCA - casts the state in the role of global information extractor for the benefit of the public. [n118] In this case, the benefit to the public is achieving information symmetry for market participants instead of extracting revenues from would-be tax evaders.

EITI also breaks from a perhaps little-known national competitiveness tradition that resides in the technical rules of the foreign tax credit regime. The Treasury has explicitly commanded U.S. companies to attempt to minimize their taxes in foreign countries; in fact, such attempts comprise a condition of eligibility for foreign tax credits. [n119] This makes sense in terms [*1401] of revenue prorection since, by virtue of the foreign tax credit, the U.S. collects tax only on a residual basis with respect to foreign source income earned by U.S. persons. [n120] The residence-based tax the U.S. can collect on such foreign source income is maximized to the extent the taxpayer minimizes the source-based tax collected by the host government. This observation suggests that U.S. companies and the U.S. government are aligned in their focus to avoid paying tax to a foreign government whenever possible. [n121]

EITI changes that assumption by suggesting that the U.S. government has a role in ensuring that U.S. multinationals pay an appropriate amount of tax to the foreign countries in which they do business. [n122] What that appropriate amount may be is hotly contested and is sure to become more so once greater public disclosure takes place. [n123] But the underlying premise of EITI is that market decisions depend on globally comprehensive reporting and disclosure of the tax planning decisions undertaken by multinationals and, importantly, that the state has a duty to extract such information from its multinationals. [n124] Under EITI, the state will exercise that right by requiring any specified company listed on a U.S. exchange to compile and disclose extensive information about its inter-company agreements, transactions, and payments, as well as payments by any of the companies in the multinational group to any foreign government. [n125] Like FATCA, the passage of EITI demonstrates that states not only have the right to extract this kind of information, but that they have the duty to do so, and, in the U.S. at least, that they have the capacity to do so. [n126]

[*1402] Perhaps the most important takeaway regarding the ability of legislators to reassert a strong role for the state within the context of a global economic system of its own making is that "an indispensable step toward a truly comprehensive system of world order is to disabuse all minds of the false myth that universal words imply universal deeds." [n127] The authors of those words, the venerable scholars Myers McDougall [n128] and Harold Lasswell, [n129] sought a universal international law of human dignity, but it is not too much of a stretch to fit the state's assertion of tax on people within that rubric. It is one thing to say that a particular regime is designed to lead to a multilateral order that features fair treatment for all stakeholders, whether that means safeguarding the tax base or eliminating information asymmetry in the marketplace. Quite obviously, implementation will be the key, and, in that measure, there is unfortunately reason for doubt.

Of particular note for the proponents of FATCA and EITI, along with any other regime that seeks to bring governments together in a concerted effort towards justice or fairness, is the recognition that law requires broad cooperation in order to work, and that is no less true in the international arena than in the domestic one. Thus, "the effective authority of any legal system depends in the long run upon the underlying common interests of the participants in the system and their recognition of such common interests, reflected in continuing predispositions to support the prescriptions and the procedures that comprise the system." [n130] FATCA and EITI face major challenges in identifying such common interests and engendering recognition of all stakeholders in carrying out the contemplated reforms. These challenges are described in the next section.

IV. Putting the Reign Back in Sovereign

FATCA and EITI are poised to reactivate the nation state in its quest to protect the global fiscal order through comprehensive regulatory action. [*1403] This would be a positive development for international tax; it suggests that the nation-state is not threatened, but rather is empowered by globalization and technological advancement to reassert its right and its ability to rule. This further indicates that the current unraveling of income taxation that appears to be occurring all over the world could be reversed through stronger, broader, and more effective regulation. In other words, the claim is that political will alone stands in the way of a coherent and fair global tax system. Unfortunately, both FATCA and EITI have fallen short of their potential in ways that must be addressed if the ultimate goal is to be achieved.

A. FATCA: Two Failures, Two Fixes

FATCA has fallen short of its potential in two ways. It has done so first by violating strongly held perceptions about what a single state can and should do as a member of international society, thereby exposing the U.S. to global criticism and resistance, even from observers who agree with its underlying goals. Much of the criticism is legitimate and could be resolved, but resolution will not undo the reputational damage to the rule of law. Second, and more damaging in the long run, FATCA has violated the cooperative model and - even though its aspirations are global - the legislation seems poised to create a world of cooperation among rich, developed countries while excluding and isolating all others, particularly those countries most fiscally vulnerable to tax evasion. [n131]

The first failure is serious, but it is at least in part reversible. One articulation of the problem in international law terms is that FATCA has failed the jurisdictional reasonableness test by claiming that the U.S. a right to regulate while failing to account adequately for the equal right of other countries to set and enforce their own laws, including consumer banking and privacy laws. [n132] This has created resistance in the international community, [*1404] especially in cases involving U.S. persons' access to basic banking services in jurisdictions in which they reside permanently and which are not "bank secrecy jurisdictions" under any standard definition, and so cannot be easily cast as perpetrators of violations against the U.S. [n133] The focus on this issue is impeding the development of FATCA as a first step toward a multilateral regime of automatic information sharing as its proponents envisioned creating. [n134] The U.S. has responded to the problem of domestic law interference by introducing intergovernmental agreements (IGAs). But IGAs raise additional unanswered questions of legal procedure that are significant rule of law questions in their own right.

For example, from the U.S. perspective, the intergovernmental agreements that have been proposed and entered into are presumably created under an existing tax treaty authorization which allows the competent authorities "to clarify or interpret" existing treaty and tax information exchange agreement provisions. [n135] In other words, the Treasury appears to be presenting these instruments as diplomatic agreements to carry out existing treaty policies. If this is the case, it represents a significant expansion of the competent authority's interpretive role, possibly beyond anyone's current conception and certainly beyond the intent of any of the signatories to any U.S. treaties currently in force. Moreover, this unprecedented expansion is occurring with no discussion of its legal framework by the Treasury.

Yet we may speculate that these agreements are competent authority agreements only as a matter of ruling out the alternatives, since the agreements themselves carry no indicia of their legal pedigree and none has been officially offered. Certainly, the agreements are not being undertaken in a manner typical for competent authority agreements. The major characteristic of a competent authority agreement is that it can be finalized [*1405] by the competent authorities of treaty signatories without any ratification procedures by either government, under the terms of the treaty. [n136] Hundreds, perhaps even thousands, of competent agreements are entered into every year on that basis. [n137] This clearly has not been the understanding of most of the IGA signatories to date: with the exception of Mexico, each is pursuing internal ratification procedures. [n138]

Moreover, as a technical matter, it is difficult to see how these IGAs could be competent authority agreements. First, none are formally described as such by their terms, in contrast to other competent authority agreements, which are consistently so described. [n139] Second, it appears that these agreements are not being signed by competent authorities: in at least one case, an agreement was signed by a U.S. embassy member rather than a competent authority, while the identities of the signatories of other agreements have not been made public. [n140] Both of these are technical [*1406] matters that may seem trivial on the surface, but they open up IGAs to scrutiny because they do not accord with the usual practice for international tax agreements, a practice from which the U.S. has not deviated for almost a century.

This brings the IGAs into murky status under U.S. law, as it seems that no internal legislative procedure will be undertaken to enact these international agreements in the U.S. - they appear to await only internal ratification by FATCA partners. If so, the agreements represent another unprecedented first in the history of U.S. tax law and tax treaty making: they appear to introduce a new category of sole executive agreements on taxation, not pre-authorized by congress, not expressly authorized by any existing treaty, and serving to override existing statutory tax law without any congressional oversight at all. [n141] The rule of law implications of this kind of muddled approach to what appears to be an ambitious assertion of the U.S. tax jurisdiction is highly problematic.

A second articulation of the rule of law problem is that FATCA unearths and harshly highlights an existing but perhaps little-noticed jurisdictional reasonability failure by the U.S., namely its practice of citizenship-based taxation. Since the violation of the residence principle by status-based jurisdictional assertions has long been clear, FATCA emerges as an economic sanction to enforce an order that, now under a spotlight, many view as indefensible in principle. [n142] Statutorily, this sanction is imposed on foreign institutions, but the impact is that U.S. persons living in other [*1407] countries may now be viewed as a burden for foreign institutions who find it more expedient to deny them basic account services - even when there is no evidence of tax fraud or criminal activity - than to face the high cost of compliance with U.S. law. [n143]

Predictably, this has given rise to vociferous objection from parties who may not themselves even be subject to FATCA or its related reporting requirements, but who see the interaction of FATCA and citizenship-based taxation as an unnecessary affront to human mobility as well as a violation of important international norms. [n144] In international law terms, FATCA's enforcement of citizenship-based taxation appears to violate the duty of the U.S. to "take into account the sovereign interests of other states, yet at the same time ensure that the interests of the forum State and of the international community are sufficiently heeded." [n145] The violation arises because it involves pursuing people who live, work, and pay taxes in other countries based on their ongoing status as citizens or green card holders in the U.S., even if they also hold citizenship in the country of their residence. [n146] Many such dual or multiple citizens may have lived for years, decades, and even lifetimes without understanding their ongoing obligations to the U.S.; some may not even have realized they had such status, because they may have mistakenly believed that citizenship required their affirmative consent or pursuit. [n147]

There are some fairly straightforward solutions to the citizenship-based jurisdictional reasonability problem, but they would require a political appetite for tax reform that may be lacking in the U.S. One solution is to [*1408] reverse course incrementally by either exempting any assets or accounts held in the same country as the owner's residence, defined for these purposes under the international standard (such as that encompassed in the OECD Model tax convention). [n148] That does not relieve the compliance burden of foreign institutions, but it does remove some of the stigma created by highlighting citizenship taxation via an already controversial expansion of the U.S. tax jurisdiction. [n149] A related incremental step would be to move in the direction of the Stop Tax Haven Abuse Act by creating a "high tax country" kickout of sorts, which would exempt listed jurisdictions from FATCA. The U.S. Treasury has already stated that it will not consider such a move, so there are high political barriers to this solution even though it would accord with past international practice (not to mention the plain language of the statute). [n150] Both of these incremental steps would move the U.S. closer to the residence standards embraced by other countries, including all of its developed country peers, and relieve some of the opposition to FATCA.

