Volume 10 issue 2 December 2017

ELR

Erasmus Law Review

eleven international publishing

The Legitimacy of Tax Policies Developed by International Organizations

Issue Editor: Arnaud de Graaf

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ISSN: 2210-2671

Nederlands uitgeversverbond
Groep uitgevers voor vak en wetenschap

Legitimacy of Tax Policies and Acts Devised by International Organizations

Arnaud de Graaf*

This special issue of the *Erasmus Law Review* is dedicated to the legitimacy of tax policies and acts devised by international organizations.

A decade ago, countries were still unreceptive to any attempts by international organizations to interfere in their direct tax systems. States' existence and, in turn, the size of their infrastructure in the broadest sense depend on their ability to levy tax on income. As a result, they attach great importance to their sovereignty in tax matters. In today's liberalizing, globalizing and digitalizing world, however, states are losing grip on their ability to tax high net worth individuals (HNWIs) and multinationals. Persons, entities and capital are now more mobile than ever before, with the result that HNWIs and multinationals are able to exploit differences in national tax systems (in terms of who is subject to tax, the scope of the tax base and the level of the applicable tax rates) and can consequently reduce their effective tax burdens substantially. And they are being assisted in this respect by tax competition among countries competing for investments in an effort to maintain or even increase their national tax revenues. Since the financial and subsequent economic crisis, however, the major Western economies in particular have realized that the only way for countries to counter the eroding of their tax revenues is to join forces under the umbrella of an international organization. In doing so they are acknowledging that tax policies based on 'every man for himself' will in the long run simply lead to lower tax revenues. As a result, the G20, OECD, IMF, World Bank and EU are all increasingly making their presence felt in the field of taxation, with many of these organizations' recent proposals prompting changes in countries' national tax legislation. International organizations have also sought to oversee countries' implementation of and compliance with these proposals. Given the far-reaching implications of these developments for countries' sovereignty in tax matters, we may question whether the process by which these international organizations arrive at such proposals and their monitoring rules can be considered legitimate. As these developments are still relatively recent, they have so far attracted little attention from tax academics. And that is the gap that this special issue, comprising four contributions, aims to fill to a certain degree.

In the first contribution, Sissie Gonzalez-Fung discusses the package of policy reforms published by the OECD on behalf of the G20 in November 2015 and that are designed to curb base erosion and profit shifting (BEPS) by multinationals. In response to the questioning of the BEPS project's legitimacy by tax academics, politicians and civil society groups, the author explores the validity of the 'democratic deficits' complaints lodged against the G20 and the OECD as global tax regulators in the BEPS project, as well as the norms reflected in the project itself.

In the second contribution, Leo Neve examines the legitimacy of the way in which the Global Forum on Transparency and Exchange of Information for Tax Purposes exercises its regulatory authority. He concludes that this authority is not being exercised legitimately as, by preventing jurisdictions from adhering to due process rules, the Global Forum is violating the rule of law.

In the third and fourth contributions, Sophia Murillo and Uyanga Berkel-Dorlig consider the legality of acts by the IMF and the World Bank in the field of tax, and the possible implications for these acts' legitimacy. Both authors conclude that not only is there a deficit in the legal basis for such acts, but also a legitimacy deficit in the way these organizations arrive at such acts in the field of taxation. They both argue that change is needed if these acts are to attain greater legitimacy.

I wish you every enjoyment in reading this special issue.

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The Questionable Legitimacy of the OECD/G20 BEPS Project

Sissie Fung*

Abstract

The global financial crisis of 2008 and the following public uproar over offshore tax evasion and corporate aggressive tax planning scandals gave rise to unprecedented international cooperation on tax information exchange and coordination on corporate tax reforms. At the behest of the G20, the OECD developed a comprehensive package of 'consensus-based' policy reform measures aimed to curb base erosion and profit shifting (BEPS) by multinationals and to restore fairness and coherence to the international tax system. The legitimacy of the OECD/G20 BEPS Project, however, has been widely challenged. This paper explores the validity of the legitimacy concerns raised by the various stakeholders regarding the OECD/G20 BEPS Project.

Keywords: base erosion and profit shifting, OECD, G20, legitimacy, international tax reform

1 Introduction

The global financial crisis of 2008 and the following public uproar over offshore tax evasion and corporate aggressive tax planning scandals gave rise to unprecedented international cooperation on tax information exchange and coordination on corporate tax reforms. Developing and industrialised rich countries alike have aligned themselves with the general tax policy direction set by the Organisation for Economic Cooperation and Development (OECD) to create a fairer and more transparent global tax environment. At the behest of the G20, the OECD also developed a comprehensive package of 'consensus-based'[1] policy reform measures aimed to curb base erosion and profit shifting (BEPS)[2] with respect to multinational corporations, which is based on three key pillars: introducing coherence of corporate income tax at the international level, reinforcing substance requirements in the existing international standards, and improving tax transparency as well as certainty and predictability for businesses.[3] Launched in July 2013, the BEPS Project is based on the OECD's 15-point Action Plan[4] that needed to be addressed and delivered by October 2015. Given the ambitious timeframe of the BEPS Project, during which discussion drafts were released and finalised one after another at a staggering speed with little time allowed for public comments, and the divergent views of capital importing and capital exporting countries on a vast array of international tax issues addressed in the Project, one might, however, wonder whether true consensus could be reached under such circumstances. As more and more countries are jumping on the OECD/G20 BEPS bandwagon and having committed themselves to the comprehensive BEPS Package and the 'timely, consistent and widespread' implementation thereof,[5] the OECD and the G20 might have successfully attempted to change the international tax landscape. At the time of writing of this paper, ninety countries have joined the Inclusive Framework for BEPS Implementation, representing more than 90% of the world's economy and more than 75% of the world's population.[6]

The global endorsement of the BEPS Package and its implementation through domestic laws and tax treaty provisions in a coordinated manner is remarkable in many ways. For a start, governments are generally reluctant to relinquish their taxing power given the unique status it is asserted with the notion of sovereignty and ultimately with statehood itself.[7] Taxation is not

