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# EUI Working Papers

RSCAS 2011/12

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES  
Global Governance Programme-03

GLOBAL TAX GOVERNANCE: WORK IN PROGRESS?

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**GLOBAL GOVERNANCE PROGRAMME**

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ISSN 1028-3625

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Printed in Italy, May 2011  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu/RSCAS/Publications/](http://www.eui.eu/RSCAS/Publications/)  
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## **Abstract**

The international financial crisis which broke out in 2008 has had a major impact on fiscal sustainability of countries all over the world. Countries have responded with varying measures. Moreover, in the aftermath of the global financial crisis, international initiatives regarding tax governance have gained political momentum; various initiatives regarding fiscal policy have been taken at the global level, and several policies with implications for national tax policy and law are conducted at that level . Therefore, this paper will give an overview of the international tax initiatives at the level of the Group of Twenty (G-20), the Organization for Economic Cooperation and Development (OECD), the United Nations (UN), the International Monetary Fund (IMF) and the World Trade Organization (WTO). These international tax initiatives cannot be referred to as “international tax law”. It would be more appropriate to see them as a hesitant beginning of a form of “global tax governance”. This contribution will show that the unequivocal fiscal principle of ‘no taxation without representation’ poses an important challenge for the emergence of *legitimate* global tax governance, as most of the international initiatives lack an inclusive process. Whereas multiple international tax initiatives exist, we cannot yet discern the existence of globally *effective* tax governance.

## **Keywords**

Global Tax Governance, Group of Twenty, Organization for Economic Cooperation and Development, United Nations, International Monetary Fund, World Trade Organization





*“Governance has three states, like mass.  
The national which is solid, the European which is liquid,  
and the international which is gaseous.”*  
Pascal Lamy

## 1. Introduction

The international financial crisis which broke out in 2008 has had a major impact on fiscal sustainability of countries all over the world. In response to the global recession, many countries have undertaken massive and unprecedented fiscal interventions and have adopted stimulus packages, aimed at supporting the financial sector and boosting aggregate demand.<sup>1</sup> Moreover, as the economy starts to recover, fiscal consolidation is necessary in order to ensure fiscal sustainability for the future.<sup>2</sup> Levying taxes is considered to be an essential feature of national sovereignty, and countries all over the world have responded to the global recession with varying measures. In the aftermath of the global financial crisis, international initiatives regarding tax governance have gained political momentum; various initiatives regarding fiscal policy have been taken at the global level, and several policies with implications for national tax policy and law are conducted at that level. Therefore, this paper will give an overview of the international tax initiatives at the level of the Group of Twenty (G-20), the Organization for Economic Cooperation and Development (OECD), the United Nations (UN), the International Monetary Fund (IMF) and the World Trade Organization (WTO). These international tax initiatives cannot be referred to as “international tax law”. It would be more appropriate to see them as a hesitant beginning of a form of “global tax governance”. This contribution will show that the unequivocal fiscal principle of ‘no taxation without representation’ poses an important challenge for the emergence of *legitimate* global tax governance, as most of the international initiatives lack an inclusive process. Whereas multiple international tax initiatives exist, we cannot yet discern the existence of globally *effective* tax governance.

## 2. The contribution of the G-20: a high-level deliberative forum

### 2.1. G-20 summits in relation to the financial crisis

The G-20 was created by the G-7 finance ministers and central bank governors in response to the Asian financial crisis in the late 1990s. At their meeting of 25 September 1999, they announced their proposal ‘to broaden the dialogue on key economic and financial policy issues among systematically significant economies and promote cooperation to achieve stable and sustainable world economic growth that benefits all.’<sup>3</sup> From the outset, the G-20 brought together ‘systematically significant’ industrialised and developing economies in order to discuss key issues in the global economy.<sup>4</sup> Until 2008, meetings had taken place at the level of finance ministers and central bank governors. Spurred by the financial crisis that started in September 2008, US President George W. Bush convened a meeting of the leaders of G-20 Members in Washington D.C. on 15 November 2008. For the very first

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<sup>1</sup> European Commission, ‘Innovative financing at a global level’, SEC (2010) 409, 2010, 8.

<sup>2</sup> Dominique Strauss-Kahn, ‘Navigating the fiscal challenges ahead’, *Fiscal Monitor*, IMF Fiscal Affairs Department, 14 May 2010, 3.

<sup>3</sup> Statement of G7 Ministers and Central Bank Governors, 25 September 1999, Washington D.C., § 19.

<sup>4</sup> Meeting of G-20 Finance Ministers and Central Bank Governors, *Communiqué*, Berlin, 15-16 December 1999, § 2. For an overview of the early functioning of the G-20, see J.J. Kirton, ‘The G-20: Representativeness, Effectiveness, and Leadership in Global Governance’ in J.J. Kirton, J.P. Daniels and A. Freytag (eds.), *Guiding Global Order. G 8 Governance in the 21st Century*, Aldershot, Ashgate 2010.

time, the G-20 was held at the level of Heads of State and Government, reflecting the political importance attached to the tackling of the financial crisis through a global forum. In the Washington Declaration, two overall priorities were set: the restoration of global growth and the reform of global financial governance, aiming to prevent a similar crisis from happening again.<sup>5</sup> Since the Washington summit, four more G-20 summits were organised: in London (2 April 2009), Pittsburgh (24-25 September 2009), Toronto (26-27 June 2010) and Seoul (11-12 November 2010). In Pittsburgh, the Heads of State and Government decided to lift the G-20 to the level of 'premier forum for international economic cooperation'.<sup>6</sup> Notwithstanding its increasingly important role in global economic governance, the G-20 remains an informal body: it does not have a charter or voting mechanism, does not produce legally binding solutions, and does not even have a secretariat to assist it.<sup>7</sup> The informal structure is apparently what the G-20 Heads of State were looking for when dealing with the financial crisis: on several occasions the G-20 reiterated that it does not aim to further institutionalise into a traditional international organisation.<sup>8</sup> As the G-20 is not an international organisation to which states have delegated powers, it has the freedom to do other things such as: agenda-setting, coordinating policies and distributing tasks across existing institutions, and building consensus around norms and knowledge.<sup>9</sup>

## 2.2. The G-20 and tax policy

The aforementioned G-20 declarations touch upon matters specifically relating to fiscal policy. Two 'taxation topics' have been given particular attention throughout the summits: the fight against tax havens and the elaboration of new taxation instruments. First of all, a top priority throughout the different G-20 meetings has been the 'transparency and exchange of information for tax purposes'. In this regard, the OECD's Standards of Transparency and Exchange of Information for Tax Purposes play a central role.<sup>10</sup> The outcome report of the G-20 meeting of finance ministers and central bank governors of 20-21 November 2004 already 'calls on financial centres and other jurisdictions within and outside the OECD which have not yet adopted these standards to take the necessary steps, in particular in allowing access to bank and entity ownership information'.<sup>11</sup> In London in April 2009, the G-20 leaders reaffirmed the importance of the international fight against tax havens: '*We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over*'.<sup>12</sup> In Pittsburgh it was more specifically made explicit: '*We are committed to maintain momentum in dealing with tax havens... We welcome the expansion of the Global Forum on Transparency and Exchange of Information, ... The main focus of the Forum's work will be to improve tax transparency and exchange of information so that countries can fully enforce their laws to protect their tax base. We stand ready to use countermeasures against tax havens from March 2010*'.<sup>13</sup> Despite the Pittsburgh commitments, the G-20 has not stated what countermeasures were considered against tax havens. Recent developments suggest that such measures may include economic sanctions,

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<sup>5</sup> Washington Declaration, Summit on Financial Markets and the World Economy, 15 November 2008, §§ 5-9.

<sup>6</sup> Leaders' Statement, The Pittsburgh Summit, 24-25 September 2009, § 19.

<sup>7</sup> G-20, 'The Group of Twenty: A History', 2008, p. 5 and 24; N. Woods, 'The G20 leaders and Global Governance' *Global Economic Governance Programme Working Paper 2010/59*, Seoul, 27-29 September 2010, p. 4 (hereinafter referred to as N. Woods (September 2010)).

<sup>8</sup> J.J. Kirton, 'From G7 to G20: Capacity, Leadership and Normative Diffusion in Global Financial Governance, *International Studies Association Annual Convention*, Hawaii, March 1-5 2005, 7.

<sup>9</sup> N. Woods (September 2010), 4.

<sup>10</sup> On the OECD's contributions see *infra*, 3.3.

<sup>11</sup> G-20 Meeting of Financial Ministers and Bank Governors, Berlin, 20-21 November 2004, § 9.

<sup>12</sup> London Summit, Leaders' Statement, 2 April 2009: The Global Plan for Recovery and Reform, § 15.