The rule of law questions raised by FATCA are thus solvable in theory, but perhaps even more problematic to FATCA's development is that this reform has fallen far short of its potential by failing to enact the legislation to ensure reciprocity in information gathering and exchange by the U.S. itself. [n151] This has the potential to be a much more serious problem in the long run, because it proposes a turn away from multilateralism and toward a world in which developed countries can and will take what they want from poor countries under the guise of leveling a playing field which is already heavily skewed toward the global north. In this case, information and capital will flow from poor countries to the U.S. without any information flowing in the opposite direction. Unlike the other issues raised by FATCA, the path to multilateralism and the commodification of information cannot be reversed by unilateral action on the part of the U.S.

This violation occurs because the statutory FATCA regime is a one-way information street, the currently proposed solution to that one-way street is an only partially two-way street, and even that partial solution will be denied to most poor countries. FATCA is a one-way street because it only extracts information from foreign financial institutions: though the IRS will enter [*1409] into "agreements" with these institutions, there is clearly no quid pro quo from the U.S. to the foreign financial institutions or their home countries. [n152] FATCA's partial two-way street emerges in the IGAs, but these are not genuinely two-way since the information they extract from other governments is far more expansive than the information the U.S. is willing to require its own institutions to disclose for the benefit of foreign governments. [n153] The IGAs contain aspirational language suggesting that the U.S. is committed to seeking reciprocity at some future point. [n154] But at present, the best a foreign country can hope for in terms of additional information from the U.S. is its addition to a list of countries with which the U.S. will exchange portfolio interest-related information on an automatic basis. [n155] There is only one country currently on that list - Canada - and that country was already in a reciprocal information sharing relationship with the U.S. [n156]

But even these aspirational utterances toward a multilateral automatic information exchange network will be denied to most developing countries. This is because of the manner in which the U.S. is casting the IGAs as treaty-based agreements rather than treaties. [n157] The reason for doing so may be to bypass onerous treaty-making requirements - including achieving the advice and consent of the Senate - by couching the IGAs with an existing authority. But the unintended consequence is that reciprocal IGAs can only be entered into with the U.S. on the strength of an existing tax agreement. [n158]

Accordingly, only those countries that have existing double tax conventions or tax information sharing agreements, or that have signed the Convention on Mutual Administrative Assistance in Tax Matters (Mutual Assistance Convention), can hope to achieve even the nominally reciprocal relationship offered by an IGA. [n159] Without one of these agreements in place, a state would not be able to extract even that unequal bargain: [n160] there is [*1410] apparently no current government-to-government FATCA alternative for countries that lack tax agreements with the U.S. As the U.S. history of tax agreements historically excludes the global south, the IGA regime necessarily excludes most of it as well. [n161]

The result is that poor countries, for which illicit flows of capital heading for sanctuary in U.S. accounts represents a major and even catastrophic loss of revenue, will not gain much opportunity to protect their own tax bases under the FATCA/IGA regime. What is perhaps even more serious for the international tax regime is that the U.S., having achieved its own objectives with respect to information flow on a unilateral basis, will have no reason to bargain multilaterally with these countries in any other forum. Far from creating a step toward global automatic information sharing, FATCA appears poised to separate the globe into information haves and information have-nots, with rich countries as the major beneficiaries.

These are grave policy failures for the U.S. that should cause great concern for those who think information flows are just as critical to development in poor countries as they are to the preservation of the welfare state in rich ones. Because FATCA is framed in defensive terms as a protection of the U.S. tax base, and a preservation of fairness for U.S. taxpayers as against each other, [n162] the concerns of the global poor are overlooked and ignored in the conversation. Unless these violations are addressed, FATCA threatens to turn information into a commodity that can only be extracted by rich countries and will be used by those countries for their own advantage, even as they perversely maintain institutional and regulatory support for tax evasion by persons from other jurisdictions. That is a serious issue for anyone who is concerned with defining a reasonable jurisdiction for the state as a member responsible to others in an international society of states.

B. EITI: First Implement It, Then Expand It

EITI, like FATCA, has great potential for reasserting the state's role in regulating taxation on a global basis. [n163] EITI's potential lies in the assertion [*1411] that all stakeholders - including shareholders, governments, and civil society at large - have an interest in knowing how public companies and governments behave and interact internationally. This observation leads logically to an inquiry into the limited scope of EITI. But if disclosure would solve information asymmetries in the market to the benefit of stakeholders in the U.S. and around the world, one may well wonder why it is limited to the extractive industries. Answering this question reveals some obstacles that still need to be overcome for EITI to fulfill its potential.

The first obstacle to overcome is resistance to public disclosure. As in the case of FATCA, vociferous opposition has significantly delayed the implementation of the enacting legislation. [n164] Industry resistance delayed the promulgation of interpretive regulations - just as it did in FATCA - and it is delaying the actual disclosure required by the legislation - again, in a parallel to FATCA. But in this case, the resistance does not derive primarily from what may have been unintended effects of the legislation based on its interaction with other laws, as is arguably the case with FATCA. Instead, the resistance is from the direct target of the regulation, namely, the extractive industries themselves. [n165] One surprising aspect of this resistance is that it is emanating from some who continue to voice strong support for EITI principles internationally. [n166]

In a sign of the global nature of tax policymaking, the E.U.'s imminent adoption of a more lax standard than that enumerated in the EITI rules has [*1412] served to invigorate industry resistance to EITI in the U.S. This demonstrates that, like FATCA, EITI is a means of halting a regulatory race to the bottom. [n167] In the case of information, the race is in the direction of minimal disclosure standards. As one report observed, "if the compromise passes in Brussels, it will bolster industry arguments that the U.S. rules implementing Dodd-Frank should be watered down to match the E.U. approach and ensure a level playing field." [n168] But a level playing field would quite obviously exist if the global market has full information; that is, if all multinational companies engaged in full disclosure of their tax payments in all countries and if all stakeholders - shareholders, taxpayers, governments, and watchdog groups - had the same information about how multinationals engage in pitting countries against each other in the global tax competition game. [n169]

Accordingly, the best possible path forward for EITI is to overcome industry opposition and enforce the law that is already on the books, but also to expand disclosure beyond the extractive industries to all public companies. This will engender (and in concept has already engendered) additional resistance, but it is the only legitimate solution to the level playing field problem. [n170] At a meeting of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes held in 2010, U.K. Tax Minister Stephen Timms stated that the OECD ought to lead a global discussion on broad-based EITI-style disclosure by multinationals, on the grounds that "there should be transparency about where companies earn their profits and where they pay their tax." [n171] 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. [n172]

Both EITI and FATCA emerge in the context of a waning of public trust of the state amidst stories of rampant and too-often unpunished fraud and abuse of the tax system by individuals and multinationals. [n173] These failures [*1413] of the state are juxtaposed against the equal failure of large revenue shortfalls and cuts to public sector programs through austerity-based reforms. [n174] The search for greater accountability with respect to the taxes ostensibly sought by governments, but avoided by individuals and multinationals, is an appropriate response in principle, but much remains to be worked out in the implementation.

V. Conclusion

The first Obama administration undertook some important steps forward in protecting the income tax against its ongoing erosion under the pressures of globalization. [n175] The second (and future U.S. administrations) could do more, and better. The first step forward must include addressing some of the unresolved and important oversights created by its initial legislation; in particular, those provisions that pertain to working out a reasonable jurisdictional reach for the tax state. This will require addressing the problems presented by FATCA without going too far in the direction of aiding and abetting criminal activity including tax evasion. In turn, this will require the United States to reconsider the appropriateness of citizenship-based taxation with respect to individuals who live abroad and hold dual or multiple citizenship or permanent residence status, perhaps especially when such persons reside in countries that impose high taxes on their residents. By resolving these issues, the United States should be able to relieve some of the international resistance to FATCA on the grounds that it unduly interferes with the exercise of jurisdiction by an equally positioned [*1414] sovereign, paving the way for renewed cooperation on a multilateral basis with the intended target of FATCA - namely, international tax evasion perpetrated by wealthy Americans who live in the United States.

The second step forward is to expand the accountability of financial and nonfinancial institutions to stakeholders, which includes civil society as a whole. This can and should be accomplished by making FATCA fully reciprocal by expanding the reporting requirements applicable to U.S. financial institutions and by adopting more, and more inclusive, automatic information sharing mechanisms, especially for the benefit of poor countries. It should also be advanced by expanding EITI beyond the extractive industries sector, so that stakeholders can assess the fruits of the international tax rules that have encouraged the erosion of the income tax base.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawGas IndustryGeneral OverviewInternational LawAuthority to RegulateTaxationTax LawState & Local TaxesNatural Resources TaxGeneral Overview

FOOTNOTES:

n1. Hiring Incentives to Restore Employment Actßß501-531, Pub. L. No. 111-147, 124 Stat. 71 (2010) (codified in scattered sections of I.R.C.), available at http://www.gpo.gov/fdsys/ pkg/PLAW-111publ147/pdf/PLAW-111publ147.pdf.

n2. Dodd-Frank Wall Street Reform and Consumer Protection Act ß 1504, 15 U.S.C.A. ß 78m(q) (West, Westlaw through P.L. 112-208).

n3. See The Cardin-Lugar Amendment (Dodd-Frank 1504), Publish What You Pay, http://www.publishwhatyoupay.org/about/stock-listings/cardin-lugar-amendment-dodd-frank-1504 (last visited Mar. 15, 2013). EITI grew out of the Publish What You Pay movement. See History of EITI, EITI, http://eiti.org/eiti/history (last visited Mar. 15, 2013).

n4. See discussion infra Part IV.

n5. See discussion infra Part IV.

n6. Although the FATCA's Model Inter-Governmental Agreements do have "reciprocal" versions, the reciprocity is mostly aspirational in nature. See U.S. Dep't of Treasury, Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA 13-14 (Nov. 14, 2012),[hereinafter Model Intergovernmental Agreement] available at http://www.hm-treasury.gov.uk/d/joint_intl_statement_ fatca_260712.pdf ("Reciprocity[:] The [Government of the] United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with [FATCA Partner]. The [Government of the] United States is committed to further improve transparency and enhance the exchange relationship with [FATCA Partner] by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.").

n7. See Allison Christians, Drawing the Boundaries of Tax Justice in The Carter Commission: Fifty Years Later (forthcoming 2013) (arguing that states are presiding over the increasingly unjust exercise of taxation as globalization erodes the foundational principles of the income tax).