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1. OECD, *Explanatory Statement* (2015), OECD/G20 Base Erosion and Profit Shifting Project.
2. According to the OECD, BEPS 'refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to locations where there is little or no economic activity or value creation', <https://www.oecd.org/dac/financing-sustainable-development/Addis%20flyer%20-%20BEPS.pdf> (July 2015).
3. OECD, *Action Plan on Base Erosion and Profit Shifting* (2013), at 13-14, and OECD, *Mandatory Disclosure Rules, Action 12 – 2015 Final Report* (2015), at 3.
4. OECD (2013), above n. 3.
5. *See* the G20 Leaders' Hangzhou Communiqué of 4-5 September 2016, at para. 19.
6. <www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> (20 November 2016).
7. As observed by Rosenbloom, 'no area of law is closer to the subject of sovereignty than taxation'. H.D. Rosenbloom, 'Sovereignty and the Regulation of International Business in the Tax Area', 20 *Canada-United States Law Journal* 267 (1994).

only concerned with the generation of a country's domestic revenue, but it also creates and reflects the 'social contract' between the nation-state and its constituents.[8] The importance of fiscal self-determination in the global tax debate may be illustrated by the earlier, often perceived 'failed'[9] attempt of the OECD to rewrite the international tax system in its project on harmful tax practices in the late 1990s,[10] which has been criticised for violating the sovereignty of nations, in particular low tax and secrecy jurisdictions, over their fiscal affairs.[11] Not surprisingly, the OECD/G20 BEPS Project has also raised some fiscal sovereignty concerns, most notably among G20 members themselves.[12] In the United States, Paul Ryan, Speaker of the House of Representatives, has called for a united front from the US Treasury against the BEPS Project, which is, in his words, 'attempting to basically grab a tax base of our [US] domestic corporations'.[13] Other major Western economies in the G20, such as France, the United Kingdom and Australia, are trying to protect their tax autonomy by engaging in unilateral actions, which in turn have been criticised by other participants in the BEPS Project, especially the United States.[14] While endorsing the BEPS initiative, the EU, as a member of the G20, is attempting to secure its own relevance in the global tax policymaking. The Commission's ambitious agenda to tackle corporate tax avoidance and harmful tax competition has been generally criticised for going above and beyond the OECD/G20 BEPS proposals. From the more stringent rules on interest deduction, hybrid mismatches and Controlled Foreign Corporation (CFC) legislation, to the proposed additional measures outside the BEPS Package, such as the (now abandoned) 'switch-over clause', a general anti-abuse rule and exit taxation on transfers of assets and on migration of tax residency, it was obvious that the European Commission (EC) envisioned a much more rigid framework to address BEPS through its Anti Tax Avoidance Directive than that of the OECD's. In particular, the EC's state aid investigations into the so-called 'sweetheart tax deals' between multinationals and certain EU countries have been criticised for undermining the BEPS consensus and the G20 agenda to improve tax certainty.[15] Ironically, the BEPS initiative was set up to avoid uncoordinated unilateral actions;[16] however, the result is apparently just the opposite. On the other side of the spectrum, emerging economies in the G20 are concerned

8. *See* A. Christians, 'Sovereignty, Taxation and Social Contract', 18 *Minnesota Journal of International Law* 99 (2008).
9. The OECD's harmful tax competition initiative was based on the 1998 report, which contained 19 wide-ranging recommendations to counteract tax havens and harmful preferential tax regimes (collectively referred to as 'harmful tax practices'), including coordinated defensive measures that could be applied to tax havens. In June 2000, the OECD released a controversial blacklist of 35 jurisdictions labelled as tax havens, which was received with much criticism externally as well as internally. Under the newly elected Bush administration, the then-Secretary of the Treasury Paul O'Neill announced a re-evaluation of the United States' participation in the OECD's campaign against harmful tax practices. His statement further reads that 'the United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonise world tax systems. The United States simply has no interest in stifling the competition that forces governments – like businesses – to create efficiencies'. Thus basically withdrawing the U.S. support. <https://www.treasury.gov/press-center/press-releases/Pages/po366.aspx> (10 May 2001). From that moment onwards, the OECD sang a different, softer tune: it has abandoned the central goal of the initiative – the mitigation of the harmful effects of tax 'poaching', *i.e.* when one country redirects capital and financial flow and the corresponding revenue from the other countries by bidding aggressively for the tax base that 'rightly' belongs to those other countries –, backed down on its call for sanctions to be applied against uncooperative tax havens and reduced its aim to only securing commitments to exchange information between jurisdiction on civil tax and criminal matters. According to Sharman, the OECD has thus failed to achieve the 1998 report's original aim to regulate international tax competition. 'By 2002, not only had the OECD failed to convince tax havens of the error of their ways, but it had also failed to convince key sectors of the international audience of the wisdom and justice of its arguments relative to those of its opponents.' J.C. Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation* (2006), at 71.
10. OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998).
11. *See e.g.* A. Townsend Jr., 'The Global Schoolyard Bully: The Organization for Economic Cooperation and Development's Coercive Efforts to Control Tax Competition', 25 *Fordham International Law Journal* 215 (2001), K. Carlson, 'When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as It Relates to Globalization, Sovereignty and Privacy', 35 *John Marshall Law Review* 163 (2002), V.E. James, 'Twenty-First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of their Tax and Economic Policy Sovereignty', 34 *University of Miami Inter-American Law Review* 1 (2002), M. Littlewood, 'Tax Competition: Harmful to Whom?', 26 *Michigan Journal of International Law* 162 (2004).
12. According to a report from the Mercatus Center, the BEPS Project is infringing U.S. national sovereignty. The report concludes: 'The United States should lead other OECD countries by reforming its domestic tax code and rejecting the OECD's Base Erosion and Profit Shifting Project. Tax policy should remain an area of domestic decision-making, allowing each country to choose a tax system that best fits its unique needs within the global landscape. The international community should be cautious about OECD attempts to eliminate tax competition by consolidating international tax rules.' J.J. Fichtner and A.N. Michel, 'The OECD's Conquest of the United States: Understanding the Costs and Consequences of the BEPS Project and Tax Harmonization', *Mercatus Research*, at 42 (2016).
13. K. Strassel, 'Paul Ryan on the Prospect for a Tax Overhaul', *Wall Street Journal*, 21 June 2015.
14. US Treasury Deputy Assistant Secretary for International Tax Affairs Robert Stack cautioned that the UK's diverted profit tax (DPT) and the Australia's version of the DPT and the Multinational Anti-avoidance Law (MAAL) would take the BEPS Project in 'a disturbing direction' and finds it 'hard to believe that the tax experts in both governments don't recognise the technical weakness of their legislation'. K.A. Bell, 'U.S. and the UK Delegates Differ on Their Evaluation of the BEPS Project', *Bloomberg BNA* (2015). France has also proposed to introduce a diverted profit tax (or 'Google tax') modelled on the UK measure.
15. *See* A. Athanasiou, 'Unilateral Actions Continues to Plague BEPS, Saint-Amans Says', *Tax Notes* (2016), and US Department of the Treasury, 'White Paper on the European Commission's Recent State Aid Investigations of Transfer Pricing Rulings', <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf> (2016).
16. *See* the testimony of Pascal Saint-Amans before the US Senate Committee and Finance: 'Unilateral action by countries on an uncoordinated basis, however, has the potential to replace the problem of non-taxation with the proliferation of uncoordinated legislative measures that will lead to excessive compliance costs for MNEs, as well as the potential for double or multiple taxation of the same income, undermining the existing consensus-based standards and replacing them with chaos. It also has the potential to encourage protectionist measures that would be detrimental to international trade.' <www.finance.senate.gov/imo/media/doc/Testimony%20of%20Pascal%20Saint-Amans.pdf> (2014).