<sup>13</sup> Leaders' Statement, The Pittsburgh Summit, 24-25 September 2009, § 15.

but the details are yet to be disclosed.<sup>14</sup> As Christians observes, ‘the prospect of imposing economic sanctions is a serious measure which raises difficult questions regarding the rights of nations to enforce legal standards upon each other outside a treaty or similar international agreement, as well as about the implications of imposing sanctions on small, impoverished countries’.<sup>15</sup> The global financial crisis has brought about new pressures to regulate tax havens, as the ‘light touch’ regulation of tax havens provided an important channel through which complex financial products -which were at the source of the financial turmoil- could be wrapped and distributed all over the global financial system.<sup>16</sup> The G-20 relies on the OECD’s Global Forum for the implementation of the fight against tax havens.<sup>17</sup> Moreover, in line with the OECD’s stance on tax havens, the G-20 does not impose any duty to exchange information automatically or to foreclose tax havens, but demands transparency and information exchange upon request. Following the Pittsburgh Declaration of September 2009, the four targeted jurisdictions that were on the OECD’s black list quickly promised to cooperate, and thereby succeeded to prevent to become the subject of possible sanctions. It has been argued that the G-20 did not adopt a tougher stance on the fight against tax havens as some G-20 Members are protecting tax havens themselves (eg.: China protecting Hong Kong and Macau, Britain protecting the Isle of Man, Guernsey and Jersey).<sup>18</sup> However this may be, since the G-20 at summit level is composed of Heads of State and Government, it tends to avoid taking stances on topics that are considered to be too politically sensitive.<sup>19</sup> Clearly, the G-20 relies on the OECD for the effective implementation of the fight against tax havens. This reliance can be explained from the G-20’s lack of operational and implementation capabilities to carry out its policy goals.<sup>20</sup> As indicated above, the G-20 intentionally remains an informal body.

The G-20’s explicit declarations regarding transparency and exchange of tax information stand in contrast with its much vaguer statements on the elaboration of new tax instruments that can raise States’ tax revenues. As decisions regarding such instruments are still considered an exclusive power of States, these discussions are politically much more sensitive. However, both the possibility of an environmental tax and of a tax on financial transactions have been discussed at G-20 summits. During the financial crisis, several countries were urged to intervene robustly in order to support the financial sector.<sup>21</sup> Consequently, at the Pittsburgh Summit, the G-20 tasked the IMF to prepare a report ‘with regard to the range of options countries have adopted or are considering as to how the financial sector could make a fair and substantial contribution toward paying for any burdens associated with government interventions to repair the banking system.’<sup>22</sup> At its Toronto Summit, after the submission

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<sup>14</sup> Ph. Aldrick, ‘G-20 summit: Blacklisted Tax Havens Face Sanctions’, *The Telegraph*, 3 April 2009; N. Mathieson, ‘Belize faces prospect of G20 sanctions over tax information’, *The Observer*, 7 February 2010.

<sup>15</sup> A. Christians, ‘Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20’, 5 *Northwestern Journal of Law and Social Policy*, 2010, 5 (hereinafter referred to as A. Christians (2010)). See also A. Christians, ‘Sovereignty, Taxation and Social Contract’, 18 *Minnesota Journal of International Law*, 2009, 99-123.

<sup>16</sup> Mah-Hui, ‘Old Wine in a New Bottle: the Subprime Mortgage Crisis- Causes and Consequences’, *Working Paper No. 532*, New York, Levy Economics Institute, 2008, especially 18-19; P. Webster, G. Hurst, S. Kennedy, ‘Northern Rock Nationalization Runs into £49bn Granite Barrier’, *The Times*, 21 February 2008; Christian Aid, ‘The Morning after the Night Before’, London, *Christian Aid*, 2009, especially 20-21.

<sup>17</sup> See *infra*, 3.3.

<sup>18</sup> D. Lesage, D. MacNair, M. Vermeiren, ‘From Monterrey to Doha: Taxation and Financing for Development’, *Development Policy Review*, 2010, 168 (hereinafter referred to as D. Lesage et al. (2010)); A. Neubacher, ‘The World’s Shortest Blacklist: Why the Fight against Tax Havens is a Sham’, *Spiegelonline*, April 2009.

<sup>19</sup> A. Christians (2010), 8-9.

<sup>20</sup> See *infra*, 3.1 for further elaboration on the OECD/ G-20 relationship.

<sup>21</sup> The fiscal cost of direct support has averaged 2,8 percent of GDP for advanced G-20 countries. See: IMF, ‘A Fair and Substantial Contribution by the Financial Sector, Final report for the G-20’, June 2010.

<sup>22</sup> Leaders’ Statement, The Pittsburgh Summit, 24-25 September 2009, § 16.

of the IMF report<sup>23</sup>, the G-20 declared that the financial sector should make a ‘fair and substantial contribution’ both to pay for financial interventions that were made in relation to the financial crisis as to reduce the risks for the financial system in the future.<sup>24</sup> However, regarding the measures to be taken, the G-20 underlined ‘that there are a range of policy approaches to this end’. Whereas with its statement the G-20 legitimized taxation of the financial sector in principle, it did not set any international standard regarding the measures to be taken, leaving this matter entirely to decisions to be taken at State level.<sup>25</sup>

One of the priorities set forward during the London Summit was ‘ensuring a fair and sustainable recovery for all’.<sup>26</sup> According to this principle, fiscal stimulus programmes should envisage a ‘resilient, sustainable and green recovery’. Furthermore, the London statement refers to the commitment ‘to address the threat of irreversible climate change, based on the principle of common but differentiated responsibilities’. Whereas the possibility of environmental taxation was discussed in the framework of the G-20 meetings<sup>27</sup>, no specific measures have been elaborated. Again, specific decisions on taxation remain in the hands of the State.

### 2.3. Legitimacy of the G-20 as a global actor

The G-20 consists out of 19 countries and the EU.<sup>28</sup> In addition, the Managing Director of the IMF, the President of the World Bank and the chairs of the International Monetary and Financial Committee and Development Committee of the IMF and World Bank also participate in G-20 meetings ‘on an *ex officio* basis’.<sup>29</sup> Together, the G-20 Members represent more than 85% of global GDP, 80% of world trade (including intra-EU trade), and two-thirds of the world’s population. There are no formal criteria for G-20 membership. In view of the objectives of the G-20, it was considered important that countries and regions of systemic significance for the international financial system would be included. The G-20 website states that next to economic criteria, aspects such as geographical balance and population representation also play a major role.<sup>30</sup> Compared to the composition of the G-7/8, the G20 is much more inclusive and reflects the ongoing power shifts and new political realities in the global economy.<sup>31</sup> However, even though the G-20 includes countries from every region of the world, western countries still outweigh the other regions’ countries.<sup>32</sup> Whereas the current economic criteria for membership can be defended from the viewpoint of efficiency, the lack of any requirements

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<sup>23</sup> See *infra*, 4.2.

<sup>24</sup> G-20 Toronto Summit Declaration, 26-27 June 2010, § 21.

<sup>25</sup> ‘Some countries are pursuing a financial levy. Other countries are pursuing different approaches’. See: G-20 Toronto Summit Declaration, 26-27 June 2010, § 21.

<sup>26</sup> London Summit, Leaders’ Statement, 2 April 2009: The Global Plan for Recovery and Reform, § 25.

<sup>27</sup> See also Leaders’ Statement, The Pittsburgh Summit, 24-25 September 2009, § 5; G-20 Toronto Summit Declaration, 26-27 June 2010, §§ 10 and 41.

<sup>28</sup> These 19 countries are (in alphabetical order): Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom and the United States.

<sup>29</sup> G-20, ‘What is the G-20’ and ‘FAQ’, available at [www.g20.org](http://www.g20.org).

<sup>30</sup> *Ibid.*

<sup>31</sup> See J. J. Kirton, ‘The G-20: Representativeness, Effectiveness, and Leadership in Global Governance’, in J.J. Kirton, J.P. Daniels and A. Freytag (eds.), *Guiding Global Order. G 8 Governance in the 21st century*, Aldershot, Ashgate, 2010, 143; U. Krotz and R. Maher, ‘Europe in the New World: National Governments and the EU at the G-20’ 39 *Perspectives on Europe*, Council for European Studies, 2009, 26-27.

<sup>32</sup> South Africa is for example the only country from the African region. See E. Suruma, ‘It’s Time for Africa’s Voice in the G-20’, *Recovery or Relapse: The Role of the G-20 in the Global Economy*, Global Economy and Development at Brookings, 2010, 13-14; N. Woods, ‘Global Governance after the Financial Crisis: A New Multilateralism or the Last Gasp of the Great Powers?’, *Global Policy*, 2010, 1 (hereinafter referred to as N. Woods (2010)).

regarding democracy and the unequal regional representation pose a problem with regard to the principle ‘no taxation without representation’. However, so far, the G-20 has acted as a deliberative body, not as a centre of decision-making. In this respect, its strength has been to ‘put the relevant international organisations to work’, and even to reinvigorate their activities.<sup>33</sup> As long as the G-20 merely functions as a deliberative forum, its deliberations on tax policy appear legitimate. However, as the G-20 lacks institutional and implementation capabilities it depends on other international organisations to put its policy priorities into practice. In this regard, the legitimacy of these latter organisations is an essential prerequisite for legitimate international tax governance.