n8. I use the term "mercenary" here to connote the negative casting by various academics and governmental institutions of certain tax competition practices by states and their financial institutions. For further discussion see Org. for Econ. Co-operation & Dev., Harmful Tax Practices: An Emerging Global Issue (1998); Vito Tanzi, Globalization and the Work of Fiscal Termites, Fin. & Dev., Mar. 2001, http://www.imf.org/external/pubs/ft/fandd/2001/03/tanzi.htm; Richard Hay, OECD Report on "Level Playing Field' Imminent, 9 Managing Partner 1, 1 (2006) (stating that the OECD's project threatens to "shut non-cooperating international financial centers out of the world's banking and securities markets" in violation of "[a] longstanding principle of international law [that] limits taxing rights to those which a country can enforce without the need for assistance from others"); Lawrence Speer, Conservative Think Tanks Attack OECD on Offshore Tax Scrutiny During Forum, Daily Tax Rep., Nov. 15, 2005, at G-3 (2005) (reporting description of the anti-tax havens campaign as "hypocritical," "a thinly disguised move by industrialized countries toward forced harmonization of tax policies at the global level," and an attempt to create ""a new tax cartel'"); Daniel J. Mitchell, An OECD Proposal to Eliminate Tax Competition Would Mean Higher Taxes and Less Privacy, 1395 Backgrounder 1, 18 (2000), available at http://www.heritage.org/ research/reports/2000/09/oecd-proposal-to-eliminate-tax-competition (OECD project "an attack on sovereignty"); Jinyan Li, Tax Sovereignty and International Tax Reform: The Author's Response, 52 Can. Tax J. 141, 146 ("External forces may make a country give up its sovereignty. One example is the OECD-led harmful tax competition campaign."). I discuss the troublesome aspects of casting some practices - but not others - in this moralistic light in Allison Christians, Sovereignty, Taxation and Social Contract, 18 Minn. J. Int'l L. 99, 115-16 (2009) ("OECD rhetoric is susceptible to interpretation as little more than a means to mask or legitimize what is essentially an illegitimate use of political or economic force to achieve the aims of the powerful against those of the weak.").

n9. See, e.g, Adam Rosenzweig, Why Are There Tax Havens?, 52 Wm. & Mary L. Rev 923 (2010).

n10. See Julie Roin, Taxation Without Coordination, 31 J. Legal Stud. S61 (2002) (demonstrating how interest groups, especially national legislators and powerful taxpayers, consistently undermine global tax harmonization efforts in order to promote their own social and economic positions); Michael J. Graetz, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies, 54 Tax L. Rev. 261, 280-81 (2001) (arguing that according to the logic of democracy, nations should prioritize their own interests, rather than engage in any campaign to seek global tax justice); Tsilly Dagan, National Interests in the International Tax Game, 18 Va. Tax Rev. 363 (1998) (stating that since global coordination and cooperation are virtually impossible to attain, nations should maximize their own long-term welfare).

n11. See Allison Christians, How Nations Share, 87 Ind. L.J. 1407 (2012); Michael McIntyre, How to End the Charade of Information Exchange, 56 Tax Notes Int'l 255, 255 (2009), available at http://faculty.law.wayne.edu/mcintyre/text/mcintyre_articles/ Treaties/charade_56TNI.pdf (describing current information sharing agreements as ineffective in design and in practice, delivering nothing more than "an undeserved patina of respectability" in the form of symbolic cooperation); Daniel Shaviro, Why Worldwide Welfare as a Normative Standard in U.S. Tax Policy?, 60 Tax L. Rev. 155 (2007) (suggesting that cooperation in tax matters might serve long-term national interests, but defecting definitely serves short-term ones).

n12. For example, Michael Graetz cites John Rawls's Law of Peoples for the proposition that seeking advantage must take priority over cooperation since "we regard our obligation for the well-being of our fellow citizens as more pressing than for people in need elsewhere in the world." See Graetz, supra note 10, at 277-78. Rawls' critics contest this assertion on the ground that there is no morally sound foundation for making such a claim and that the claim itself is contradicted in Rawls' own writings. See, e.g., Thomas Pogge, John Rawls: His Life and Theory of Justice (Michelle Kosch trans., 2007).

n13. Geoffrey Gabor, Inside The Budget Battle with Congressman Paul Ryan, TJE Am. Bus. Mag. (Aug. 1, 2011), http://www.americanbusinessmag.com/2011/08/inside-the-budget-battle-with-congressman-paul-ryan/.

n14. Interest Reporting, Smith, Inhofe Urge Treasury to Reconsider Nonresident Alien Interest Reporting Rules, Daily Tax Rep., Feb. 20, 2003, at 8, 9 (concerning proposed non-resident alien interest reporting rules).

n15. Letter from Senator Gordon H. Smith to John Snow, Secretary of the Treasury (Feb. 13, 2003), available at http://archive.freedomandprosperity.org/ltr/smith-irs/smith-irs.pdf.

n16. See, e.g., Eoin Callanin Washington, Greenspan Warns on Borrowing Costs, Fin. Times, July 27, 2007, http://www.ft.com/cms/s/0/0c5556fa-3bd9-11dc-8002-0000779fd2ac.html (quoting former Federal Reserve Chairman Alan Greenspan: "Other nations have seen the results of the bold tax reforms enacted by the U.S. in the 1980s and they have moved to follow our example. And with much of the world having reduced their corporate rates, we now have the second highest statutory corporate tax rate among OECD nations."); U.S. Dep't of Treasury, Treasury Releases Business Taxation and Global Competitiveness Background Paper 36 (July 24, 2007), available at http://www.treasury.gov/press-center/press-releases/Documents/07230%20r.pdf ("Since 1980, the United States has gone from a high corporate tax-rate country to a low-rate country (following the Tax Reform Act of 1986) and, based on some measures, back again to a high-rate country today because other countries recently have reduced their corporate tax rates ... . The evolution of OECD tax rates over the past two decades suggests that [corporate income tax] rate setting is an interactive game subject to the pressures of international competition."); Henry M. Paulson Jr., Our Broken Corporate Tax Code, Wall Street J., July 19, 2007, at A15 ("Over the past two decades, while ... our statutory corporate income tax rate has increased, other nations have been reducing their rates to replicate our miracle ... . It's not surprising then, that average OECD corporate tax rates have trended steadily downward.").

n17. Because tax incentives take a number of different forms and may often be hidden in expenditure budgets and policies that are not explicitly tax-related, it is difficult to count or measure their existence and impact. There are already many regimes that use such non-rate incentives and the use of these indirect means appears to be growing. See, e.g., Allison Christians, Global Trends and Constraints on Tax Policy in the Least Developed Countries, 42 U.B.C. L. Rev. 239 (2010); Herbert Jauch, Export Processing Zones and the Quest for Sustainable Development: A Southern African Perspective, 14 Env't & Urbanization 101 (2002).

n18. That is not to say that all states would be better off in such a world, since that is obviously not the case. For a discussion see Adam Rosenzweig, Thinking Outside the (Tax) Treaty, 2012 Wis. L. Rev. 717 (2012).

n19. See, e.g., Diana Farrell et al., McKinsey Global Inst., Mapping Global Capital Markets: Fifth Annual Report (Oct. 2008), available at http://www.mckinsey.com/[#x7E]/media/McKinsey/dotcom/ Insights%20and%20pubs/MGI/Research/Financial%20Markets/ Mapping%20global%20capital%20markets%20-%20Fifth%20annual%20report/MGI_Mapping_capital_ markets_fifth_annual_report.ashx; Comm. on Capital Mkts. Reg., Interim Report of the Committee on Capital Markets Regulation, at ix (November 30, 2006), available at http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ ReportREV2.pdf ("The United States is losing its leading competitive position as compared to stock markets and financial centers abroad."); Down on the Street, Economist, Nov. 25, 2006, http://www.economist.com/node/8316406; Charles E. Schumer & Michael R. Bloomberg, To Save New York, Learn From London, Wall Street J., Nov. 1, 2006, http://online.wsj.com/article/SB116234404428809623.html.

n20. See, e.g., Vito Tanzi, Taxation In An Integrating World 130-31 (1995) (By 1993, Belgium, Denmark, France, Germany, Ireland, Luxembourg, Netherlands, Spain, and the UK exempted foreign-owned interest earned from domestic bank accounts); see also Mitchell B. Weiss, International Tax Competition: An Efficient or Inefficient Phenomenon?, 16 Akron Tax J. 99, 108 (2001) ("Not surprisingly, one country after the next responded in kind, introducing measures that not only discouraged the outbound migration of their country's capital, but also encouraged the importation of large amounts of capital from higher-taxing jurisdictions. Some countries created tax-exempt domestic investment opportunities; some relaxed their enforcement efforts; but most followed the U.S.'s lead, exempting their withholding tax on imported interest income and substantially cutting their corporate and individual tax rates.").

n21. See Craig M. Boise & Andrew P. Morriss, Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles, 45 Tex. Int'l L.J. 377 (2009).

n22. See J. Clifton Fleming et al., Worse Than Exemption, 59 Emory L.J. 79 (2009).

n23. See J. Clifton Fleming et al., Some Perspectives from the United States on the Worldwide Taxation vs. Territorial Taxation Debate, J. Australasian Tax Tchrs. Ass'n, Dec. 2008, at 35.

n24. Of course, the U.S. - like any other country - imposes tax on foreign persons who invest in the country. See e.g., I.R.C. ß 871-885. However, the revenue raised from foreign persons is minuscule compared to that raised from U.S. persons. See Internal Revenue Serv., Individual Returns 2005, at 15-18 (2012), available at http://www.irs.gov/pub/irs-soi/05inalcr.pdf (noting that 2005 domestic individual returns totaled approximately $ 935 billion); Scott Luttrell, Internal Revenue Serv., Foreign Recipients of U.S. Income 2007, at 121 (2010), available at http://www.irs.gov/pub/irs-soi/10winbulforeignreceps.pdf (noting that 2005 foreign individual U.S. source withholdings via IRS form 1042S totaled approximately $ 10 billion); Internal Revenue Serv., 2006 Statistics of Income: Corporation Income Tax Returns 2-3, 172-83 (2012), available at http://www.irs.gov/pub/irs-soi/06coccr.pdf (noting that 2006 domestic corporate returns totaled approximately $ 353 billion while returns from foreign-controlled domestic corporations via form 1120 totaled approximately $ 50 billion); Internal Revenue Serv., 2003 Corporation Returns: Returns of Active Corporations (2012), available at http://www.irs.gov/file_source/pub/irs-soi/03co10is.xls; Internal Revenue Serv., 2003 Corporation Returns: Returns with Net Income (2012), available at http://www.irs.gov/file_source/pub/irssoi/03co11is.xls (last visited Feb. 19, 2013) (noting that 2003 effective income tax receipts from foreign corporations with U.S. business operations via IRS form 1120-F totaled approximately $ 600 million).