that the BEPS framework will not properly protect the sovereign taxation rights of developing and low-income countries, as it ostensibly claimed to do.[17] In an official response to the UN BEPS questionnaire, India criticised the OECD for addressing only the superficial BEPS issues while sweeping the real ones under the carpet, which is weakening the effectiveness of the Project, and implored the UN to take action to 'prevent the international taxation rules from getting unjustly skewed in favour of the developed countries', and in particular 'to take the interest of the developing countries and the base erosion and profit shifting faced by them into account while carrying out work on BEPS'.[18]

With scepticism about the BEPS Project mounting in Washington, DC, major OECD economies like France, the United Kingdom and Australia going their own ways (and more countries will likely follow suit in order to protect their tax base),[19] the EU attempting to outdo the OECD by pushing forward an even more ambitious fiscal agenda, and emerging economies like India expressing their concerns of biased tax policies and questioning the effectiveness of the proposed anti-BEPS measures, it is quite remarkable that the G20 leaders have actually endorsed the BEPS Package in the first place.[20] Rather, it seems that the BEPS Project is predominantly driven by the ambition of the OECD secretariat than that of the G20's, which makes the popularity of the BEPS Project even more peculiar: why would any country want to join the Inclusive Framework and to sign the Multilateral Instrument where they have de facto no or little influence in the development thereof? And by doing so, how can governments of the countries legitimise their decision towards their electorate? These questions may be even more poignant for countries that were not represented in the BEPS-44 group,[21] since they were not at all involved in the decision-making process during the BEPS Project, but only until after the agenda had been set, the action points were agreed on, the content of the initiatives had been decided and the final reports were delivered. As 'BEPS Associates', these countries 'are required to commit to the comprehensive BEPS Package and its consistent implementation and to pay an annual member's fee to cover the costs of the framework'. In return, they will now be bestowed with the honour to work alongside with the OECD and G20 members, supposedly 'on an equal footing', to further develop standards in respect of some remaining BEPS issues and to review and monitor the effective implementation of the agreed minimum standards.[22] Not only would it prove to be a daunting task to translate the combined BEPS reports and related documents into legislation, which is far more challenging for developing and low-income countries considering their limited resources, but also to expect that non-OECD non-G20 countries will meekly follow a policy framework where they took no part in the prior decision-making thereof, ensure its 'widespread, consistent and effective implementation',[23] and foot the bill of that framework is, as India put it, 'somewhat patronising'[24] indeed. Yet, despite the condescending undertone, considerable compliance costs, apparent lack of democratic legitimacy,[25] fiscal sovereignty concerns,[26] possible biased tax agenda and potentially ineffective measures, this has remarkably not refrained these countries from committing themselves to the comprehensive BEPS package.