### 3. The contribution of the OECD: leading actor on international tax cooperation

#### 3.1. The OECD and fiscal policy

The OECD has long enjoyed a position of central importance in formulating and disseminating tax policy norms, labeling itself ‘the market leader in developing tax standards and guidelines’<sup>34</sup>, a characterisation that is widely recognized as accurate.<sup>35</sup> The OECD’s Committee on Fiscal Affairs brings together senior tax officials from OECD Member States<sup>36</sup>, complemented by the representatives of Argentina, China, India, Russia and South Africa. The Committee determines the OECD’s work programme in the tax area and provides a forum for exchanging views on tax policy and administrative issues. The core fiscal issues the OECD deals with are tax policy analysis and statistics, tax conventions, and international tax co-operation. The OECD’s Current Tax Agenda of June 2010 refers to the important fiscal implications of the financial crisis and underlines the need for fiscal recovery that ensures fair and sustainable fiscal consolidation, much in line with the G-20’s approach.<sup>37</sup> As indicated above, the G-20 depends on the OECD for the elaboration and implementation of its tax discourse. Accordingly, the OECD performs supportive functions for the G-20. On the other hand, the G-20 elevates some of the OECD’s tax activities to the top of the international policy-making agenda.<sup>38</sup> Accordingly, the relationship between the G-20 and the OECD is described as a ‘symbiotic relationship’.<sup>39</sup> The OECD’s Tax Agenda proposes several tax measures that are to ensure fiscal sustainability (*inter alia* property taxes, environmentally-related taxes, and taxes paid by the financial sector), but again stresses that the States decide how best to reduce their budget deficits.<sup>40</sup> The OECD’s approach regarding the tackling of the financial crisis is in line with its

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<sup>33</sup> For example regarding the implementation and elaboration of the OECD’s Standards of Transparency and Exchange of Information for Tax Purposes (*infra*, 3.3.), or the IMF’s expertise regarding a fiscal contribution of the financial sector (*infra*, 4.2.). N. Woods, (September 2010), 9; R. Eccleston, P. Carroll, A. Kellow, ‘Handmaiden to the G-20? The OECD’s evolving role in global economic governance’, *Paper presented to the 2010 Australian Political Studies Association Conference*, Melbourne, 9-10 (hereinafter referred to as R. Eccleston et al (2010)).

<sup>34</sup> OECD, ‘OECD’s Current Tax Agenda’, June 2010, 74-75.

<sup>35</sup> Y. Brauner, ‘An International Tax Regime in Crystallisation’, *56 Tax Law Review*, 2003, 259; A.J. Cockfield, ‘The Rise of the Informal ‘World Taxation Organization’ Through National Responses to E-Commerce Tax Challenges’, *89 Yale J.L. & Tech.* 2006, 136; A. Christians (2010), 2.

<sup>36</sup> Currently, the OECD consists of 34 Member States (in alphabetical order): Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

<sup>37</sup> See *infra*, 1.1.-1.2.

<sup>38</sup> See *infra*, 3.3.

<sup>39</sup> R. Eccleston, et al. (2010), p. 4; A. De Guttery, ‘The institutional Configuration of the G-7 in the New International Scenario’, *The International Spectator*, 29(2), 1994, 70.

<sup>40</sup> ‘OECD’s Current Tax Agenda’, June 2010, 15-17.

overall tax policy: the emphasis is put on cooperation between the relevant fiscal actors rather than tax harmonisation, respecting the principle of fiscal sovereignty.<sup>41</sup>

### **3.2. Tax analysis and tax dialogue: international cooperation**

The OECD aims to assist policy-makers in designing tax policies, by undertaking tax policy analysis from an international comparative perspective. Furthermore, the OECD enables an International Tax Dialogue (ITD) in order to ‘facilitate discussion of tax matters’ and to ‘share good practices and pursue common objectives in improving the functioning of national systems’.<sup>42</sup> The ITD was initiated principally in response to the call by the UN’s Monterrey Financing for Development Conference for more international dialogue on tax matters.<sup>43</sup> By increasing dialogue and strengthening national tax systems, the ITD assists in the mobilisation of tax revenues for development. The ITD’s approach is to build on the strengths of existing organisations and to promote an inclusive forum where all organisations interested in the issues can come together. The ITD is a collaborative project involving the European Commission, the Inter-American Development Bank, the IMF, the OECD, the UK Department for International Development and the World Bank to encourage and facilitate discussion of tax matters among national tax officials, international organisations, regional development banks and other key stakeholders. It brings together actors of different levels (global, regional and national level) and thus allows for both horizontal and vertical interaction among the relevant fiscal players. As each actor delivers input regarding expertise at its own level, the forum enables an inclusive dialogue. The ITD has no binding force and does not ensure the implementation of international standards at national level, but rather aims to strengthen national tax policy through the sharing of best practices in the framework of an inclusive, international forum.

### **3.3. Standards of Transparency and Exchange of Information**

Since its inception, the OECD has been trying to establish a coordinated response to international tax evasion.<sup>44</sup> In 2006, the majority of academic analysts agreed that the OECD’s Harmful Tax Competition Initiative had failed to achieve its objective of undermining the role of tax havens in international tax avoidance and evasion.<sup>45</sup> However, the global financial crisis ignited broader political interest regarding the topic, with the G-20 focusing on the OECD as central institution to realize the fight against tax havens.<sup>46</sup> The Standards of Transparency and Exchange of Information that have been developed by the OECD are primarily contained in article 26 of the OECD Model Tax Convention and the 2002 Model Agreement on Exchange of Information on Tax Matters. The standards require (1) the exchange of information on request where it is ‘foreseeably relevant’ to the administration and enforcement of the domestic laws of the treaty partner, (2) no restrictions on exchange caused by bank secrecy or domestic tax interest requirements, (3) availability of reliable information and powers to obtain it, (4) respect for taxpayers’ rights, and (5) strict confidentiality of information exchanged. Today, the standards are universally endorsed<sup>47</sup>, and the UN has incorporated the OECD standards in

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<sup>41</sup> ‘OECD’s Current Tax Agenda’, June 2010, 97.

<sup>42</sup> ‘OECD’s Current Tax Agenda’, June 2010, 110.

<sup>43</sup> See *infra*, 3.2.

<sup>44</sup> See for a more elaborated historical overview: R. Eccleston, et al. (2010), 6-10; K. Carlson, ‘When Cows have Wings: an analysis of the OECD’s tax heaven work as it relates to globalization, sovereignty and privacy’, *J. Marshall Law Review* 163, 2002, 165-172 (hereinafter referred to as K. Carlson (2002)).

<sup>45</sup> R. Eccleston, et al., 7.

<sup>46</sup> See *supra*, 2.1.

<sup>47</sup> See OECD, ‘Promoting Transparency and Exchange of Information for Tax Purposes’, September 2010, available at: <http://www.oecd.org/dataoecd/32/45/43757434.pdf>; A. Christians (2010), 2.

the UN Model Tax Convention, enhancing a uniform global approach regarding the fight against tax evasion.<sup>48</sup>

In order for the standards to take effect, they have to be implemented by countries through the conclusion of tax information exchange arrangements (TIEA). Whereas only 46 agreements were signed until 2008, the political endorsement by the G-20 resulted in 374 signed TIEA's by 2010.<sup>49</sup> Signing agreements is a necessary step towards full implementation of the standard; but it is also necessary that these agreements enter into force and are effectively implemented. In order to monitor and trigger effective exchange, the Global Forum on Transparency and Exchange of Information for Tax Purposes was restructured and strengthened in September 2009.<sup>50</sup> The Global Forum received a three year mandate to peer review all the members and other jurisdictions that require 'special attention'. The peer reviews will encompass two phases: phase one will review the national legal and regulatory frameworks, while phase two will assess the practical implementation of the standard. The reports will include recommendations to improve the situation in the reviewed jurisdictions. As the Global Forum's reviews only started recently, the effectiveness of the monitoring process is not yet clear. In any case, the take-off of the Global Forum's review is a significant step in global tax governance as it goes beyond the mere elaboration of international tax standards. The focus of the Global Forum shifted from enabling TIEA, towards the triggering of effective implementation of the international transparency standards on the national level, the traditional 'Achilles heel' of attempts to regulate international tax evasion.<sup>51</sup> Again, the establishment of the Global Forum has been facilitated thanks to the support expressed by the G-20.<sup>52</sup> The symbiotic relationship between the G-20 and OECD is essential for the international efforts in the field of transparency and exchange of information: while the OECD has been able to advance its agenda thanks to attention paid to the topic by the G-20, the G-20 requests the OECD to deliver reports and assigns monitoring functions to it. On this point too, it is argued that the international efforts of the G-20 and OECD are not tough enough, as they do not impose automatic information exchange or close tax havens down but merely demand 'transparency' and 'information exchange upon request', allowing tax havens to be taken from the OECD's black list through partial compliance with information exchange.<sup>53</sup>

### ***3.4. OECD/ Council of Europe Convention on Administrative Assistance***

The Convention on Mutual Administrative Assistance in Tax Matters is the result of work carried out jointly by the Council of Europe and by the OECD. The Convention was opened for signature by the Member States of the Council of Europe and of the OECD on 25 January 1988. The Convention is currently binding for 14 States.<sup>54</sup> The scope of the Convention is broad; it covers a wide range of taxes and goes beyond exchange of information on request. It provides for other forms of assistance, such as

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<sup>48</sup> Article 26 of the UN Model Double Taxation Convention was amended in order to adopt the OECD's Standard. See *infra*, 4.1.

<sup>49</sup> R. Eccleston, et al. (2010), 9.