n25. See, e.g., Tax Justice: The Ongoing Debate (Joseph Jacobs Thorndike & Dennis Ventry eds., Urban Institute Press 2002). The fact that the United States remains the only developed country in the world without a national sales tax may be attributed in part to the reluctance of the U.S. population to accept what it perceives as a regressive tax. See, e.g., Carl Davis et al., Inst. on Taxation & Econ. Policy, Who Pays?: A Distributional Analysis of the Tax Systems in All 50 States 3-4 (3d ed. Nov. 2009), available at http://www.itepnet.org/whopays3.pdf ("Four of the ten most regressive tax systems - those of Washington, South Dakota, Tennessee, and Nevada - rely very heavily on regressive sales and excise taxes."); contra Paul Krugman, Why I'm Soft On Sales Taxes, N.Y. Times (Nov. 17, 2012, 5:38 PM)), http://krugman.blogs.nytimes.com/2010/11/17/why-im-soft-on-sales-taxes/. However, the omission may be attributable to a general resistance to any new taxes, regardless of their perceived distributional impact. See, e.g., Mervyn A. King, The Cash Flow Corporate Income Tax, in The Effects of Taxation on Capital Accumulation, 377, 379 (Martin Feldstein ed., 1987) ("There is truth in the well-known adage that "an old tax is a good tax.'").

n26. See Itai Grinberg et al., Tax Morale Affects Tax Compliance: Evidence from Surveys and an Artefactual Field Experiment, 70 J. Econ. Behav. & Org. 447 (2009); Bruno S. Frey & Benno Torgler, Tax Morale and Conditional Cooperation, 35 J. Comp. Econ. 136 (2007) (noncompliance by other taxpayers tends to decrease a taxpayer's tax morale and compliance).

n27. Gabor, supra note 13.

n28. The recent debt ceiling and fiscal cliff standoffs are excellent examples of the nature of debate surrounding fiscal matters in the U.S. See, e.g., Robert Pear, Obama to Ask for $ 1.2 Trillion Increase in Debt Limit, N.Y. Times, Dec. 27, 2011, http://www.nytimes.com/2011/12/28/us/politics/obama-to-ask-for-1-2-trillion-increase-in-debt-limit.html; Robert Pear, Senate Vote Approves Rise in Debt Limit, N.Y. Times, Jan. 26, 2012, http://www.nytimes.com/2012/01/27/us/politics/senate-approves-1-2-trillion-debt-limit-rise.html; Jonathan Weisman, Republicans Pledge New Standoff on Debt Limit, N.Y. Times, May 15, 2012, http://www.nytimes.com/2012/05/16/us/politics/gop-pledges-new-standoff-on-debt-limit.html; Helene Cooper, Obama and House Republicans Offer Taste of Renewed Fight Over the Debt Ceiling, N.Y. Times, May 16, 2012, http://www.nytimes.com/2012/05/17/us/politics/obama-presses-congress-to-act-on-his-priorities.html; Jackie Calmes, Demystifying the Fiscal Impasse That Is Vexing Washington, N.Y. Times, Nov. 15, 2012), http://www.nytimes.com/2012/11/16/us/politics/the-fiscal-cliff-explained.html; Jennifer Steinhauer, Divided House Passes Tax Deal in End to Latest Fiscal Standoff, N.Y. Times, Jan. 1, 2013, http://www.nytimes.com/2013/01/02/us/politics/house-takes-on-fiscal-cliff.html; The Fiscal Cliff Deal: America's European Moment, Economist, Jan. 5, 2013, http://www.economist.com/news/leaders/21569024-troubling-similarities-between-fiscal-mismanagement-washington-and-mess.

n29. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010) (codified in scattered sections of I.R.C.), available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ147/pdf/PLAW-111publ147.pdf.

n30. The placement as a revenue raiser tacked onto a bill aimed at unrelated objectives has been viewed by opponents of FATCA as a sign that its passage was undertaken with some degree of stealth. See, e.g., FATCA: The Empire Strikes Back, Recover Partners Blog (July 4, 2011), http://www.recoverypartners.biz/blog/2011/07/04/fatca-the-empire-strikes-back/; Koshek Rama Moorthi, FATCA: Obama's New Year Surprise Against American Expats, Examiner (Nov. 30, 2012), http://www.examiner.com/article/fatca-obama-s-new-year-surprise-against-american-expats; ACA's Voice in the News, Am. Citizens Abroad (Oct. 2012), http://americansabroad.org/news-and-events/aca-s-voice-in-the-news/. Although it may appear anomalous to observers from other countries, the addition of unrelated riders and last minute addenda, especially revenue raisers, is a standard feature of U.S. lawmaking. For a brief discussion of how reconciliation and pay-as-you-go rules and standards affect tax policymaking in the U.S. see Policy Basics: Introduction to the Federal Budget Process, Center on Budget & Pol'y Priorities (Jan. 3, 2011), http://www.cbpp.org/files/3-7-03bud.pdf. Presented as a revenue offset at the tail end of a long, complex, and contested piece of legislation did allow FATCA to pass with minimal debate or discussion in 2010. But the seeds for FATCA had been sown in earlier legislative attempts, both in Senator Levin's Stop Tax Haven Abuse Act of 2009 and Senator Baucus' stand-alone FATCA of 2009. See Summary of the Stop Tax Haven Abuse Act of 2011, Carl Levin (July 12, 2011) http://www.levin.senate.gov/newsroom/press/release/summary-of-the-stop-tax-haven-abuse-act-of-2011/; H.R. 3933 (111th): Foreign Account Tax Compliance Act of 2009, GovTrack.US (Oct. 27, 2009), http://www.govtrack.us/congress/bills/111/hr3933; see also Douglas Shulman, Prepared Remarks of Commissioner Douglas Shulman Before the 22nd Annual George Washington University International Tax Conference (Dec. 10, 2012) (transcript available at http://www.irs.gov/uac/Prepared-Remarks-of-Commissioner-Douglas-Shulman-before-the-22nd - Annual-George- Washington-University-International-Tax-Conference) (stating that "the Administration and the IRS are focused on a multi-year international tax compliance strategy ... to put a serious dent in offshore tax evasion" and expressing support for the FATCA Act of 2009).

n31. 156 Cong. Rec. H1152 (daily ed. Mar. 4, 2010) (statement of Sen. Allyson Schwartz), ("The HIRE Act is fully paid for and it does not add to the annual deficit. It is paid for by cracking down on overseas tax havens.").

n32. See 156 Cong. Rec. S2369-70 (April 9, 2010), (daily ed. April 15, 2010) (enclosure provided by of Douglas Elmendorf) (showing that the HIRE Act was expected to produce a revenue deficit in the amount of $ 4,380,000); Cong. Budget Office, Letter and Table Outlining Budgetary Effects of HIRE Act, (Feb. 18, 2010), http://www.cbo.gov/sites/default/files/cbofiles/ ftpdocs/112xx/doc11230/hr2847.pdf (showing amounts expected to be raised by FATCA provisions as $ 343 million, $ 448 million, and $ 710 million, for 2010, 2011, and 2012, respectively). That precarious budgetary situation was aggravated by the fact that while the spending provisions of the HIRE Act were immediately implemented, most of the FATCA provisions have yet to be enforced. For example, the disclosure of U.S. accounts by foreign financial institutions was, according to the statute, to begin after December 2012, but the enforcement has been delayed by the Treasury since regulations interpreting the statute were not finalized until January, 2013. See Hiring Incentives to Restore Employment Act ßß501-502 (giving the original implementation schedule); I.R.S. Notice 2012-42 (Oct. 24, 2012) (which delays the implementation of information reporting until March 31, 2015 and gross withholding until January 1, 2017); see also DLA Piper, Comparison of FATCA Timeframes (Oct. 2012), available at http://www.dlapiper.com/files/Uploads/Documents/Tax-news-Chart__Oct2012.pdf.

n33. See William McGurn, Obama's IRS Snoops Abroad, Wall Street J., July 16, 2012,, http://online.wsj.com/article/ SB10001424052702303933704577531280097324446.html ("David Axelrod invoked the holy grail behind the FATCA led, global IRS expansion. "We lose $ 100 billion a year to offshore tax shelters,' Mr. Axelrod told CNN."). For background information on base erosion via offshore holdings see David Voreacos, Offshore Tax Scorecard: UBS, Credit Suisse, HSBC, Julius Baer, Bloomberg News, Oct. 12, 2011, http://www.businessweek.com/news/2011-10-12/offshore-tax-scorecard-ubs-credit-suisse-hsbc-julius-baer.html; Kim Dixon, Nearly 15,000 Americans Admit Offshore Tax Cheating, Reuters (Nov. 17, 2009), http://www.reuters.com/article/idUSTRE5AG3IU20091117; Martin Sullivan, U.S. Citizens Hide Hundreds of Billions in the Caymans, Tax Notes, May 24, 2004, at 96; Press Release, U.S. Dep't of Justice, Department of Justice Asks Court to Serve Summons for Offshore Records (Apr. 15, 2009), available at http://www.justice.gov/opa/pr/2009/April/09-tax-349.html ("Some United States taxpayers are evading billions of dollars per year in United States taxes through the use of offshore accounts").

n34. See, e.g., Press Release, U.S. Dep't of Justice, South Florida Woman Pleads Guilty to Failing to Disclose Income from Swiss Bank Accounts and Agrees to $ 21 Million Penalty (Jan. 8, 2013), available at http://www.justice.gov/opa/pr/2013/January/13-tax-030.html (""The Justice Department continues to pursue those who hide income and assets from the IRS through the use of nominee businesses and offshore bank accounts,' said Assistant Attorney General Keneally. "U.S. taxpayers who fail to come forward in the voluntary disclosure program risk prosecution and substantial fines, as this case demonstrates.'").

n35. Cong. Rec. S1746 (daily ed. Mar. 18, 2010) (statement of Sen. Carl Levin) ("Section 531 ends shenanigans involving U.S. persons ... .").

n36. Cong. Rec. S1745 (Mar. 18, 2010) (statement of Sen. Carl Levin).