17. The BEPS Project is built on the premise to 'restore the trust of ordinary people in the fairness of their tax system, to level the playing field among business, and to provide governments with more efficient tools to ensure the effectiveness of their sovereign tax policies'. OECD (2015), above n. 1, at 4. Oxfam's briefing paper, however, suggests that the BEPS Project, like any other (ongoing) OECD-led tax reforms, will not benefit developing countries. Oxfam, *Business Among Friends; Why Corporate Tax Dodgers Are Not Yet Losing Sleep over Global Tax Reform*, 185 Oxfam Briefing Paper, at 14 (2014).
18. <www.un.org/esa/ffd/tax/Beps/CommentsIndia_BEPS.pdf> (2014).
19. Some other G20 countries have already taken unilateral measures to address BEPS issues in the digital economy. The Indian 6% Equalization Levy on digital e-commerce transactions, the Turkish concept of an 'electronic place of business' for tax purposes and the Indonesian circular on the delivery of application and/or content services through the Internet ('OTT Circular Letter') have also been viewed as uncoordinated unilateral actions that are undermining the BEPS consensus, as the final BEPS Action 1 report did not recommend introducing such measures in advance of the completion of the BEPS Project. OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report* (2015), at 13.
20. At the Antalya summit, the G20 leaders committed to the implementation of the BEPS Project. <www.oecd.org/g20/meetings/antalya/g20-leaders-endorse-oecd-measures-to-crackdown-on-tax-loopholes-reaffirm-its-role-in-ensuring-strong-sustainable-and-inclusive-growth.htm> (16 November 2015). The G20 Finance Ministers endorsed the Inclusive Framework for the implementation of the BEPS package in February 2016.
21. The BEPS-44 countries comprise of the then 34 OECD member states, the 8 non-OECD G20 countries (Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia and South Africa), and 2 OECD accession countries (Colombia and Latvia, although the latter became a full member of the OECD on 1 July 2016). These countries worked together on an equal footing with the OECD Committee on Fiscal Affairs (CFA), the steering body for the BEPS Project, to deliver the consensus based deliverables of the BEPS Action Plan. *See* <www.oecd.org/ctp/beps-2014-deliverables-information-brief.pdf> (2014).
22. OECD, *Background Brief – Inclusive Framework for BEPS Implementation* (2016).
23. G20 Shanghai Communiqué of the Finance Ministers and Central Bank Governors Meeting of 27 February 2016, at para. 7.
24. India remarked that the OECD's BEPS Project-approach of 'expecting developing countries to implement all the decisions made by the developed countries appears to be somewhat patronising and should be avoided', above n. 18.
25. Essers considers that despite the fact that the OECD wants to make the BEPS-process 'inclusive and effective' by means of consulting all relevant stakeholders and keeping them informed, it lacks (deliberative) democratic legitimacy as envisioned by Habermas. In his opinion, not only are countries unequally involved in the decision making process, but consultation by itself does not equate to participative decision-making. Furthermore, there is no true interactive involvement of national parliaments and citizens in the BEPS-process (thus lacking direct democratic legitimacy). P. Essers, 'International Tax Justice between Machiavelli and Habermas', *Bulletin for International Taxation* 54, at 57 (2014). *See also* C.A.T. Peters, *On the Legitimacy of International Tax Law* (2014) and I.J. Mosquera Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism', 7 *World Tax Journal* 344 (2015).
26. A. Postma and J. Schwarz, 'BEPS and the Sovereignty of Nations', 83 *ASA* 783 (2015).

It's arguably true that the BEPS Project emerged in the eye of a perfect storm: the powerful concurrence of high-impact events like the global economic crisis, fiscal austerities and a series of tax scandals, spotlighted by the lobby of civil society groups and the extensive media coverage thereof, which prompted not only public protests but also parliamentary hearings, fuelled the public debate on 'fair share of tax' and served as a catalyst that propelled countries all over the world to join the BEPS initiative despite its widespread criticism.

In the light of the above, this paper explores the validity of the legitimacy concerns raised by the various stakeholders regarding the OECD/G20 BEPS Project. Section 2 will address the democratic deficit complains lodged against the OECD/G20 BEPS Project. Section 3 will evaluate the legitimacy concerns of the BEPS Project and Section 4 will provide a conclusion.

2 The OECD/G20 BEPS Project's Democratic Legitimacy Concerns

2.1 Introduction

Is the OECD/G20 BEPS Project legitimate? Since the launch of the Project in July 2013, tax academia, politicians and civil society groups, such as Oxfam International, Tax Justice Network and Christian Aid, have raised this question and subsequently given their – often negative – responses thereto. While some evaluate the legitimacy of the Project on the decision-making process within the OECD/G20 or on the citizenry's active participation and deliberation, others judged the Project primarily on the quality of its policy outcomes.

This section explores the arguments surrounding the 'democratic deficits' complaints lodged against the G20 and the OECD as global tax regulators in the BEPS Project and the norms reflecting in the BEPS Project itself. To bring some structure amidst the multitude of different perceived legitimacy flaws in the global tax policymaking in the BEPS Project, I use José E. Alvarez's nuanced typology.[27] Following the work of Alvarez, this paper divides the putative democratic deficits complaints into three types: 1. 'vertical' (regarding the disconnect between international law-making and the democratic law-making process 'below' at the national level), 2. 'horizontal' (concerning the relations between international organisations and states and between states) and 3. 'ideological' (reflecting the dominant ideology of Western governmental elites). It should, however, be noted that certain democratic deficit complaints may rely on more than one type because, as Alvarez remarked, these three forms of critiques may converge in practice.[28] Also, given the divergent conceptions of legitimacy and democracy held by critics of the BEPS Project, the form of their democratic deficit complaints may be inconsistent. In the following subparagraphs, I will discuss each of these types separately.

2.2 Vertical Complaints

2.2.1 Introduction

Alvarez posits three types of vertical complaints. First, that international law-making by international institutions is undemocratic because it fails to replicate in any meaningful way domestic democratic governance processes and other structural components, such as electoral representation, checks and balances between legislative, executive and judicial branches, transparency, accountability and deliberative participation. Second, that the nature of global governance makes it possible for decision-makers to adopt norms that do not have domestic support. Third, that international law-making process fail to respect the substantive rights associated with democratic governance, such as due process and other human rights.[29] Critics of the OECD/G20 BEPS Project focused primarily on the first two types of vertical complaints and have, to my knowledge, not raised any concerns regarding the possible infringement of the Project with human rights.[30]

2.2.2 First Type of 'Vertical Complaints': Gaps in Democratic Governance Processes

2.2.2.1 Flaws in Representational Authority

Although the G20 and the OECD are perfectly entitled to establish policy norms among their member countries, their aspiration to become 'the leader of the global economy and financial system' respectively 'a global standard setting body' is challenged by the absence of legitimate authority in the wider world. Created by the G7 to become the 'premier forum for international cooperation on the most important issues of the global economic and financial agenda',[31] the G20 brings together nineteen 'systematically important'[32] advanced and emerging economies from every region of the globe, plus the EU, that represents roughly 90% of global gross domestic product, 80% of world trade (including

27. J.E. Alvarez, 'Introducing the Themes', (Introduction to Symposium on 'Democratic Theory and International Law'), 38 *Victoria University of Wellington Law Review* 159 (2007). *See also* S. Wheatley, *The Democratic Legitimacy of International Law* (2010), at 15-16 and 22-23.