<sup>50</sup> See Global Forum, 'Summary of Outcomes of the Meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes Held in Mexico on 1-2 September 2009', available at <http://www.oecd.org/dataoecd/44/39/43610626.pdf>.

<sup>51</sup> R. Eccleston, et al. (2010), 10.

<sup>52</sup> Leaders Statement, The Pittsburgh Summit, 24-25 September 2009, § 15; R. Eccleston, et al., 8.

<sup>53</sup> D. Lesage et al. (2010), 168; Tax Justice Network, 'UN tax committee warms up for its new mandate', 27 August 2009: 'As regular TJN readers know this body (i.e. OECD) is allowing secrecy jurisdictions to be whitelisted just as soon as they sign half-hearted information exchange agreements with another dirty dozen countries such as themselves'.

<sup>54</sup> Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, The Netherlands, Norway, Poland, Sweden, United Kingdom, United States and Ukraine. Canada, Germany, Korea, Mexico, Portugal, Slovenia and Spain have signed the Convention but not yet ratified it. See: OECD, 'Convention on Mutual Assistance in Tax Matters', May 2010, available at: [http://www.oecd.org/document/14/0,3343,en\\_2649\\_33767\\_2489998\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/14/0,3343,en_2649_33767_2489998_1_1_1_1,00.html).

spontaneous exchanges of information<sup>55</sup>, simultaneous examinations, performance of tax examinations abroad, service of documents, assistance in recovery of tax claims and measures of conservancy. As the Convention was drafted before the elaboration of the Standards on Transparency and Exchange of Information, the assistance covered by the Convention is subject to limitations existing in domestic laws. In particular, the Convention does not require the exchange of bank information on request nor does it override any domestic tax interest requirement. In order to bring the Convention in line with the internationally adopted standards, an amending Protocol to the OECD/ Council of Europe Convention has been drafted and opened for signature on 27 May 2010.<sup>56</sup> To date, 16 countries signed the Protocol, while none did ratify it yet.<sup>57</sup> Through the impetus of the OECD's International Standards on Exchange of Information<sup>58</sup>, and the political importance attached to the fight against tax evasion by the G20<sup>59</sup>, the Protocol to the OECD/ Council of Europe Convention has been opening up the door for 'internationalization' of the OECD/ Council of Europe Convention. Contrary to the aforementioned international standards, the Convention contains legally binding obligations for the parties. This partly explains why the Protocol has not yet been ratified by any country, and did not yet enter into force. However, its elaboration affirms the important shift in the area of international exchange of information and administrative tax cooperation from international policy towards binding international legal instruments.

### 3.5. The OECD's legitimacy

Thanks to the OECD's expertise regarding international tax cooperation, its agenda has been put forward on the international plane by the G-20. Whereas the OECD's decisions consequentially target the whole world, only a small (and declining) part of the targeted countries are included in OECD negotiations. As the OECD asserts itself: *'In the 1970s, the OECD was comprised of all major market economies comprising a vast share of world production and trade. That share is diminishing and long-term projections indicate that this trend should accelerate as the world economy develops and more countries share in the benefits of globalisation. In order to remain an influential actor in the global architecture of international policy analysis, dialogue and rule-making, the OECD must innovatively and selectively adjust its membership to the new global context.'*<sup>60</sup> The OECD's Strategy for Enlargement and Outreach (May 2004) resulted in the OECD Council resolution on Enlargement and Enhanced Engagement of 16 May 2007. In the 2007 resolution, the Council took several decisions in view of the envisaged enlargement of the OECD. Firstly, it decided to open discussions on accession with Chile, Estonia, Israel, the Russian Federation and Slovenia. Today, three out of these four are Member States of the OECD: Chile (the first South-American Member State), Estonia, Israel and Slovenia. The accession of the Russian Federation is still 'underway'. Moreover, the Council put forward the strengthening of OECD co-operation with five non-members that are emerging economies (Brazil, China, India, Indonesia and South Africa) through enhanced engagement programmes. Each country involved in an enhanced engagement programme participates in OECD work through a

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<sup>55</sup> This form of assistance requires a preliminary agreement between the competent authorities of the Parties willing to provide each other information automatically.

<sup>56</sup> Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters, 27 May 2010, available at: <http://conventions.coe.int>.

<sup>57</sup> These are Czech Republic, Finland, France, Iceland, Italy, Korea, Mexico, Netherlands, Norway, Poland, Portugal, Slovenia, Sweden, Ukraine, UK, USA. List available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=208&CM=12&DF=15/10/2010&CL=ENG>.

<sup>58</sup> See *supra*, 3.3.

<sup>59</sup> See *supra*, 2.2.

<sup>60</sup> OECD, 'A Strategy for Enlargement and Outreach', Report by the Chair of the Heads of Delegations Working Group on the Enlargement Strategy and Outreach, Ambassador Seiichiro Noboru, 13 May 2004, available at <http://www.oecd.org/dataoecd/24/15/37434513.pdf>.



programme containing a mix of several elements: (1) participation in OECD committees, (2) regular economic surveys, (3) adherence to OECD instruments, (4) integration into OECD statistical reporting and information systems, (5) policy-specific peer reviews. Furthermore, the OECD established regional programmes that focus on specific regions in the world.<sup>61</sup> Even though the OECD seeks to involve non-western countries in its work, its membership still predominantly comprises western States.<sup>62</sup> However, as the OECD's decisions strongly affect non-members, these should preferably be included in the decision-making process. As Carlson observes (in line with the Regional Position Statement of the Pacific Islands Forum)<sup>63</sup>: 'Input from all parties likely to be affected is needed to respect each party's sovereign right to regulate its own fiscal policies. The OECD, an exclusive membership of the leading industrialized nations, is not the appropriate forum for a worldwide discussion regarding global tax competition.'<sup>64</sup> The concern for more representativeness is all the more significant in view of the fact that the OECD itself subscribes to the principle that taxation remains an important element of national sovereignty.<sup>65</sup>

## **4. The contribution of the UN: development and good governance in tax**

### **4.1. UN Model Double Taxation Convention**

Contrary to the G-20 and the OECD, the UN is a universal organisation, comprising 192 Member States. This inclusive membership influences the UN's tax work, which explicitly aims to support developing countries' tax policy. The UN Model Double Taxation Convention between Developed and Developing countries (1980, revised in 2001) is an important contribution in this regard. By providing legal and fiscal certainty, the UN Convention aims to prevent double taxation and discrimination among tax payers on the international plane and to do away with the discouraging effect of taxes for the free flow of international trade and investment and the transfer of technologies.<sup>66</sup> As the introductory note of the 2001 revised Convention reflects: '*The growth of investment flows from developed to developing countries depends to a large extent on what has been referred to as the international investment climate. The prevention or elimination of international double taxation... constitutes a significant component of such a climate.*'<sup>67</sup> The creation of a network of bilateral tax treaties based on a common model is seen as a step on the way to the eventual conclusion of regional or sub-regional conventions for the avoidance of double taxation. The 2001 revision of the Convention resulted in the implementation of the International Standard on Exchange of Information as elaborated in the OECD framework.<sup>68</sup>

The review and update of the UN Model Double Taxation Convention is placed under the surveillance of a Committee of Experts on International Cooperation in Tax Matters. The Committee

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<sup>61</sup> Currently, Southeast Asia (a region of strategic priority), Africa, Central and Eastern Europe, the Caucasus and Central Asia, Latin America, the Middle East and North Africa, and South-East Europe are involved in regional programmes.

<sup>62</sup> Lesage et al. (2010), 164: 'Northern countries see the OECD as the privileged forum to discuss international tax matters, if necessary with outreach to non-members and developing countries.'

<sup>63</sup> Regional Position Statement, Pacific Islands Forum, to the OECD, 28 April 2002, §§ 9, 10 and 12, available at <http://www.forumsec.org.fj/news/2001/apr13.htm> .

<sup>64</sup> K. Carlson (2002), 180.

<sup>65</sup> See *supra*, 3.1.

<sup>66</sup> UN Double Taxation Convention, Introduction, A, § 2.

<sup>67</sup> UN Department of Economic and Social Affairs, 'UN Model Double Taxation Convention between Developed and Developing Countries', 2001, ST/ESA/PAD/SER.E/21, Introduction, § 2, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/676/65/PDF/N0067665.pdf?OpenElement> .