n37. Shulman, supra note 30.

n38. See I.R.C. ß 1471 (West, Westlaw through P.L. 112-208).

n39. See Id.

n40. See id. ß 1473(3) (entities not subject to withholdable payments include publicly traded companies and their affiliated corporations, individual retirement plans and 501(a) organizations, U.S. and state agents and their assets, REITs, RICs, and certain exempt trusts).

n41. The U.S. Department of State estimates that there are 6.3 million American citizens living abroad. See Bureau of Consular Affairs, Who We Are and What We Do: Consular Affairs by the Numbers (July 2012), available at http://travel.state.gov/pdf/ca_fact_sheet.pdf. These citizens, along with anyone holding a certificate of permanent residency in the U.S. (for whom no count is estimated), are experiencing increasingly restricted financial account access in their countries of residence. See, e.g., Americans Residing Overseas Are Denied Bank Accounts, Ass'n of Ams. Resident Overseas, http://aaro.org/denied-bank-accounts (observing that foreign financial institutions are closing, threatening to close, or refusing to open accounts for residents with U.S. status, even if they are citizens of the country in which they seek to have accounts).

n42. See, e.g., Scratched by the FATCA: Congress Creates a Bureaucratic Nightmare for Fund Managers, Economist, Nov. 26, 2011, http://www.economist.com/node/21540270; David Jolly & Brian Knowlton, Law to Find Tax Evaders Denounced, N.Y. Times, Dec. 26, 2011, http://www.nytimes.com/2011/12/27/business/law-to-find-tax-evaders-denounced.html.

n43. See Staff of S. Comm. on Foreign Relations, 110th Cong., The Petroleum and Poverty Paradox: Assessing U.S. and International Community Efforts to Fight the Resource Curse (Comm. Print Oct. 16, 2008), available at http://www.gpo.gov/fdsys/pkg/CPRT-110SPRT44727/pdf/CPRT-110SPRT44727.pdf ("Too often, oil money that should go to a nation's poor ends up in the pockets of the rich, or it may be squandered on the trappings of power and massive showcase projects instead of being invested productively and equitably. In some countries, national poverty has actually increased following the discovery of oil. This "resource curse" affects us as well as producing countries. It exacerbates global poverty which can be a seedbed for terrorism, it dulls the effect of our foreign assistance, it empowers autocrats and dictators, and it can crimp world petroleum supplies by breeding instability... . This report argues that transparency in revenues, expenditure and wealth management from extractive industries is crucial to defeating the resource curse."); see also Susan Ariel Aaronson, Oil and the Public Interest, Vox (July 12, 2008), http://www.voxeu.org/article/can-transparency-extractive-industries-break-resource-curse ("Oil cravings fund and perpetuate undemocratic regimes in many energy-exporting countries... . EITI can change the behaviour of oil exporters without conditionality or force. It empowers reformist interests in resource-rich countries and effectively acts as an incentive for oil company executives and petro-state policymakers to change their behaviour.").

n44. See Extractive Industries Transparency Initiative (EITI), Publish What You Pay, http://www.publishwhatyoupay.org/activities/advocacy/extractive-industries-transparency-initiative (last visited Mar. 19, 2013).

n45. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) (enacted). For the regulations associated with this section see Disclosure of Payments by Resource Extraction Issuers, 17 C.F.R.ßß240, 249 (2010); see also Cardin-Lugar Amendment, supra note 3.

n46. Energy Security through Transparency Act of 2009, S. 1700, 111th Cong. (2009).

n47. See Ken Silverstein, As Oil Pours Into Gulf, Oil Industry Fights Anti-Corruption Measure, Harpers (May 11, 2010), http://harpers.org/blog/2010/05/as-oil-pours-into-gulf-oil-industry-fights-anti-corruption-measure/ (explaining the opposition of the American Petroleum Institute, a trade association that represents the U.S. oil and gas industry).

n48. See Daniel Firger, Lifting the Resource Curse: Will Dodd-Frank Do the Trick?, Huffington Post (Sept. 28, 2010), http://www.huffingtonpost.com/daniel-firger/post_945_b_741761.html; Rebekah J. Poston & Carine M. Williams, "Extraction and Compliance: New Reporting Requirements for Issues Involving Oil, Natural Gas or Minerals', Complinet (Nov. 3, 2010), http://www.squiresanders.com/files/Publication/0dba74ce-32ba-40f9-973b- a13fa624b222/Presentation/PublicationAttachment/21d007b3-af8b-4068-9110-1ae23dcf2ed6/Article-Poston_Williams-FCPA- Extraction.pdf.

n49. Foreign Corrupt Practices Act of 1977, 15 U.S.C. ß 78dd-1 (2006).

n50. See, e.g., Thomas Pogge, Are We Violating the Human Rights of the World's Poor? 14 Yale Hum. Rts. & Dev. L.J. 1, 24 (2011).

n51. See, e.g., Our Activities: United States, Publish What You Pay, http://www.pwypusa.org/our-activities/us (last visited Mar. 16, 2013) (describing the movement in support of EITI legislation in the U.S.); Ben German, Sens. Cardin, Lugar Slam Oil Industry's Dodd-Frank Lawsuit, Hill (Oct. 11, 2012, 12:53 PM), http://thehill.com/blogs/e2-wire/e2-wire/261495-sens-cardin-lugar-slam-oil-industry-dodd-frank-lawsuit ("The Cardin-Lugar Amendment puts transparency - the key to citizens' ability to hold their government to account - ahead of corruption. To do otherwise is a losing proposition for the United States and company shareholders ... ."); Susan Symons et al., Price Waterhouse Coopers, Tax Transparency Framework: A review of the Tax Communications of the Largest Listed Companies in Belgium, The Netherlands and UK (Nov. 2008), available at http://www.pwc.be/en/publications/total-tax-framework-pwc-08.pdf.

n52. See Dodd-Frank Wall Street Reform and Consumer Protection Act ß 1504(2)(A), 15 U.S.C.A. ß 78m(q)(2)(A) (West, Westlaw through P.L. 112-209), ("Information required ... Not later than 270 days after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission shall issue final rules ... ."); Christopher M Matthews, Lawmakers Pressure SEC on Dodd-Frank Extractive Provisions, Wall Street J. Blog (June 25, 2012), http://blogs.wsj.com/corruption-currents/2012/06/25/lawmakers-pressure-sec-on-dodd-frank-extractive-provisions/ ("In a letter sent Friday to SEC Chairwoman Mary Schapiro, 58 lawmakers said they were concerned that the Commission had missed the April 17, 2011, statutory deadline for the provisions' final rules.").

n53. See Disclosure of Payment by Resource Extraction Issuers, Exchange Act Release No. 34-67717 (Aug. 22, 2012), available at http://www.sec.gov/rules/final/2012/34-67717.pdf.

n54. Complaint, Am. Petroleum Inst. v. SEC, No. 12-1398 (D.D.C. filed Oct. 10, 2012), available at http://www.law.du.edu/documents/corporate-governance/sec-and-governance/api-v-sec/Complaint-American-Petroleum- Institute-v-SEC-12-1398-DC-Cir-Oct-10-2012.pdf.

n55. For example, ExxonMobil has expressed support for EITI but opposes the Dodd-Frank provisions on the grounds they will impede the competitiveness of American companies in the global market. See ExxonMobil, About Us: Transparency, ExxonMobil.com, http://www.exxonmobil.com/Corporate/ about_issues_transparency.aspx (last visited Feb. 18, 2013) ("ExxonMobil has actively participated in Extractive Industries Transparency Initiative (EITI) since its inception in 2002 at both the secretariat and country levels, including continuous participation on the EITI board as either a primary or alternate member. ... The Corporation is supporting the application, validation, and membership processes of EITI participating countries False"); Ken Cohen, Misguided SEC Transparency Rules Only Hurt American Companies, ExxonMobil.com (Oct. 26, 2012), http://www.exxonmobilperspectives.com/2012/10/26/misguided-sec-transparency-rules-only-hurt-american-companies/. Shell has expressed similar support for disclosure in principle. See Shell Oil, Royal Dutch Shell PLC Sustainability Report 2010, at 7 (2010), available at http://reports.shell.com/sustainability-report/2010/servicepages/previous/files/all_shell_sr10.pdf ("In the interests of transparency and accountability, we believe in the disclosure of revenues that extractive industries pay to host governments."). Yet Shell, along with ExxonMobil, is a member of the American Petroleum Institute, the lead complainant in the EITI lawsuit. Jon Gingerich, The Politics of Climate Change, O'Dwyer's Mag, (Feb. 2010), http://www.odwyerpr.com/editorial/0201the-politics-of-climate-change.html ("API members include Chevron, ConocoPhillips, ExxonMobil, GE, Halliburton and Shell."); Press Release, Global Witness, Global Witness Condemns API Lawsuit to Strike Down Dodd-Frank Oil, Gas, and Mining Transparency Provision (Oct. 12, 2012), available at, http://www.globalwitness.org/library/global-witness-condemns-api-lawsuit-strike-down-dodd-frank-oil-gas-and-mining- transparency ("API members, especially its biggest and most influential players which include Chevron, BP, ExxonMobil and Shell, are using API as a front to destroy this law."). As explanation for these inconsistencies, the American Petroleum Institute argues that it is not against disclosure in principle, but opposes "anti-competitive" regulation. See Carlton Carroll, API Files Court Challenge Against Costly, Anti-Competitive SEC Rule, Am. Petroleum Inst. (Oct. 10, 2012), http://www.api.org/news-and-media/news/newsitems/2012/oct-2012/api-files-court- challenge-against-costly-sec-rule.aspx (""The oil and natural gas industry strongly supports payment transparency,' said API President and CEO Jack Gerard. "We've been working hard to increase transparency for a decade, but this rule could interfere with ongoing efforts by making U.S. firms less competitive against state owned firms in China and Russia that have no interest in transparency.'").

n56. This is a different question from that involving whether taxation is a fundamental aspect of nationhood. That is, even if we decide that the exercise of taxation in general is a fundamental right of sovereignty (a debatable proposition), we must still decide that the exercise of taxation in a specific case is the right of a specific sovereign.

n57. See Christians, supra note 7.