28. Alvarez, above n. 27.

29. *Ibid. See also* Wheatley, above n. 27, at 23-28.

30. BEPS practices, however, do have a negative impact on the enjoyment of human rights as they deprive governments of the recourses needed to alleviate poverty, eradicate child labour, reduce illiteracy and gender disparities, etc. As such, the BEPS Project has the potential to significantly improve human rights conditions, particularly in the developing world.

31. G20-website: <www.g20.org/docs/about/about_G20.html> (last visited 27 July 2016).

32. In their statement of 25 September 1999, G7 Finance Ministers and Central Bank Governors announced that they 'propose to establish a new mechanism for informal dialogue in the framework of the Bretton Woods institutional system, to broaden the dialogue on key economic and financial policy issues among systemically significant economies and promote cooperation to achieve stable and sustainable world economic growth that benefits all', the announcement of which led to the establishment of the G20. <www.library.utoronto.ca/g7/finance/fm992509state.htm> (1999).

EU intra-trade) as well as two-thirds of the world's population.[33] Based on the group's 'economic weight and broad membership', the G20 deems itself for having 'a high degree of legitimacy and influence over the management of the global economy and financial system'.[34] However, the composition of the G20 membership is problematic from a representational perspective because the African region is grossly under-represented while low-income countries and small, open economies are completely absent.[35] The official membership of the EU in the G20 also reflects some legitimacy considerations, as other regional organisations do not have an official seat at the G20 table. As rightfully questioned by Norwegian Foreign Minister Jonas Gahr Støre: 'South Africa is part of it, but not as a representative of Africa. Saudi Arabia is part of it, but not as a representative of the Arab world. So why is the European Union represented in addition to having four individual EU member states and two others as observers?'[36] Consequently, the legitimacy of EU's membership in the G20 is also challenged, both from within and without. While non-EU countries complain about the over-representation of the EU in the G20 in comparison to other regions of the world, EU Member States that are excluded from the G20's membership are sceptical about their lack of direct involvement in the G20 decision-making process and fear that the major EU economies that are members of G20 in their own right (i.e. France, the United Kingdom, Germany and Italy) will use the forum to increase their influence within the EU.[37] As such, the G20 process could damage the trust among the Member States and 'undermine the core of the European multilateral project itself'.[38]

Like the G20, the legitimacy of the OECD's authority from a representational perspective has been questioned. Nicknamed 'the rich man's club', the OECD is neither inclusive with regard to its membership nor operates in a political vacuum; its policies serve first and foremost the interest of the member countries.[39] As the self-proclaimed 'leader in setting standards and guidelines in respect of international tax matters',[40] the OECD has an influence that reaches far beyond the current thirty-five member countries it serves. In fact, the OECD actively seeks out and engages with non-OECD countries in order to secure their commitment in the implementation of the OECD's instruments, standards and guidelines. However, the decision-making power is vested in the OECD Council alone, which is composed of one representative per member country and a representative of the European Commission. Non-OECD countries are not represented in the Council nor participate in its decision-making in any meaningful way. Critics therefore argue that the OECD is not the appropriate forum for discussions and decisions on international tax matters. While welcoming the work the OECD has undertaken through its BEPS Project, UK lawmakers reiterated their concerns: 'However, international tax discussions must be fully reflective of international concerns, including those of developing countries, and we remain concerned that the OECD – due to its composition – is not adequately reflecting the needs of the poorest countries in its policy outcomes'.[41]

2.2.2.2 Flaws in Governance Structure

The governance structure of the G20 and the OECD lacks the institutional components associated with representative electoral polities. The G20, in particular, is 'severely flawed'[42] as it does not possess legal personality nor does it have a treaty or charter in which the competences and procedural principles of the organisation are defined, including formalised rules for membership and processes for decision-making and resolving disputes. Nor does the G20 possess any formal mechanisms either for reporting or for accountability to the broader international community. The summit meetings are held behind closed doors and the only way the public can learn about the G20 leaders' deliberations is through their communiqués.[43] Because of its informal arrangement, institutional deficiencies and lack of accountability and transparency, the legitimacy of the

33. *See* G20, above n. 31. The G20's share of the global GDP, trade and population includes all EU countries, although different opinions exist whether the EU represents all its members in the G20.
34. *See* G20, above n. 31.
35. J. Vestergaard, 'The G20 and Beyond: Towards Effective Global Economic Governance', *DIIS Report* 2011:04, at 6. Norwegian Foreign Minister Jonas Gahr Støre described the G20 as 'a self-appointed group', where its 'composition is determined by the major countries and powers. It may be more representative than the G7 or the G8, in which only the richest countries are represented, but it is still arbitrary. We no longer live in the 19th century, a time when the major powers met and redrew the map of the world. No one needs a new Congress of Vienna.' Jonas Gahr Støre in an interview conducted by M. Ertel, 'Norway Takes Aim at G-20: "One of the Greatest Setbacks Since World War II"', *Der Spiegel*, 22 June 2010.
36. Støre, above n. 35.
37. *See* P. Debaere and J. Orbie, 'The EU in the Gx System', in K.E Jørgensen and K.V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power*, (London: Routledge, 2013) 311.
38. J. Jokela, 'The G-20: A Pathway to Effective Multilateralism?', *Chaillot Papers* 2011:125, at 67-68.
39. The main aim of the OECD is to promote policies designed 'to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy', Article 1(a) of the Convention on the Organisation for Economic Cooperation and Development, Paris, 14 December 1960.
40. <www.oecd.org/ctp/tax-global/setting-the-tax-agenda.htm> (last visited 31 July 2016).
41. UK House of Commons, International Development Committee, *Tackling Corruption Overseas* (2016), at 26.
42. G. Helleiner, 'Developing Countries, Global Financial Governance, and the Group of Twenty', available at <http://fpif.org/developing_countries_global_financial_governance_and_the_group_of_twenty> (2001).
43. K. Alexander, K. Lorez, M. Zobl & D. Thürer, 'The Legitimacy of the G20 – A Critique Under International Law', available at: <http://ssrn.com/abstract=2431164>, at 14 (2014).