<sup>68</sup> Article 26 UN Double Taxation Convention, was adapted to be in line with article 26 of the OECD Model Convention. See above: 3.3.

comprises 25 members nominated by governments, acting in their expert capacity. The members are appointed for a term of four years, drawing from the fields of tax policy and tax administration, and have to reflect an adequate equitable geographical distribution that represents different tax systems. Next to supervision of the UN Model Double Taxation Convention, the Committee is mandated to (1) provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities, (2) consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries and appropriate recommendations, (3) make recommendations on capacity-building and the provision of technical assistance to developing countries and countries with economies in transition, and (4) give special attention to developing countries and countries with economies in transition in dealing with (1) to (3). However, criticism has been voiced that the UN Tax Committee is too weak in terms of political clout and resources (only two UN staff members support the Committee) to engage in substantial issues other than updating the UN Model Double Taxation Convention.<sup>69</sup> In other words, even though the UN provides as such a more inclusive and legitimate forum to elaborate global tax policy<sup>70</sup>, it lacks the institutional capacity to do so.<sup>71</sup>

#### **4.2. Monterrey and Doha: good governance, tax and development**

On 21 and 22 March 2002, the UN organized an International Conference on Financing for Development in Monterrey, resulting in the so-called “Monterrey Consensus”. The Monterrey Consensus puts forward the goal to ‘eradicate poverty, achieve sustained economic growth and promote sustainable development’ in the context of the emerging global economic system.<sup>72</sup> Next to the need of national development efforts, the Consensus recognizes the ‘urgent need to enhance coherence, governance, and consistency of the international monetary, financial and trading systems’. In the Monterrey Consensus taxation is rarely mentioned. In Chapter 6 on institutional issues, the UN ‘encourages’ the international community to ‘strengthen international tax cooperation, through enhanced dialogue among national tax authorities and greater coordination of the work of the concerned multilateral bodies and relevant regional organizations, giving special attention to the needs of developing countries and countries with economies in transition’<sup>73</sup>. In contrast, the preparatory reports of UN Secretary-General Kofi Annan<sup>74</sup> and the High-Level Panel chaired by the former Mexican President Ernesto Zedillo<sup>75</sup> had elaborated on several tax-related issues in more detail.

As a follow-up to the Monterrey Conference, a Conference was organized in Doha on 29 November-2 December 2008. The Doha Declaration resulting therefrom reaffirms the Monterrey Consensus and underlines again the importance of effective global economic governance structures that include low-income countries.<sup>76</sup> The Doha Declaration contains more references to taxation than the Monterrey Consensus. In the chapter on domestic resource mobilisation, the Declaration states that attention should be paid to step up efforts to enhance tax revenues through modernized tax systems,

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<sup>69</sup> Lesage et al. (2010), 163; Tax Justice Network, ‘UN is failing on tax –so the OECD calls the shots’, 20 June 2008, available at: <http://www.taxjustice.blogspot.com/2008/06/un-is-failing-on-international-tax-so.html> .

<sup>70</sup> K. Carlson (2002), 186.

<sup>71</sup> A. Christians (2010), 12.

<sup>72</sup> UN, ‘Monterrey Consensus of the International Conference on Financing for Development’, 2003, available at: <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> .

<sup>73</sup> Monterrey Consensus, § 64.

<sup>74</sup> UN, ‘Report of the Secretary-General to the Preparatory Committee for the High-Level International Intergovernmental Event on Financing for Development’, A/AC.257/12, New York, 18 December 2000.

<sup>75</sup> UN, ‘Report of the High-Level Panel on Financing for Development’, A/55/1000, New York, 26 June 2001.

<sup>76</sup> UN, ‘Doha Declaration on Financing for Development’, A/CONF.212/L.1/Rev.1\*, §§ 16 and 78, available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/CONF.212/L.1/Rev.1> .

more efficient tax collection, broadening the tax base and effectively combating tax evasion, with an overarching view to make tax-systems more 'pro-poor'. While the Doha Declaration recognizes that each country is responsible for its own tax system, it underlines the importance of international cooperation in order to support national fiscal policies and the need to strengthen the international institutional arrangements regarding tax matters. While the Declaration's references to tax remain vague, Doha can be seen as a success because the issue of taxation gained a lot of ground at the ideological level: 'in contrast to Monterrey, in Doha the topic was prominently present in the draft outcome documents, interventions from important players, side-events and civil-society lobbying... This is a major achievement. Sowing new ideas and concepts, even without actual decisions or firm official declarations, is precisely one of the functions of the UN and processes like Financing for Development.'<sup>77</sup> Notably, important supporters for a tax and development agenda in Doha were OECD officials.

In response to the Monterrey and Doha calls upon the international community to step up its efforts regarding international tax governance (and in line with the tax priorities determined by the G-20 and the OECD), the European Commission elaborated a 2009 Communication on 'good governance in tax matters' and a 2010 Memorandum on 'Tax and development: promoting good governance in taxation as part of development cooperation'.<sup>78</sup> The Communication provides a series of steps to promote good governance in the tax area, entailing action in the field of the EU's internal and external policy, and at the EU and Member State level. Amongst other measures, it proposes to include a reference to 'good governance in the tax area' within general agreements with third countries, as well as the inclusion of provisions on transparency and exchange of information for tax purposes into these agreements. This is an important proposal, as it would integrate the concept of good tax governance into legally binding agreements. Furthermore, the Communication underlines that coherence should be envisaged between EU financial support and provisions of access to the EU markets with the principles of good governance in the tax area. In this regard, the Commission believes that efforts at EU level to promote good governance in the tax area in third countries eligible for development aid should be enhanced by monitoring the implementation of good governance, technical assistance, and proposing the inclusion of a specific provision related to good governance in the tax area under the review of the Cotonou Agreement. Moreover, the Communication pays specific attention to the need for European international tax policy coordination, i.e. coherence between tax policies of Member States, coherence between bilateral tax treaties of Member States with third countries, a unified EU approach towards third countries and a better coordination of EU Member States' positions in discussions at the OECD, G20 and UN on international good governance in the tax area.

These European Commission initiatives reflect how tax policy-related initiatives at the global level (cf. the Monterrey Consensus and Doha Declaration) can trickle down to lower (regional and national) levels of policy-making, where they can be translated into more concrete action. The UN concept of 'good tax governance' has been fleshed out by the European Commission in the aforementioned documents. This example underlines that global tax governance implies a multi-actor and multi-level process which requires cooperation between all the relevant actors. Whereas it is too soon to evaluate the implementation of the Commission's initiatives, the concept of 'good tax governance' has the potential to be translated 'from governance into law'.

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<sup>77</sup> Lesage et al. (2010), 169.

<sup>78</sup> Respectively 'Communication from the Commission to the Council, the European Parliament, and the European Economic and Social Committee: 'Promoting Good Governance in Tax Matters', \*COM/2009/0201final\*/, 28 April 2009; 'Tax and development: promoting good governance in taxation as part of development cooperation', MEMO/10/146, 21 April 2010.

## 5. The IMF: technical analyser and advisor

### 5.1. The IMF and tax policy

As indicated above<sup>79</sup>, the G-20 assigns tax policy tasks also to the IMF. The latter has been described as ‘one of a range of organizational instruments’ of the G-7/8/20.<sup>80</sup> As the IMF asserts itself: ‘*Even when the Fund showed itself to be crucial in crisis response, much of that responsiveness is seen to have been driven by political forces outside the institution—previously the G-7, now the G-20.*’<sup>81</sup> The IMF’s fiscal policy expertise is provided by the Fiscal Affairs Department (FAD). FAD has three main tasks: monitoring and analyzing global fiscal trends; advising IMF member countries on fiscal issues; and contributing to the design and implementation of IMF-supported programmes. The IMF is not known for coordinating tax policy among its member countries<sup>82</sup>; it rather exerts influence in the context of the technical advice it delivers. In the aftermath of the crisis, the fiscal surveillance of the IMF has gained importance. Accordingly, the IMF launched the Fiscal Monitor (2009), ‘*to survey and analyze the latest public finance developments, update reporting on fiscal implications of the crisis and medium-term fiscal projections, and assess policies to put public finances on a sustainable footing.*’<sup>83</sup> The 2010 Fiscal Monitor warns that the fiscal risk has risen: even though the global economy is recovering, the fiscal outlook in advanced economies is worsening, while the fiscal outlook in emerging and low-income economies is improving at a lower pace than expected.<sup>84</sup> While the report underlines that the needs for fiscal adjustment differ according to the specific circumstances in countries, it proposes several measures that could support fiscal adjustment in a sustainable manner. Specific attention is paid to the discussion of tax increases that are ‘less distortionary’, like elimination of below-standard VAT rates or an increase in tobacco and alcohol excises, carbon taxation, and property taxes.<sup>85</sup> These proposed measures lie much in line with the proposals of the G-20 and the OECD.<sup>86</sup> As Christians asserts: ‘the IMF is closely aligned with the OECD both in terms of dominant membership and ideology’.<sup>87</sup>

### 5.2. Technical expertise regarding fiscal policy measures

In the Leaders’ Statement emanating from the Pittsburgh Summit, the G-20 leaders task the IMF to prepare a report with regard to ‘the range of options countries have adopted or are considering as to how the financial sector could make a fair and substantial contribution toward paying for any burdens associated with government interventions to repair the banking system’.<sup>88</sup> In response, the IMF elaborated the report *A Fair and Substantial Contribution by the Financial Sector*<sup>89</sup> by June 2010, just before the G-20 Toronto Summit. In the report, the IMF finds that (net of the fiscal costs recovered so far) the fiscal cost of direct support has averaged 2.8 percent of GDP for advanced G-20 countries,

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<sup>79</sup> See *supra*, 2.2.

<sup>80</sup> R. Eccleston et al. (2010), 5.

<sup>81</sup> IMF, ‘IMF Governance—Summary of Issues and Reform Options’, 1 July 2009, available at <http://www.imf.org/external/np/pp/eng/2009/070109.pdf>.

<sup>82</sup> A. Christians (2010), 12, note 56.