n58. See Cedric Ryngaert, Jurisdiction in International Law 5-6 (Vaughan Lowe ed., 2008) ("Defining jurisdiction is hardly self-evident. What is certain is that jurisdiction somehow relates to sovereignty... . Jurisdiction becomes a concern of international law when a State, in its eagerness to promote its sovereign interests abroad, adopts laws that govern matters of not purely domestic concern... . The law of jurisdiction is doubtless one of the most essential as well as controversial fields of international law, in that it determines how far, ratione loci, a State's laws might reach."); B.J. George, Jr., Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev. 609, 609 (1966) ("One of the most difficult words in the legal lexicon to delineate is the term "jurisdiction' ... ."); Joseph H. Beale, The Jurisdiction of a Sovereign State, 36 Harv. L. Rev. 241, 241 (1923) (de?ning jurisdiction as "the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court ... ."); Christopher L. Blakesley, United States Jurisdiction over Extraterritorial Crime, 73 J. Crim. L. & Criminology 1109 (1982) (de?ning jurisdiction as the authority to affect legal interests); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (""Jurisdiction,' it has been observed, is a word of many, too many, meanings' ... .") (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). .

n59. See Jack M. Mintz, National Tax Policy and Global Competition, 26 Brook. J. Int'l L. 1285, 1288 (2001); Ryngaert, supra note 58, at 3 (describing his theory of "an overarching principle of jurisdictional "reasonableness', [that] takes into account the sovereign interests of States other than the forum State (i.e., the State exercising its jurisdiction), yet which at the same time ensures that the interests of the forum State and of the international community are sufficiently heeded. A reasonable exercise of jurisdiction may alleviate the "extraterritorial' impact of jurisdictional assertions... .").

n60. See, e.g., Stanley S. Surrey, Current Issues in the Taxation of Corporate Foreign Investment, 56 Colum. L. Rev. 815, 817 (1956) ("The boundaries of the tax jurisdiction of the federal government are here not limited by any legal lines. Instead, the assertion of jurisdiction is essentially a matter of national policy and national attitudes as to the proper obligations of American citizens and corporations in meeting the costs of government."); Michael S. Kirsch, The Tax Code as Nationality Law, 43 Harv. J. on Legis. 375 (2006) (outlining the various and sometimes conflicting rationales for establishing the tax jurisdiction and noting the potential international law violations posed by various exertions of the jurisdiction beyond the physical territory of the state).

n61. See, e.g., Joseph A. Schumpeter, The Crisis of the Tax State, in International Economic Papers (W.F. Stolpher & R.A. Mugrave trans., 1953).

n62. See, e.g., Ryngaert, supra note 58, at 8-9 ("The term "extraterritorial jurisdiction' is often used to condemn the long arm of US law... . The United States are perceived to champion a geographically almost unlimited application of their own "exceptional' legislation, a perception which is stoked by US unilateralism in world politics... ."). Accordingly, it has been suggested that a states' right to tax is generally accepted as not exclusive but conjunctive. The principle may be embedded in the international law concepts of comity and reciprocity. See, e.g., F.A. Mann, Further Studies in International Law 4 (1990) (stating that "since every State enjoys the same degree of sovereignty, jurisdiction implies respect for the corresponding rights of other States.").

n63. Dominic Kelly, The International Chamber of Commerce, 10 New Pol. Econ. 259, 260, 261 (2005), available at http://www2.warwick.ac.uk/fac/soc/pais/people/kelly/publications/ global_monitor/cnpe114469.pdf.

n64. See Int'l Chamber of Commerce, Proceedings of the First Congress 9 (1921), available at http://archive.org/download/brochure18inteuoft/ brochure18inteuoft.pdf.

n65. See Mitchell B. Carroll, International Tax Law: Benefits for American Investors and Enterprises Abroad, 2 Int'l Law. 692, 693-94 (1968).

n66. See id.

n67. For a recitation of this early history of the international tax order see Michael J. Graetz & Michael M. O'Hear, The "Original Intent" of U.S. International Taxation, 46 Duke L.J. 1021 (1997).

n68. See Kelly, supra note 63, at 261 ("Most noteworthy was the ICC's involvement with the World Economic Conference in May 1927, under the auspices of the League of Nations... . This perception of in?uence very quickly became a source of irritation for other non-governmental organisations (NGOs). For example, the direct representation of the ICC on the Economic Consultative Committee of the League of Nations drew the following acerbic response from the International Co-operative Alliance in May 1930: "Our attention has been drawn to the extraordinary claims which have been publicly made that the organized private traders of the world had not only succeeded in entrenching themselves at Geneva in the authorities of the League on a basis of equality of voice and voting with the National Governments, but wielded such in?uence on behalf of their clients - the capitalist private traders - that they practically dominated the situation and were even able to repudiate their own National Governments.'").

n69. See Allison Christians, Networks, Norms, and National Tax Policy, 9 Wash. U. Global Stud. L. Rev. 1 (2010).

n70. See Arthur J. Cockfield, The Rise of the OECD as Informal "World Tax Organization' Through National Responses to E-Commerce Tax Challenges, 8 Yale J.L. & Tech. 136 (2006); Allison Christians, Hard Law, Soft Law, and International Taxation, 25 Wis. J. Int'l L. 325 (2007); David Rosenbloom, The David R. Tillinghast Lecture International Tax Arbitrage and the "International Tax System", 53 Tax L. Rev. 137, 140-41 (2000); Reuven S. Avi-Yonah, The David R. Tillinghast Lecture International Tax Arbitrage and the "International Tax System", 53 Tax L. Rev. 167, 169 (2000).

n71. See Peggy B. Musgrave, Sovereignty, Entitlement, and Cooperation in International Taxation, 26 Brook. J. Int'l L. 1335, 1336 (2001); Nancy H. Kaufman, Fairness and the Taxation of International Income, 29 Law & Pol'y Int'l Bus. 145, 148, 169 (1998); Steven A. Dean, More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime, 84 Tul. L. Rev. 125, 144 n.79 (2009) (explaining "the Lockean notion that governments earn the right to collect tax revenues by providing the services that make the creation of the underlying income possible"); J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, Fairness in International Taxation: The Ability-To-Pay Case for Taxing Worldwide Income, 5 Fla. Tax Rev. 299, 307 (2001) (explaining benefits-based arguments).

n72. See Diane Ring, International Tax Relations: Theory and Implications, 60 Tax L. Rev. 83 (2007).

n73. See Allison Christians, Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study, 71 Brook. L. Rev. 639 (2005)

n74. See Cockfield, supra note 70, at 139.

n75. Staking an exclusive claim over a person based on domestic legal status, to the exclusion of all other countries, is an example of the American exceptionalism that dominates the general jurisprudence on national jurisdiction. See Ryngaert, supra note 58. It is further complicated by the fact that legal status may be defined for tax purposes in ways that conflict with other domestic nationality laws. See Kirsch, supra note 60, at 377 ("It is now possible for an individual to be treated as a citizen for tax purposes during a period when she is not a U.S. citizen under nationality law.").

n76. See Reuven S. Avi-Yonah, The Case Against Taxing Citizens, 58 Tax Notes Int'l 389 (2010); Kaufman, supra note 71, at 148, 169 (arguing that jurisdiction based on residence, and that based on source, constitute "customary norms" if not quite customary international law). International law scholars typically describe customary law as binding even on those states that had no part in forming it, "because they choose to acknowledge its obligatory character." Int'l Law Ass'n London Conf., Comm. on Formation of Customary (Gen.) Int'l Law, Statement of Principles Applicable to the Formation of General Customary International Law 33 (2000), available at www.ilahq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376. However, there is an exception for so-called "persistent objectors" - those who, before a practice develops into a rule of general law, "persistently and openly" dissent from the rule. Id. at 27-29. It is debatable whether that describes the U.S., since its compliance efforts have been sporadic in practice. However, the fact that the practice can be traced in legal form to the income tax system of the Civil War in America suggests "persistent and open" dissent from any customary law that defines jurisdiction based on residence.

n77. Professor Avi-Yonah argues that in addition to failing any normative justification, citizenship-based taxation is becoming a nuisance for the U.S. in terms of compliance. See Avi-Yonah, supra note 76, at 11 ("The only way we can maintain the fiction that we actually tax most of our nonresident citizens is by enacting complicated credit and exclusion provisions that are difficult to administer and are frequently ignored in practice. For someone who acquired US citizenship by being born here and has lived almost their entire life overseas, filing tax returns and complying with [the Code] must be a highly unlikely proposition even if no tax burden would likely result. If we did not tax nonresident citizens, we could abolish section 911. We could also abolish IRC section 877, which has proven ineffective in deterring tax-motivated expatriations, and simply apply the new IRC 877A (the exit tax on expatriation) to individuals abandoning US residency, like most countries do. Finally, we could give up on the "savings clause' [sic] in our tax treaties, which we insist upon to enable us to tax nonresident citizens but which we may well have to pay a price for in treaty negotiations.").

n78. 265 U.S. 47 (1924)

n79. Id. at 56.

n80. See, e.g., Brian J. Arnold, Tax Discrimination against Aliens, Non-Residents, and Foreign Activities 7 (1991) ("A country's legal authority to levy tax is effectively limited only by practical considerations of enforcement and collection. Rules of public international law or domestic constitutional law restrict a country's jurisdiction to tax only in narrow, relatively insignificant ways."); see also Sol Picciotto, International Business Taxation 307 (1992) ("From the point of view of formal sovereignty, there is no restriction on a state's right to tax, and it may be exercised without regard to its effects on other states."). Contra Kirsch, supra note 60, at 389-90, 407-08 (outlining how the exertion of citizenship-based taxation on persons who are not citizens as defined under nationality laws violates both customary international law and the U.S. constitution). If exerting citizenship-based taxation is merely a matter of administrative capacity, success in implementing the FATCA regime may encourage other countries to follow the U.S. lead.

n81. Ryngaert, supra note 58, at 3; see also Kirsch, supra note 60, at 390-93 (outlining traditional bases for jurisdictional assertions and the reasonableness principle).

n82. See Robert L. Muse, A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996), 30 Geo. Wash. J. Int'l L. & Econ. 207, 241-42 (1996-1997) ("Because each nation possesses exclusive authority within its territory - but no authority within the territory of another - each nation is co-equal in rights and status with other nations, regardless of disparities in economic or military power.").