G20 has been widely challenged.[44] Furthermore, both the G20 and the OECD do not have the authority to impose binding tax rules or sanctions in the event of non-compliance. Most significantly, both the G20 and the OECD lack a parliament. In the words of Alvarez, 'since there is no international parliament subject to proportional representation of the peoples of the world, international law-makers lack the ties to democratically elected polities that legitimize law within democracies'.[45]

To improve the governance of international tax, critics like Oxfam have called for the establishment of a global tax body along the lines of Vito Tanzi's proposal of a formal 'World Tax Organisation', which could impose binding tax rules on nations.[46] Others believe that the United Nations Tax Committee should be upgraded to an intergovernmental tax body.[47] However, despite the universal membership, the decision-making process within the UN itself has often been criticised for being 'undemocratic' as it presumably lacks electoral representation, principles of separation of powers, transparency and/or broad public participation.[48] It is obvious that proposals to elevate the BEPS Project to the level of the UN do not resolve all the democratic deficits of international law-making and the idea of establishing a binding global tax institution for the governance of international corporate taxes is most likely utopian. Both Christine Lagarde, managing director of the IMF, and Jim Yong Kim, president of the World Bank, have questioned the feasibility of such proposals. The former warned that many countries in the world would 'very strongly oppose' to the idea of surrendering their power to a global tax body, as 'levying taxation is considered as an attribute to sovereignty', while the latter is sceptical about whether adding another institution would provide a real solution to a problem.[49] Self-serving as it may be, the United States and other wealthy OECD countries shared the World Bank's view and opposed to the establishment of an intergovernmental body at the UN for international cooperation in tax matters, including through upgrading the existing Committee of Experts on International Cooperation in Tax Matters. 'Such a body would substantially overlap with work that is already taking place in other contexts, such as the IMF, World Bank, African Tax Administration Forum (ATF), CIAT and the OECD'.[50]

2.2.2.3 Flaws in Deliberative Processes

From a Habermasian outlook, the lack of active participation and deliberation of national parliaments and citizens in the BEPS Project is problematic. As described by former Dutch senator Peter Essers,

> [p]arliaments can only discuss the results of the OECD meetings with the ministers of the national government; citizens can only hold their national parliamentarians accountable in elections every four years. The business and civil society representatives can only 'comment' on the different proposals, they are not really part of the decision making process. This means that there is no true interactive involvement of national parliaments and citizens in the OECD BEPS process.[51]

US Senate Finance Committee Chairman Orrin Hatch has voiced this complaint on several occasions. In a speech delivered at the Senate, Hatch criticised the BEPS Project for moving well beyond its original mandate and becoming a mechanism for rewriting global tax strategies behind closed doors without the input or consent of the US Congress. 'Sure, the OECD has been quite forthcoming in meeting with members and congressional staff, but, in the actual BEPS deliberations, all the decisions are being made by unelected bureaucrats in Paris, and not by anyone from the Senate or House of Representatives.'[52] At a committee hearing examining the OECD's BEPS reports, senator Hatch reminded the Obama Administration that

> it is Congress – and Congress alone – that has the ultimate authority to make changes to the U.S. tax code. While the Treasury Department does have broad regulatory authority under the law, that power is not without limits. Even in those areas where authority clearly exists for the administration to promulgate regulations, it is virtually always better if Congress is viewed as a partner in this process rather than an adversary. And, in those instances where the regulatory authority is less clear, congressional involvement and approval is even more important to

44. *E.g.* N. Woods, 'The G20 Leaders and Global Governance', *GEG Working Paper* 2010:59; Alexander, Lorez, Zobl & Thürer, above n. 43; J. Rood, 'Transnational Governance and Democratic Legitimacy: The Case of the G20 and Financial-Economic Cooperation', in The Hague Institute for Global Justice and the Netherlands Institute of International Relations 'Clingendael', 'Special Report on Transnational Governance and Democratic Legitimacy' 67 (2014) and Vestergaard, above n. 35.
45. Alvarez, above n. 27.
46. Oxfam, above n. 17, at 15-16. Reference is made to V. Tanzi, 'Is There a Need for a World Tax Organisation?', in A. Razin and E. Sadka (eds.), *The Economics of Globalization: Policy Perspectives from Public Economics* (1999) 173.
47. *See e.g.* K. Sadiq, on behalf of the BEPS Monitoring Group, 'Presentation to the Enlarged Framework on BEPS of the OECD Committee on Fiscal Affairs', available at: <https://bepsmonitoringgroup.files.wordpress.com/2016/07/presentation-to-cfa-if-june-2016.pdf> (2016); Mosquera Valderrama, above n. 25. *See also* Oxfam's proposal for an intergovernmental UN tax body, signed by nearly 40 civil society groups, available at: <www.oxfam.org.uk/get-involved/campaign-with-us/latest-campaign-news/2015/07/un-tax-body-is-good-for-everyone>.
48. Alvarez, above n. 27.
49. D. Smith, 'IMF Chief Talks Panama Papers Fallout: Time to "Think Outside Box" on Global Tax', *The Guardian*, 11 April 2016.
50. US Statement to ECOSOC Special Meeting on International Cooperation in Tax Matters, available at: <www.un.org/esa/ffd/wp-content/uploads/2015/04/2015esm-usa.pdf> (2015). *See also* S. Medhora, 'Richer Nations Reject Call for Tough Tax Provisions at Foreign Aid Conference', *The Guardian*, 16 July 2015, and P. Rangaprasad and C. Freymeyer, 'One Year after Addis Ababa, Rich Countries Blocking UN from Working on Tax, Again', *Financial Transparency Co*, 21 July 2016.
51. Essers, above n. 25, at 57.
52. O. Hatch, Speech on the Senate floor, available at: <www.finance.senate.gov/chairmans-news/in-speech-hatch-outlines-concerns-with-oecd-international-tax-project> (16 July 2015).

ensure that policy changes are viewed by the public as legitimate.[53]

Although this critique might be rightfully made, the staggering speed in which the BEPS Project evolved makes it practically impossible for national parliaments and citizenry to have a meaningful participation and deliberation in the first place. Proponents of the BEPS Project may, on the other hand, argue that states, not persons, are party to the international law system. According to Beitz, 'international society is understood as domestic society writ large, with states playing the roles occupied by persons in domestic society'.[54] In this view, the absence of individual citizens in the international decision-making process does not necessarily undermine the BEPS Project's legitimacy, as long as they are represented by their elected government. This argument, however, highlights the problematic legitimacy of the Project for those countries that were not represented in the BEPS-44 group.