<sup>83</sup> IMF, ‘Navigating the Fiscal Challenges Ahead’, *Fiscal Monitor, World Economic and Financial Survey*, 14 May 2010.

<sup>84</sup> *Fiscal Monitor* 2010, 5.

<sup>85</sup> *Fiscal Monitor* 2010, Section IV.

<sup>86</sup> See *supra*, for G-20, 2.1.-2.2.; for OECD, 3.1.

<sup>87</sup> A. Christians (2010), 12.

<sup>88</sup> Leaders Statement, The Pittsburgh Summit, 24-25 September 2009, § 16.

<sup>89</sup> IMF, ‘A Fair and Substantial Contribution by the Financial Sector’, June 2010, available at <http://www.imf.org/external/np/g20/pdf/062710b.pdf>.

while the amounts pledged averaged 25 percent of GDP during the crisis. Furthermore, government debt in advanced G-20 countries is projected to rise by almost 40 percentage points of GDP during 2008–2015.<sup>90</sup>

The report continues with an overview of the different measures that have been put forward by governments to recover the cost of direct fiscal support: levies related to selected financial sector claims (USA) and taxes on bonuses and specific financial transactions (UK and France).<sup>91</sup> The main objective of the report is, however, to discern measures that would limit and help to meet the costs of future crises.<sup>92</sup> The report proposes two modes of contribution from the financial sector: a financial stability contribution<sup>93</sup> (FSC), possibly complemented with a financial activities tax (FAT)<sup>94</sup>. The IMF report concludes by underlining the importance of international cooperation: ‘*Countries’ experiences in the recent crisis differ widely, and so do their priorities as they emerge from it. But none is immune from the risk of future failures and crises. Unilateral actions by governments risk being undermined by tax and regulatory arbitrage. Effective cooperation does not require full uniformity, but agreement on broad principles, including the bases and minimum rates of the FSC and FAT.*’<sup>95</sup>

The outcome of the IMF report on financial sector contributions served as input for the policy discussions at the G-20. However, whereas the IMF report stressed the importance of global cooperation regarding a financial sector contribution, the G-20 Toronto Declaration makes clear that a global approach of the issue has not (yet) been achieved. While the G-20 leaders agreed upon the need of a contribution of the financial sector for costs of financial risks, they did not provide any global approach regarding the measures to be taken, concluding that ‘there are a range of policy approaches to this end’.<sup>96</sup>

In March 2008, FAD elaborated a paper *The Fiscal Implications of Climate Change*<sup>97</sup>, another issue that is high on the G-20 agenda.<sup>98</sup> The report concludes that in order to mitigate climate change, fiscal instruments are needed ensuring that the full social cost of greenhouse gas emissions is borne by the emitters. The proposed fiscal instruments were carbon taxation, cap-and-trade, or a mix of both.<sup>99</sup> However, for effective implementation of these measures, worldwide efforts and solutions are necessary: as climate change is a global externalities problem, it demands international fiscal cooperation in order to overcome conceptual and implementation problems.<sup>100</sup> But again, when regard is had at the G-20 policy discussions, it becomes clear that, even though a ‘green recovery from the financial crisis’ stands high on the political agenda, no international guidelines regarding the implementation of environmental taxation are yet agreed upon.<sup>101</sup>

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<sup>90</sup> IMF, ‘A Fair and Substantial Contribution by the Financial Sector’, 2010, part II, A.

<sup>91</sup> IMF, ‘A Fair and Substantial Contribution by the Financial Sector’, 2010, part II, B.

<sup>92</sup> IMF, ‘A Fair and Substantial Contribution by the Financial Sector’, 2010, part III.

<sup>93</sup> A levy to pay for the fiscal cost of any future government support to the sector. This could accumulate in a fund, or be paid to general revenue. See IMF, ‘A Fair and Substantial Contribution by the Financial Sector’, 2010, 25.

<sup>94</sup> A levy on the sum of the profits and remuneration of financial institutions, and paid to general revenue. See IMF, ‘A Fair and Substantial Contribution by the Financial Sector’, 2010, 26.

<sup>95</sup> IMF, ‘A Fair and Substantial Contribution by the Financial Sector’, 2010, 26.

<sup>96</sup> G-20 Toronto Summit Declaration, 26-27 June 2010, § 21.

<sup>97</sup> IMF, Fiscal Affairs Department, ‘The Fiscal Implications of Climate Change’, March 2008, available at <http://www.imf.org/external/np/pp/eng/2008/022208.pdf>.

<sup>98</sup> See *supra*, 2.1-2.2.

<sup>99</sup> IMF, ‘The Fiscal Implications of Climate Change’, 2008, 12.

<sup>100</sup> IMF, ‘The Fiscal Implications of Climate Change’, 2008, 22-24.

<sup>101</sup> See *supra*, 1.2.

### 5.3. Fiscal transparency

In line with the G-20 and OECD priorities regarding fiscal transparency, the IMF has elaborated its own policy on the matter. In 1998, the IMF drafted a *Code of Good Practices on Fiscal Transparency* (reviewed in 2007; the ‘Code’).<sup>102</sup> The Code was developed as one of the contributions of the IMF to the Standards and Codes Initiative, a set of guidelines on governance designed to support improvements to the architecture of the international financial system. The Code identifies a set of principles and practices to help ensure that governments provide a clear picture of the structure and finances of government. The implementation of the Code is voluntary. To provide guidance on the Code’s implementation, the IMF published a *Manual on Fiscal Transparency* that elaborates the Code’s principles and practices in more detail and draws on experiences in member countries to illustrate good practices. Especially for countries that derive a significant share of revenues from oil and mineral sources, the IMF elaborated a *Guide to Resource Revenue Transparency*. The assessment procedure of countries’ fiscal transparency is also voluntary. Countries can undertake an assessment of their fiscal transparency, called the ‘fiscal transparency module of the Report on the Observance of Standards and Codes’ (‘fiscal transparency ROSC’). In this document, the country’s current practices are listed and country-specific priorities for improving fiscal transparency are established. Subsequently, countries can decide to publish the fiscal ROSC on the IMF’s Standard and Code’s website.<sup>103</sup> As of September 2010, 92 countries have posted their fiscal ROSCs on the IMF’s web page. The IMF’s ROSC does not contain sufficient standards and codes to ensure effective global tax transparency policy. As is the case with the OECD’s Standards, the IMF ROSC does not require the automatic reporting of information, and does not engage in automatic exchange of information on tax matters.<sup>104</sup> Moreover, while a high percentage of completed fiscal ROSCs have been published (around 90%), this generally occurs after exchanges with the targeted authorities over the wording of the ROSC.<sup>105</sup> Furthermore, the lack of ROSCs’ independence and objectivity has been criticised by some market participants in an IMF survey.<sup>106</sup> Clearly, the IMF’s fiscal transparency procedures do not guarantee any practical or effective outcome, as the implementation depends on both the willingness and the capability of individual States. However, the IMF procedures can be valuable: in some instances they have raised the profile of institutional weaknesses and specific concerns over fiscal data quality in the IMF’s surveillance discussions with country authorities, and helped focus the IMF’s technical assistance.<sup>107</sup> As said before, the IMF’s strength lies not in the coordination of national tax policy, but rather in the technical advice it delivers.

### 5.4. The IMF’s legitimacy

In spite of its 183-countries membership, criticism has been voiced as to the IMF’s inclusiveness. ‘In fact, dissatisfaction with Fund governance well pre-dates the crisis, reflecting a sense of waning relevance (given ascendant private capital markets), effectiveness (demonstrated by the Fund’s inability to tackle global imbalances), and legitimacy (with institutional structures described as “outmoded and feudalistic”).’<sup>108</sup> Each member country of the IMF is assigned a quota, based broadly

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<sup>102</sup> IMF, ‘Fiscal Transparency’, available at <http://www.imf.org/external/np/fad/trans/index.htm> .

<sup>103</sup> Available at <http://www.imf.org/external/np/rosc/rosc.asp> .

<sup>104</sup> D. Spencer, ‘The IMF and capital flight: Redesigning the international financial architecture’, January 2006, 2, available at: [www.brettonwoodsproject.org](http://www.brettonwoodsproject.org) .

<sup>105</sup> M. Petrie, ‘Promoting Fiscal Transparency: the Complementary Roles of the IMF, Financial Markets, and Civil Society’, *IMF Working Paper WP/03/199*, October 2003, 12.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Idem*, 5.