n83. See A. Bianchi, Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches, 35 Ger. Y.B. Int'l L. 366, 385 (1992) (submitting that "principles of jurisdiction need to be studied in connection with other principles such as the prohibition of economic coercion and intervention, the consideration of which could be useful to set up standards of legitimacy for extraterritorial measures"). Human rights scholars seem to come to similar conclusions in this regard. For a discussion of views see Martha C. Nussbaum, Frontiers of Justice: Disability, Nationality, Species Membership 256-57 (2006) (noting that even in cases of human rights violation, some of which have been extreme, forcible intervention and economic sanction have been used "in a very small number of cases").

n84. Avi-Yonah, supra note 76, at 34-37 (outlining key changes in approach to jurisdictional reach in the taxation of income earned by United States persons through foreign entities).

n85. See Christians, supra note 17; Frederick Schauer, The Politics and Incentives of Legal Transplantation, in Governance in a Globalizing World 253 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) n86. See Georg S<sl o>rensen, The Transformation of the State: Beyond the Myth of Retreat (2003); Ha-Joon Chang, Globalisation, Economic Development, and the Role of the State (2004).

n87. Id.

n88. See Phillip Genschel, Globalization and the Transformation of the Tax State, 13 European Rev. 53 (2005).

n89. See Peggy B. Musgrave, Sovereignty, Entitlement, and Cooperation in International Taxation, 26 Brook. J. Int'l L. 1335, 1349 (2001) (arguing that states are losing control over corporations and that this "will compel the transfer of national responsibility for the corporation income tax to an international authority").

n90. See Robert T. Kurdle & Lorraine Eden, The Campaign Against Tax Havens: Will it Last? Will it Work?, 9 Stan. J.L. Bus. & Fin. 37, 66-68 (2003-2004).

n91. See Org. for Econ. Co-operation & Dev., Addressing Base Erosion and Profit Shifting (2013).

n92. For a seminal argument see Reuven S. Avi-Yonah, Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State, 113 Harv. L. Rev. 1573 (2000).

n93. See, e.g., Allison Christians, Tax Activists and the Global Movement for Development Through Transparency 15 n.70 (Univ. of Wis. Tax Law & Dev. Legal Studies Paper Series, Paper No. 1193, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029055.

n94. One explanation for this may be that in the past, blanket account surveillance of a citizenry would have been viewed as an unwarranted intrusion by the state. For example, the OECD clearly and repeatedly proclaimed that it never intended the harmful tax practices project to sanction or enable states to embark on "fishing expeditions." OECD, Harmful Tax Practices, supra note 8, at 10. Yet it has long been clear that sophisticated fishing expeditions would be the only way for states to curb tax evasion, since "without them, the chance of an evader getting caught will likely remain modest." Robert Kudrle, The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib, 8 Global Econ. J. 1, 89 (2008).

n95. See Ha-Joon Chang, supra note 86.

n96. See Article 26 of the OECD Model Tax Convention on Income and Capital, OECD http://www.oecd.org/ctp/taxtreaties/article26oftheoecdmodeltaxconventiononincomeandcapital.htm (last visited Mar. 18, 2013) ("Countries are not at liberty to engage in "fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.").

n97. Id. (amending the language of the article to require states to "exchange such information as is foreseeably relevant").

n98. See Lillian Aponte Miranda, The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development, 45 Vand. J. Transnat'l L. 785, 828-29 (2012).

n99. See Susan C. Morse, Taxation of Offshore Accounts: Ask For Help, Uncle Sam: The Future of Global Tax Reporting, 57 Vill. L. Rev. 529, 531-32 (2012) ("FATCA is a new solution to the old problem of U.S. domestic taxpayers evading tax on their income from offshore accounts.").

n100. See supra note 89 and accompanying text.

n101. See Morse, supra note 99, at 542 ("U.S. tax administrators can improve the chances of FATCA's success by seeking the cooperation and involvement of non-U.S. governments.").

n102. See Miranda supra note 98, at 828-29.

n103. Morse, supra note 99, at 536-37.

n104. See id.

n105. See e.g., Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (Can.); Data Protection Act, 1998, c. 29 (U.K.).

n106. See supra notes Error! Bookmark not defined.29-42 and accompanying text.

N107. See, e.g., Robert Kurdle, The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib, 8 Global Econ. J. 1, 1-18 (2008) (describing shifts in OECD approach and U.S. reaction to the harmful tax practices project as it evolved).

n108. See id.

n109. See McIntyre, supra note 11, at 255.

n110. But in this case, it is not a long tradition. 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. See Christians, supra note 93.

n111. See Henry Lazenby, New SEC Rules Should Become International Standard - PWYP Coalition, Mining Wkly. (Aug. 23, 2012), available at http://www.miningweekly.com/article/new-sec-rules-should-become-international-standard-pwyp-coalition-2012-08-23 (quoting a sustainability analyst for an extractive industries investment company as saying "we would be able to better value companies if they are forced to be more transparent about their dealings ... .").

n112. See Allison Christians, Do We Need to Know More About Our Public Companies?, 66 Tax Notes Int'l 843, 843-44 (2012).

n113. See Edward D. Kleinbard, Stateless Income, 11 Fla. Tax Rev. 699, 762-70 (2011).

n114. See, e.g., Lynnley Browning, Insight: Microsoft Use of Low-Tax Havens Drives Down Tax Bill, Reuters (July 27, 2011, 7:07 PM), www.reuters.com/article/2011/07/27/us-microsoft-tax-idUSTRE76Q6OB20110727..

n115. See Richard Murphy, Task Force on Fin. Integrity & Econ. Dev., Country by Country Reporting: Holding Multinational Corporations to Account Wherever They Are (June 2009), available at www.financialtaskforce.org/wp-content/uploads/2009/06/Final_CbyC_Report_Published.pdf.

n116. In the United States, for example, tax information is protected pursuant to federal statute, with high penalties for disclosure. See I.R.C. ß 6103 (2006). Canada has a similar rule. See Income Tax Act, R.S.C. 1985, c. 1, ßß239(2.2), 241 (5th Supp.) (Can.). 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. See I.R.C. ß 6103(d)(1)(D)(iii). 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. See 5 U.S.C. ß 552(b)(3) (2006) (articulating an exception from the Freedom of Information Act disclosure for information otherwise protected by statute). See I.R.C. ß 6103(a)(1). Placing reporting requirements under securities compliance rules rather than within the tax code overcomes this problem. See, e.g., Steven Mark Levy, How the FBAR is Used, in Federal Money Laundering Regulations, Banking, Corporate and Securities Compliance ch. 10.04 (rev. ed. 2011).

n117. Mark Fenster, The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State 19 (Jan. 9, 2012) (unpublished), available at http://ssrn.com/abstract=1918154.

n118. See supra Part III.C.

n119. See, e.g., Internal Revenue Serv., Instructions for Form 1116, at 2 (2012), available at http://www.irs.gov/pub/irs-pdf/i1116.pdf ("Taxes paid to a foreign country that you do not legally owe, including amounts eligible for refund by the foreign country. If you do not exercise your available remedies to reduce the amount of foreign tax to what you legally owe, a credit for the excess amount is not allowed.").

n120. Id. (noting that the U.S. government gives tax credits to corporations paying taxes to foreign governments).

n121. Of course, the company facing residence-based taxation is indifferent with respect to which country collects what portion of a tax. But by limiting access to foreign tax credits on the basis of efforts to reduce tax in the source country, the U.S. aligns its multinationals with its own goal of minimizing source-based tax. See id.

n122. Cf. supra note 40 and accompanying text.

n123. This information-enabled public discourse is a source of worry for multinational company managers and advisors, who fear that the public is likely to misunderstand the disclosed information. See, e.g., William Morris, Taxation and Development: Is Country-by-Country Reporting the Answer?, OECD Observer (Mar. 2010), http://www.oecdobserver.org/news/fullstory.php/aid/3229/Taxation_and_development.html.

n124. See, e.g., Mabel van Oranje & Henry Parham, Publishing What We Learned: An Assessment of the Publish What You Pay Coalition (2009), available at http://www.publishwhatyoupay.org/sites/pwypdev.gn.apc.org/ files/Publishing%20What%20We%20Learned%20-%20EN.pdf.

n125. See 17 C.F.R. ßß229, 249 (2012).

n126. 17 C.F.R. ß 229.101.

n127. Myres S. McDougal & Harold D. Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, 53 Am. J. Int'l L. 1, 4-5 (1959).

n128. McDougall may be relatively unknown among the tax community, but his work on international law and his contribution to the New Haven School of Jurisprudence earned him worldwide recognition as an eminent expert on the rule and the role of law, and he had much to say that would resonate especially among international tax scholars. See Michael Reisman, Myres S. McDougal: Architect of a Jurisprudence for a Free Society, 66 Miss. L.J. 15 (1996).

n129. While also likely unknown to tax scholars, Professor Lasswell was a professor of political science and later law who studied the intersections of personality, economy, society, and politics and has been referred to as "the most original and productive political scientist of his time." See Gabriel A. Almond, Harold Dwight Lasswell: 1902-1978, in Biographical Memoirs 249, 249 (Nat'l Acad. of Scis. ed., 1987), available at http://www.nasonline.org/publications/biographical-memoirs/memoir-pdfs/lasswell-harold.pdf.

n130. McDougal & Lasswell, supra note 127, at 4-5.

n131. See, e.g., Illicit Financial Flows from Developing Countries: 2001-2010: Overview, Global Fin. Integrity, http://iff.gfintegrity.org/iff2012/2012report.html (last visited Mar. 19, 2013) ("The developing world lost US$ 859 billion in illicit outflows in 2010, an increase of 11% over 2009. The capital outflows stem from crime, corruption, tax evasion, and other illicit activity.").

n132. See Melissa A. Dizdarevic, The FATCA Provisions of the Hire Act: Boldly Going Where No Withholding Has Gone Before, 79 Fordham L. Rev. 2967, 2969 (2011) (describing how the IRS has depended on voluntary information reporting and the use of withholding taxes to ensure that income is collected); Proposals to Fight Offshore Tax Evasion, Tax Notes, Apr. 20, 2009, at 264-68 (explaining how the IRS uses a Qualified Intermediary program under which foreign banks that receive payments certify the nationality of their depositors and reveal the identity of any American citizens using their banking services).