2.2.3 Second Type of 'Vertical Complaints': Gaps in Domestic Support

Another commonly perceived democratic deficit is the possibility for unelected non-governmental organisations (NGOs) and special interest groups to bypass national parliaments by lobbying for certain policies at the international level and subsequently bring pressure to governments.[55] Critics therefore argue, for different reasons, that multilateral institutions are illegitimate due to their elite-driven agendas. While some worried about the influence of the corporate elites on the policy-making process in the BEPS Project,[56] others are concerned with the role of NGOs in the international tax justice debate. NGOs like Tax Justice Network, Christian Aid and Oxfam International have fuelled the public debate on 'international tax justice', 'fair share of tax' and 'corporate social responsibility', which was traditionally reserved to tax practitioners and academia. Although the NGOs have been criticised for influencing the public opinion with 'unjust, unfair and misleading arguments',[57] their role in the BEPS Project has been significant. An important feature of the BEPS Project's proposal, the Country-by-Country (CbC) reporting that requires multinational corporations to disclose financial details about their operation in every country where they are active, has reportedly been lobbied by NGOs.[58] Interestingly, the OECD has warned its member countries of the lobbying risks in the domestic decision-making process, as it could lead to 'undue influence, unfair competition, and policy capture to the detriment of the public interests and effective public policies'.[59] To restore citizens' trust in their national government and political parties, the OECD Council adopted the 2010 Recommendation on Principles for Transparency and Integrity in Lobbying,[60] which is, in the words of the OECD, an international instrument addressing major risks in the public decision-making process related to lobbying'. However, it is unclear whether these principles also apply to the decision-making process within the OECD itself, in particular relating to '[t]he practice of "revolving doors", where [OECD] staff can slip between related public and private sectors, threatens the integrity of public decision-making by raising the risks of conflicts of interest and the misuse of insider information and contacts'.[61]

2.3 Horizontal Complaints

2.3.1 Introduction

Horizontal complaints assert that 'international lawmaking is illegitimate to the extent it fails to treat sovereigns as horizontal equals'.[62] This refers to the principle of sovereign equality of States, which is incorporated in

53. O. Hatch, Statement at Finance Hearing on OECD BEPS Reports, available at: <www.finance.senate.gov/chairmans-news/hatch-statement-at-finance-hearing-on-oecd-beps-reports> (1 December 2015).
54. C.R. Beitz, 'Bounded Morality: Justice and the State in World Politics', 33 *International Organization* 405, at 408 (1979).
55. *See* R. Keohane, S. Macedo & A. Moravcsik, 'Democracy-Enhancing Multilateralism', 63 *International Organization* 1, at 3 (2009).
56. Oxfam, for example, argues that the business lobby has a disproportionate influence on the BEPS process, partly due to the 'revolving door between tax legislators and accountancy firms' advisers', where staff could go back and forth from the OECD to private lobby firm that 'has an interest in influencing a policy process in which there might be a conflict of interest'. Oxfam, above n. 17, at 10-12. In their analysis of the public consultation process on BEPS Actions' discussion drafts, Eberhartinger and Pututschnig concluded that '[c]omment letters were submitted predominantly by multinationals or their representative bodies, by large accounting and law firms, and by expert organizations and lobbying groups, all operating from within OECD countries'. E. Eberhartinger and M. Petutschnig, 'The Scepticism of BRICS Practitioners on the BEPS-Agenda', available at: <https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/BEPS_Agenda_Scepticism.pdf> (last visited 25 July 2016).
57. On the emergence of NGOs in the international tax justice debate, Essers cautioned that 'the debate on international tax justice is increasingly being polluted by unjust, unfair and misleading argument. Because the discussion is no longer limited to tax experts, the risk increases that these unjust, unfair and misleading aspects of the debate could have significant impact on public opinion and on the responsible politicians who ultimately have to take the decisions'. Essers, above n. 25, at 54.
58. *See* Brauner on the role of civil society in the BEPS Project in Y. Brauner, 'BEPS: An Interim Evaluation', *World Tax Journal* 10, at 35 (2014). The idea of CbC-reporting by multinational corporations was first proposed by Richard Murphy, founder of the Tax Justice Network. R. Murphy, 'A Proposed International Accounting Standard Reporting Turnover and Tax by Location', available at: <http://visar.csustan.edu/aaba/ProposedAccstd.pdf> (2003). The G8, under the chairmanship of UK Prime Minister David Cameron, called upon the OECD to develop a common template for CbC-reporting (G8 Lough Erne Communiqué of 2013, at para. 25), which later has been included in the BEPS proposals. *See* R. Murphy, 'Country-By-Country Reporting', in T. Pogge and K. Mehta (eds.), *Global Tax Fairness* (2016) 96, at 96.
59. OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (2014), at 21.
60. Recommendation of the Council on Principles for Transparency and Integrity in Lobbying, at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=256&Lang=en> (2010).
61. *See* the OECD-website <www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm> (last visited 17 September 2016).
62. Alvarez, above n. 27.

article 2, paragraph 1, of the UN Charter.[63] In its Resolution on the promotion of a democratic and equitable international order, the UN General Assembly affirms that such order must be 'based on equal participation in the decision-making process, interdependence, mutual interest, solidarity and cooperation among all States'.[64] In the context of the BEPS Project, the horizontal complaints are not only understood as democratic deficits reflecting in the relationship between the G20/OECD and states and between states themselves, but it also concerns the relationship between the G20 and the OECD. In the following subparagraphs, I will discuss these different relationships separately.