<sup>108</sup> IMF, ‘IMF Governance—Summary of Issues and Reform Options’, 1 July 2009, available at <http://www.imf.org/external/np/pp/eng/2009/070109.pdf> .

on its relative size in the world's economy. A member's quota determines its maximum financial commitment to the IMF and its voting power, and has a bearing on its access to IMF financing.<sup>109</sup> On 18 September 2006, the Board of Governors of the IMF adopted a Resolution on Quota and Voice Reform in the IMF (the 'Singapore Resolution')<sup>110</sup>, aiming to better align the IMF's quota shares with members' relative positions in the world economy, to make it more responsive to changes to the global economy, as well as enhancing the participation and voice of low-income countries in the IMF.<sup>111</sup> The Singapore Resolution increased on an *ad hoc* basis the quota of the most underrepresented countries: China, Korea, Mexico and Turkey. Furthermore, it requested the IMF Executive Board to reach an agreement on a new quota formula. In April 2008, the Board of Governors agreed on a new reform package. The 'Amendment on Voice and Participation' contained 5 important new elements: (1) a new quota formula, (2) *ad hoc* quota increases for all 54 countries that were underrepresented under the new quota formula, (3) tripling the number of basic votes to increase the voice of low-income countries, as well as protection of the share of the basic votes in total voting power going forward, (4) providing resources for an additional Alternate Executive Director for the two African chairs represented on the IMF's Executive Board, and (5) realigning quota and voting shares every five years.<sup>112</sup> In order for the 2008 package reforms to enter into force, acceptance of the Amendment on Voice and Participation by 112 member countries, representing at least 85 percent of total voting power, is required. The IMF 2008 reforms were given political support by the G-20: in the Leaders' Statement of the London Summit, the G-20 states that '*we commit to implementing the package of IMF quota and voice reforms agreed in April 2008 and call on the IMF to complete the next review of quotas by January 2011*'.<sup>113</sup> However, this political support did not engender the necessary acceptance by IMF member countries to let the 2008 package enter into force: at the moment, only 91 members have accepted the Amendment on Voice and Participation.<sup>114</sup> Even if the 2008 package would enter into force, developing countries will remain underrepresented. Whereas the 2008 reform intends to enhance the African capacity at the IMF through the introduction of additional alternate directors, several elements impede the effectiveness of these representatives.<sup>115</sup> Other board members will not be inclined to heed them, as they do not have sufficient votes to matter, nor are decision-making procedures in place that create incentives for others to consult them.

Woods identifies five elements that should be changed in order to make the IMF an inclusive institution: the strategic directorate should include emerging economies, the appointment of the senior management should not be a privilege of the EU and US, effective oversight of the management of the IMF should be carried out by the Executive Board (not by the Managing Director), the US veto should be suppressed, and a requirement that a majority of countries as well as a majority of voting power is required to pass some measures should be introduced so as to create an incentive for the small number of rich and powerful member countries to consult with the large number of poor and vote-poor member countries.<sup>116</sup>

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<sup>109</sup> IMF, Factsheet, IMF Quotas, 29 September 2010, available at <http://www.imf.org/external/np/exr/facts/quotas.htm>.

<sup>110</sup> IMF, 'Quota and Voice Reform in the International Monetary Fund', Resolution 61-5, 18 September 2006, available at <http://www.imf.org/external/np/pp/eng/2006/122206a.pdf>, (Appendix 1).

<sup>111</sup> IMF, 'Quota and Voice Reform in the International Monetary Fund', Resolution 61-5, 18 September 2006.

<sup>112</sup> IMF, Reform of Quota and Voice in the International Monetary Fund- report of the Executive Board to the Board of Governors', March 28, 2008. For the text of the Resolution on Quota and Voice Reform in the IMF (2008), see Appendix I, available at <http://www.imf.org/external/np/pp/eng/2008/032108.pdf>.

<sup>113</sup> London Summit, Leaders Statement, 2 April 2009; Declaration on Strengthening the Financial Summit, § 20.

<sup>114</sup> For a full list of the countries that accepted the package reforms, see <http://www.imf.org/external/np/sec/misc/consents.htm>.

<sup>115</sup> See N. Woods, 'The International Response to the global crisis and the reform of the international financial and aid architecture', *Briefing Paper to the Directorate-General for External Policies of the Union EXPO/B/DEVE/2009/21*, September 2009, 14 (hereinafter referred to as N. Woods (2009)).

<sup>116</sup> N. Woods (2009), 17.

## 6. The WTO: the SCM Agreement

### 6.1. The SCM Agreement in general

The WTO is not mandated to regulate tax policies of its Members. However, WTO rules can affect WTO Members' tax regulation in an indirect manner, as is the case for taxes that fall under the definition of a 'subsidy' of the WTO Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement'). The SCM Agreement targets trade distortive subsidies and regulates the response by other countries of subsidisation (i.e. the imposition of countervailing measures).<sup>117</sup> Pursuant to the SCM Agreement, a subsidy will be deemed to exist if two distinctive elements are present: (i) a financial contribution by a government<sup>118</sup> or any form of income or price support in the sense of Article XVI of the GATT<sup>119</sup>, (ii) that confers a benefit.<sup>120</sup> Moreover, to be subject to the disciplines of the SCM Agreement, the subsidy must be specific.<sup>121</sup> Article 1.1.(a)(1) of the SCM Agreement points to three different kinds of financial contributions: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods. Accordingly, through the application of Article 1.1.(a)(1)(ii) of the SCM Agreement, fiscal policies of WTO Members can be made subject to WTO scrutiny.

### 6.2. Influence on tax policy: the US- FSC case

Whereas the list of Article 1.1(a)(1) of the SCM Agreement is exhaustive, the WTO adjudicating bodies interpret it in a broad manner.<sup>122</sup> Also the interpretation of the financial contribution under 1.1.(a)(1)(ii) - government revenue that is otherwise due is foregone or not collected- is expansive. Next to social security obligations, the two major sources of government revenue are direct (raised on income) and indirect (raised on products) taxes, and import duties. WTO case law has dealt with cases concerning revenue alleged to be foregone under both sources. The SCM Agreement excludes from the definition of subsidy the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption or the remission of such duties or taxes in amounts not in excess of those that have accrued.<sup>123</sup> The Appellate Body in *US-FSC* confirmed that direct taxes are not covered by this exception.<sup>124</sup>

Regarding the question when other tax measures are to be considered a financial contribution, WTO adjudicating bodies provided insight in the *US-FSC* case.<sup>125</sup> In this politically sensitive case, the EU challenged the U.S. income tax exemption for foreign sales corporations (FSCs) under the SCM Agreement. The US tax system is a worldwide tax system because it taxes (in general) income of US

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<sup>117</sup> J. Wouters and B. De Meester, *The World Trade Organization, A Legal and Institutional Analysis*, Intersentia, 2007, 79.

<sup>118</sup> Article 1.1(a)(1) of the SCM Agreement.

<sup>119</sup> Article 1.1(a)(2) of the SCM Agreement.

<sup>120</sup> Article 1.1(b) of the SCM Agreement.

<sup>121</sup> Article 1.2 of the SCM Agreement.

<sup>122</sup> J. Wouters and D. Coppens, 'An Overview of the Agreement on Subsidies and Countervailing Measures - Including a Discussion of the Agreement on Agriculture', in K.W. Bagwell, G.A. Bermann and P.C. Mavroidis (eds.), *Law and Economics of Contingent Protection in International Trade*, Cambridge University Press, 2010, p. 15 (hereinafter referred to as J. Wouters and D. Coppens (2010)).

<sup>123</sup> Footnote 1 to Article 1.1(a)(1)(ii) of the SCS Agreement.

<sup>124</sup> See Appellate Body Report, *United States- Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/AB/R, adopted on March 20, 2000), § 93.

<sup>125</sup> J. Wouters and D. Coppens (2010), 17.



citizens and residents earned anywhere in the world. Nonetheless, foreign-source income of FSCs was exempted from the USA's worldwide taxation ('the FSC exemption'). Consequently, the EU argued that the US, by virtue of the exemption, was foregoing revenue otherwise due. The WTO Panel<sup>126</sup>, as well as the Appellate Body<sup>127</sup>, followed this argument. The Appellate Body clarified that 'foregoing' suggests that the government has given up an entitlement to raise revenue that it would otherwise have raised. This cannot refer to an 'entitlement in the abstract, because governments, in theory, could tax all revenues', but implies 'some defined, normative benchmark against which a comparison can be made'<sup>128</sup>. Regarding the basis of this comparison, the Appellate Body concluded that it must be tax rules applied by 'the Member in question'. Consequently, the Appellate Body determines the content of the concept of 'revenue otherwise due' by reference to the domestic legal regime of WTO Members. Applied to the *US-FSC* case, the Appellate Body thus decided that the US is responsible for having chosen a general tax system that puts its exporters at a disadvantage: *'To accept the argument of the United States that the comparator in determining what is "otherwise due" should be something other than the prevailing domestic standard of the Member in question would be to imply that WTO obligations somehow compel Members to choose a particular kind of tax system; this is not so. A Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free not to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations. What is "otherwise due", therefore, depends on the rules of taxation that each Member, by its own choice, establishes for itself.'*<sup>129</sup>

To elaborate the 'defined, normative benchmark against which a comparison can be made', the Appellate Body developed a two-prong test, the first limb being the 'but for test' and the other limb being the 'legitimately comparable income' test.<sup>130</sup> When the measure at issue can be described as an exception to a general rule, the 'but for' test can be applied. Here, the benchmark is the situation that would exist but for the measure at issue. Applied to the *US-FSC* case, the Panel looked at whether foreign income of FSCs would be taxed higher if the FSC scheme did not exist.<sup>131</sup> However, the Appellate Body realized that the 'but for' test is not always workable because it is 'usually very difficult to isolate a general rule of taxation and exceptions to that general rule given the variety and complexity of domestic tax systems'.<sup>132</sup> Moreover, the Appellate Body indicated that 'it would not be difficult to circumvent such a test by designing a tax regime under which there would be *no* general rule that applied formally to the revenues in question, absent the contested measure.'<sup>133</sup> Therefore, in most cases, Panels should use the fiscal treatment of 'legitimately comparable income' as benchmark.<sup>134</sup> The Appellate Body applied this test to the 'FSC Repeal and Extraterritorial Income Exclusion Act of 2000' (the ETI Act), by which the US aimed to bring its tax system in conformity with the *US-FSC* ruling.<sup>135</sup> It compared the way the US taxed income under the ETI Act with the way

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<sup>126</sup> See Panel Report, *United States- Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/R, adopted on March 20, 2000).