n133. This is particularly troublesome for Americans who reside abroad, for whom FATCA legislation may be obstructing their access to bank accounts, insurance coverage, and pension plans. Brian Knowlton, More American Expatriates Give Up Citizenship, N.Y. Times, Apr. 25, 2010, http://www.nytimes.com/2010/04/26/us/26expat.html. For citizens in high-tax countries who will not owe tax to the U.S. in most cases, compliance with the U.S. tax jurisdiction poses nothing more than an expensive nuisance, so FATCA seems an additional unwarranted imposition. This may be why, in Senator Levin's Stop Tax Haven Abuse Act, the focus of reform was placed on a list of targeted jurisdictions, rather than all foreign countries. See supra note 36 and accompanying text. This accords with the OECD approach, which, while deeply flawed, tried to cast its approach as a defensive, rather than an aggressive, measure, aimed at nations in which taxpayers would be subject to little or no taxation. See Org. for Econ. Co-operation & Dev., supra note 8.

n134. See supra notes 33-34 and accompanying text.

n135. See, e.g., United States Model Income Tax Convention art. 26 (Nov. 15, 2006), available at http://www.treasury.gov/press-center/press-releases/Documents/hp16801.pdf; Org. for Econ. Co-operation & Dev., Model Tax Convention on Income and on Capital, at M-62 to M-65 (July 22, 2010), available at http://www.oecd.org/tax/taxtreaties/47213736/pdf.

n136. The product of competent authority resolution may take one of two forms: a taxpayer-specific competent authority agreement or a non-taxpayer-specific, generalized competent authority agreement. See Competent Authority Agreements, IRS, http://www.irs.gov/Individuals/International-Taxpayers/Competent-Authority-Agreements (last updated Mar. 19, 2013). The former is an agreed-upon decision on an individual case; the latter is a generalized statement, typically characterized as procedural, and is meant to "clarify or interpret treaty provisions." Id. The former consists of unpublished agreements that are applied only to the individual taxpayers in resolution of their cases, while the latter results in public documents meant to be relied upon by other taxpayers. Most competent authority agreements are specific rather than general; general agreements are published in the U.S. in the Internal Revenue Bulletin and online. See Internal Revenue Bulletin, IRS, http://www.irs.gov/irb/ (last visited Mar. 19, 2013).

n137. See supra note 136.

n138. See, e.g., Baker & MacKenzie, Client Alert: United States and Mexico FATCA Intergovernmental Agreement: Effective January 1st, 2013, (Jan., 2013), in 2013 Tax Analysts Worldwide Tax Daily 12-20 (2013) ("Upon a number of consultations with the relevant tax authorities, we have concluded that no need exists for the United States and Mexico FATCA Intergovernmental Agreement to be published in the Mexican Federal Official Gazette in order for it to be effective."); Agreement Between the Department of Treasury of the United States of America and the Ministry of Finance and Public Credit of the United Mexican States to Improve International Tax Compliance Including with Respect to FATCA, U.S.-Mex., Nov. 19, 2012, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Mexico-11-19- 2012.pdf

n139. See Competent Authority Agreements, supra note 136. All of the agreements posted on this site are referred to as competent authority agreements by their terms, and all are signed by persons who are named therein as the competent authorities of their respective states. The U.S.-Mexico intergovernmental agreement is notably missing from this site even though it is currently in force. Id.

n140. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA, U.S.-U.K., Sept. 12, 2012, available at http://www.hmtreasury.gov.uk/d/ facta_agreement_tax_compliance_140912.pdf (signed by David Gauke on behalf of "The Government of the United States" and by Barbara Stephenson "For the Government of the United Kingdom of Great Britain and Northern Ireland"). Barbara Stephenson is a U.S. Minister at the United States Embassy in London. See Barbara J. Stephenson, Embassy of United States London U.K., http://london.usembassy.gov/ukdcm.html (last visited Feb. 14, 2013). It may be possible for the U.S. competent authority, currently Michael Danilack, to deputize the Minister to act, but there is no record of such deputization and there appear to be no other competent authority agreements signed by her on behalf of the U.S. competent authority. The most recent competent authority agreements have been signed by Michael Danilack. See, e.g., Competent Authority Agreement, U.S.-Nor., Nov., 2012, available at http://www.irs.gov/PUP/individuals/international/ USNorwaySourceofremunerationforgovernmentservicesandsocialsecurity paymentsDecember2012.pdf; Competent Authority Agreement, U.S.-Neth, May 21, 2012, available at http://www.irs.gov/pub/irs-utl/dutch_lfma_map.pdf; Competent Authority Agreement, U.S.-Ger., Mar. 19, 2012, available at http://www.irs.gov/pub/irs-utl/german_pension_ fund_map_2012.pdf..

n141. None of this necessarily impacts the legal force of the IGAs from an international perspective. In the eyes of the world, these may be viewed as equivalent to any other international agreement.

n142. See, e.g., Bishnodat Persaud, The OECD Harmful Tax Competition Policy: A Major Issue for Small States, in International Tax Competition: Globalisation and Fiscal Sovereignty 17, 19 (Rajiv Biswas ed., 2002) ("Defensive measures ... are a polite usage for sanctions ... ."). The imposition of a sanction is a serious matter in international law and generally requires clear justification. Scholars debate, for example, what level of violation of human life or dignity should be tolerated before one state should intervene militarily to restore order or save lives. For a discussion of views see Nussbaum, supra note 83, at 256-57 (noting that even in cases of human rights violation, some of which have been extreme, forcible intervention and economic sanction have been used "in a very small number of cases").

n143. Under the statute, foreign financial institutions have three choices with respect to accounts held by persons with U.S. status: pay the increased cost of compliance with U.S. law, pay the cost of withholding on U.S. investments, or divest from the U.S. market. See FATCA Deadline Looms for International Banks, Euromoney (Aug. 2012), http://www.euromoney.com/Article/3067431/Fatca-deadline-looms-for-international-banks.html. Media reports suggest that financial institutions appear to view ridding themselves of U.S. customers as a fourth option, even though simply having no U.S. customers does not exempt them from demonstrating their compliance. See Robert W. Wood, Americans Become Undesirable as FATCA Closes More Doors, Forbes, Oct. 25, 2012, available at http://www.forbes.com/sites/robertwood/2012/10/25/americans-are-undesirable-as-fatca-closes-more-doors/ ("These days, anyone but Americans seems likely to be welcomed into foreign banks. Welcome to FATCA, the global U.S. law that applies in earnest in 2013. Americans everywhere are facing ostracism and some are voting with their feet.").

n144. See, e.g., Ryngaert, supra note 58, at 3.

n145. Id.

n146. See id.

n147. See U.S. Dep't of State, US State Services Dual Nationality, Travel.State.Gov, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1753.html (last visited Mar. 21, 2013) ("Persons may have dual nationality by automatic operation of different laws rather than by choice.").

n148. See Allison Christians, Could a Same-Country Exception Help Focus FATCA and FBAR?, 66 Tax Notes Int'l 157 (2012).

n149. Id. at 159.

n150. See John McCrank, Update 1 - Canada Hopes for Exemption on US FATCA Rules: Treasury Says Not Considering Exemption for Canada, Reuters (Oct. 5, 2011, 5:13 PM), available at http://www.reuters.com/article/2011/10/05/canada-usa-taxes-idUSN1E7941R120111005.

n151. See Hiring Incentives to Restore Employment Act ßß501-531, Pub..L. No. 111-147, 124 Stat. 71 (2010) (codified in scattered sections of I.R.C.), available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ147/pdf/PLAW-111publ147.pdf.

n152. Id.

n153. See, e.g., Model Intergovernmental Agreement, supra note 6, at 6-9.

n154. See id.

n155. 26 C.F.R. 1.6049-8 (2010).

n156. Id. This observation explains why Canada, even more than other countries, stands to gain little or nothing in terms of base protection from an IGA with the U.S.

n157. See, e.g., Model Intergovernmental Agreement, supra note 6, at 6-9.

n158. See id. at 1; Laila Arstall, Jersey: FATCA - Intergovernmental Agreements for Crown Dependencies, Mondaq (Dec. 17, 2012), http://www.mondaq.com/x/207552/tax+authorities/FATCA+InterGovernmental+ Agreements+For+Crown+Dependencies (noting the dependence of IGAs on existing tax treaties).

n159. See Model Intergovernmental Agreement, supra note 6, at 1

n160. Robert W. Wood, Expats Call for FATCA Repeal, Forbes (Sept. 6, 2011, 8:22 AM), http://www.forbes.com/sites/robertwood/2011/09/06/expats-call-for-fatca-repeal.

n161. The U.S. Treasury could intend to extend IGA eligibility to members of the OECD Mutual Assistance Convention, thus potentially increasing the scope for reciprocity, but it is not clear that this could be done on a bilateral, case-by-case basis. Org. for Econ. Co-Operation & Dev., Status of the Convention on Mutual Administrative Assistance in Tax Matters and Amending Protocol (Dec. 5, 2012), available at http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf.

n162. See Dana Ward & Anne Stopford, FATCA - Foreign Account Tax Compliance Act, World Fin. Rev., http://www.worldfinancialreview.com/?p=616 (last visited Feb. 18, 2013).

n163. See Matthew Genasci & Sarah Pray, Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice, 11 Yale Hum. Rts. & Dev. L.J. 37, 51 (2008).

n164. See Alex Barker & Guy Chazen, Lobbyists Fight to Weaken Graft Rules, Fin. Times (Apr. 11, 2012, 8:25 PM), http://www.ft.com/cms/s/0/a8a59acc-83d4-11e1-84ca-00144feab49a.html (discussing how industry lobbyists are working to "dilute "project-by-project' disclosure rules being developed in the U.S. and the E.U.); Edward Wyatt, Use of "Conflict Minerals' Gets More Scrutiny from U.S., N.Y. Times, Mar. 19, 2012, http://www.nytimes.com/2012/03/20/business/use-of-conflict-minerals-gets-more-scrutiny.html (discussing how industry pressure has undermined and consistently sidelined EITI implementation)..

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n167. See Christians, supra note 112, at 844.

n168. Barker & Chazen, supra note 164.

n169. See Genasci & Pray, supra note 163, at 51-54; EITI's Evolution from CSR to Governance Standard Is Key to Emerging Economies, EITI News (EITI Int'l Secretariat, Oslo, Nor.), July 2010, at 5, available at http://eiti.org/files/EITI-Newsletter-2010-July.pdf.

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n171. Stephen Timms, U.K. Fin. Sec'y to the Treasury, Remarks at OECD Tax and Development Conference in Paris, (Jan. 27, 2010), available at http://www.hm-treasury.gov.uk/speech_fst_270110.htm.

n172. See id.

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