<sup>127</sup> See Appellate Body Report, *United States- Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/AB/R, adopted on March 20, 2000).

<sup>128</sup> See Appellate Body Report, *US-FSC*, § 90.

<sup>129</sup> See Appellate Body Report, *US-FSC*, § 90. In the same sense: See Panel Report, *US-FSC*, § 7.122.

<sup>130</sup> See Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108/AB/RW adopted on January 29, 2002), § 91 (hereinafter referred to as *US-FSC Article 21.5*); J. Wouters and D. Coppens, 'An Overview of the Agreement on Subsidies and Countervailing Measures - Including a Discussion of the Agreement on Agriculture', 2010, 17-19.

<sup>131</sup> See Panel Report, *US-FSC*, § 7.45.

<sup>132</sup> See Appellate Body Report, *US-FSC Article 21.5*, § 91.

<sup>133</sup> See Appellate Body Report, *US-FSC*, § 91.

<sup>134</sup> See Appellate Body Report, *US-FSC Article 21.5*, § 91.

<sup>135</sup> This was contested by the EU. See Panel Report, *US-FSC Article 21.5* (WT/DS108/RW adopted on January 29, 2002).

it taxed 'other' foreign source income and found a 'marked contrast' between them.<sup>136</sup> It concluded that, 'absent the ETI measure, the United States would tax the income under the 'otherwise' applicable rules of taxation', thus violating the SCM Agreement.<sup>137</sup>

### 6.3. *Interplay between domestic and international level*

The category of revenue otherwise due is clearly determined by reference to the domestic legal regime. The 'but for' test, as well as the legitimately comparable income test refer to domestic rules as the relevant benchmark. Consequently, what constitutes a subsidy in Country A is not necessarily a subsidy in Country B. Whereas it is difficult to find an economic logic to explain the WTO's approach<sup>138</sup>, at a general theoretical level such a different outcome is inevitable as domestic tax systems vary widely among WTO Members. Indeed, the domestic level is the only appropriate benchmark in the absence of an international level playing field, as the WTO adjudicating bodies cannot rely on an agreed international benchmark and the WTO is not a standard-setting organisation.<sup>139</sup>

The interpretation of the SCM Agreement by the WTO adjudicating bodies has a far-reaching impact on national tax policy: if a subsidy is found to be prohibited by the WTO adjudicating bodies, the subsidy must be withdrawn without delay.<sup>140</sup> Moreover, if this is not done, appropriate countermeasures can be taken.<sup>141</sup> Whereas the WTO is not an international fiscal standard-setter, the application of the SCM Agreement exemplifies the organisation's indirect influence on national tax regimes.

## 7. Concluding remarks: emergence of legitimate and effective global tax governance?

In the aftermath of the global financial crisis, international initiatives regarding tax governance have gained political momentum. The political importance attached to fiscal policy has been reflected in the outcome documents of the latest G-20 Summit meetings that pay specific attention to tax policy. Indeed, since the start of the financial crisis, the G-20 has profiled itself as a high-level deliberative forum that invigorates tax initiatives of other international institutions. However, as the G-20 lacks institutional capabilities to elaborate and implement its policies, it is depending on other international fora: particularly the OECD has engaged in a 'symbiotic relationship' with the G-20, while the IMF's input appears to be less effective. The only universal international organisation that is active in the field of tax policy is the UN. While it can be argued that the UN would be the only legitimate *global* tax policy-maker, it lacks institutional capabilities in the field of taxation in order to be effective. The UN, in turn, thus relies on support of other international tax actors (like the OECD) to engender its tax

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<sup>136</sup> See Appellate Body Report, *US-FSC Article 21.5*, §§ 98-102.

<sup>137</sup> See Appellate Body Report, *US-FSC Article 21.5*, § 103; for a further elaboration, see: J. Wouters and D. Coppens (2010), 17-19.

<sup>138</sup> Especially as, to quote the US argument, 'the European territorial tax system has the same economic effect as the FSC exemption to the its worldwide tax system, as both tax systems exempt foreign-source income of exporters'. See Panel Report, *United States- Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/R, adopted on March 20, 2000), § 7.121. For more information, see: R.E. Hudec, 'Industrial Subsidies: Tax Treatment of Foreign Sales Corporations', in E.-U. Petersmann and M.A. Pollack (eds.), *Transatlantic Economic Disputes – the EU, the U.S., and the WTO*, Oxford University Press, 2003, 175-205; J. Wouters and D. Coppens (2010), 32.

<sup>139</sup> J. Wouters and D. Coppens (2010), 32.

<sup>140</sup> SCM Agreement, Article 4.7.

<sup>141</sup> SCM Agreement, Article 4.10.

governance.<sup>142</sup> Most international fiscal initiatives focus on monitoring national and international fiscal trends and delivering expert advice, while leaving the implementation of recommendations to the free will of States.<sup>143</sup> Although we can speak of the gradual emergence of a form of global tax governance, international tax law is non-existent today. This being said, in the field of exchange of information and fiscal transparency, international cooperation has become the norm. Today, the OECD Standard of Transparency and Exchange of Information is universally accepted. Moreover, the OECD Standard has been integrated into the relevant standards of other players<sup>144</sup>, making a uniform approach regarding the topic possible. This example clarifies the challenge of global tax governance to ensure coordination and interaction among all relevant actors on all relevant policy levels: as fiscal initiatives remain spread over several actors, coordination is necessary in order to prevent overlap and ineffectiveness.

International standards require implementation to become effective. This remains a challenge. The voluntary implementation of the IMF Good Practices on Fiscal Transparency, for example, makes that it often depends on the goodwill and capacity of States. Whereas standards may be elaborated at global level, a separate process that integrates the standards into binding agreements is necessary to translate ‘governance’ into ‘law’. Often, binding agreements are elaborated at the regional<sup>145</sup> or bilateral level<sup>146</sup>, rather than at a global level. The example of the International Standard on Transparency and Exchange of Information lends itself to illustrate another challenge of global tax governance: from the mere elaboration of international standards in multilateral fora, the focus should move to international oversight of the implementation of standards. In this respect, the establishment of the Global Forum to oversee national implementation of the International Standards of Exchange of Information is a significant innovation. Whereas the recommendations of the Global Forum are not binding, the regular overview may pressurize countries to implement the OECD Standard. However, the establishment of the Global Forum is too recent to assess whether it will be effective. The most far-reaching international oversight of national tax policy is assured by the WTO adjudicating bodies, when dealing with taxes that are covered by the definition of a subsidy according to the SCM Agreement: if national taxes are found to be subsidies that violate the SCM Agreement, the tax/subsidy must be withdrawn without delay. The international judicial oversight of national taxation, however, remains exceptional, as the principle of national tax sovereignty is still strongly adhered to. Non-binding international oversight (as provided by the Global Forum) is thus a more realistic requirement in the area of global tax governance.

A last important challenge remains the inclusiveness of tax governance process. In many international fora developing countries are underrepresented.<sup>147</sup> Specifically regarding taxation, where the motto ‘no taxation without representation’ is omnipresent, inclusive participation of all the relevant fiscal actors is important. Both in the process of elaboration of international standards, as well as in the process of implementation of these standards, inclusiveness is a central requirement in view of legitimacy and effectiveness of international tax initiatives.

This paper aimed to give an overview of the various international tax initiatives on the level of the G-20, the OECD, the UN, the IMF and the WTO. While respecting the principle of national tax

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<sup>142</sup> At the Doha Conference, OECD officials appeared to be important supporters for a ‘tax and development agenda’. See *supra*, 4.2.

<sup>143</sup> See for example IMF Good Practices on Fiscal Transparency, with voluntary implementation: *supra*, 5.3.

<sup>144</sup> OECD/Council Of Europe Convention on Administrative Assistance: *supra*, 3.4; UN Model Double Taxation Convention: *supra*, 4.1.

<sup>145</sup> E.g., the European Commission’s Communications on good governance, proposing to integrate the UN principle of good governance in tax matters into binding agreements between the EU and third countries. See *supra*, 4.3.

<sup>146</sup> E.g., TIEAs are necessary in order for the OECD International Standard on Transparency and Exchange of Information to have effect. See *supra*, 3.3.

<sup>147</sup> OECD: see *supra*, 3.5; IMF: see *supra*, 5.4.

sovereignty, global initiatives regarding tax policy are increasing. In an ever more interdependent and globalized world, “global tax governance” is gradually emerging. The current analysis of various international tax initiatives reveals that several challenges remain for the emergence of a more legitimate and effective global tax governance. It will remain to be seen how and whether this recent phenomenon will further evolve.

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