2.3.2 Relationship between the G20/OECD and States and Between States

Not all countries are equally involved or have an equal say in the OECD/G20 BEPS Project. A common complaint lodged against international organisations is that they 'accord privileged status to those who hold the purse-strings' – a complaint that is not only directed at the forms of international law-making, but also at its unequal forms of enforcement.[65] Being the largest budget contributor (20.93% in 2016),[66] the United States has long enjoyed a position where it can exert its influence on the tax policymaking in the OECD and ignore those policies that are not consistent with the US interests. At the G20/OECD BEPS press conference in Lima, shortly after the release of the BEPS package in 2015, US Treasury Secretary Jacob J. Lew announced that the United States 'is proud to have played a leading role in developing the BEPS recommendations. We were able to advance our ideas in key areas such as limiting interest deductions and pushing for improved dispute resolution among countries'.[67] At the same time, the United States has no intention to sign the multilateral instrument on tax treaty measures to tackle BEPS that is being developed under Action 15 of the BEPS Action Plan, unless it includes mandatory binding arbitration that the US Senate Foreign Relations Committee is willing to accept.[68] In this respect, a decade-old speech made by the former Secretary-General of the OECD, Donald J. Johnston, still holds its value today:

> Indeed, the global economic power of the United States affords it the luxury of being able to ignore the necessity of engaging in broad based multilateral trade agreements. When others seem reluctant to opening their markets and eliminating trade distorting subsidies, the US may focus increasingly on bilateral agreements that it can negotiate to its competitive advantage, as a result of its economic muscle. After all, it is logical for the largest gorilla in the neighbourhood to take on the competition one or a few at a time. Each country would behave likewise were it to have the negotiating strength of the US.[69]

Given the global aim of the policies set out in the BEPS Action Plan, the engagement of non-OECD countries in the process is indispensable. In 2013, the OECD acknowledged the need for greater involvement of major non-OECD economies in order to accomplish the fifteen actions set forth in the BEPS Action Plan. As such, the BEPS Project was launched to include the eight non-OECD G20 countries (Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia and South Africa) and two OECD Accession countries (Colombia and Latvia)[70] as 'Associates', where they can participate in the Project on an equal footing with OECD members (the BEPS-44 group). By becoming Associates, these countries were expected to associate themselves with the outcome of the BEPS Project. Some non-G20 non-OECD countries were invited to participate in the Project as 'Invitees' on an ad hoc basis, while many other countries have participated in the Project through regional structured dialogues.[71] According to the OECD, over sixty countries and regional tax organisations were directly involved in the BEPS Project's technical work.[72] From this, the following could be discerned: (i) Associates were only involved in the BEPS process after the agenda for the BEPS initiative had been set and the content of the Action Plan had been decided; (ii) Invitees and other non-OECD non-G20 countries have only a consultative role, which is not the same as participative decision-making;[73] and (iii) from the current 193 UN member states in the world, less

63. The principle of sovereign equality of States is further understood as: 'All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:
    a. States are judicially equal;
    b. Each State enjoys the rights inherent in full sovereignty;
    c. Each State has the duty to respect the personality of other States;
    d. The territorial integrity and political independence of the State are inviolable;
    e. Each State has the right freely to choose and develop its political, social, economic and cultural systems;
    f. Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.' GA Res. 25/2625 (XXV), 24 October 1970.
64. GA Res. 61/160, 19 December 2006, at cipher 4(e).
65. Alvarez, above n. 27.
66. *See* OECD, Member Countries' Budget Contributions for 2016, available at: <www.oecd.org/about/budget/member-countries-budget-contributions.htm> (2016).
67. Statement by Treasury Secretary Jacob J. Lew at the G-20/OCED BEPS Press Conference, Lima, available at: <https://www.treasury.gov/press-center/press-releases/Pages/jl0204.aspx> (2015).
68. *See* L.A. Sheppard and S.S. Johnston, 'U.S. 'Extremely Disappointed' in DPT and BEPS Output, Stack Says', *Tax Notes International* (2015). On the US decision to participate in discussions regarding the development of a multilateral instrument, Robert Stack, US deputy assistant Treasury secretary for international tax affairs, emphasised that this 'by no means foreshadows any decision about whether to eventually join in signing such an instrument'. K.A. Bell, 'Stack: U.S. to Participate in Multilateral Tax Treaty Discussions', *Bloomberg BNA*, 2 October 2015.
69. D.J. Johnston, 'New Europe, New Frontiers, New Opportunities, New Challenges', Speech held at the 14th European Banking & Financial Forum, Prague, 28-29 March 2006.
70. Latvia became a full member of the OECD on 1 July 2016.
71. OECD (2013), above n. 3, at 25; OECD (2016), above n. 22, at 2.
72. *Ibid*., at 2.
73. *See* Essers, above n. 25.

than a third participated to varying extent in the BEPS Project while the remainder were not at all involved.

Following the BEPS Project, two drafting groups were established, tasked with the implementation of the comprehensive BEPS Package: one concerning the development of a multilateral instrument that will allow countries to swiftly amend their existing bilateral tax treaties in order to implement the tax treaty-related BEPS recommendation (the Ad Hoc group on the Multilateral Instrument, with 31 December 2016 as the deadline for deliverables)[74] and another regarding a peer review and monitoring framework on the effective implementation of the agreed minimum standards (the Inclusive Framework for BEPS Implementation). All relevant and interested countries were called upon to commit themselves to the BEPS Package and were openly invited to join these drafting groups. As 'BEPS Associates', countries participating in the Inclusive Framework will work alongside with the OECD and G20 members on an equal footing to

> develop standards in respect of remaining BEPS issues; review the implementation of agreed minimum standards through an effective monitoring system; monitor BEPS issues, including tax challenges raised by the digital economy; and facilitate the implementation processes of the members by providing further guidance and by supporting development of toolkits and guidance to support low-capacity developing countries.[75]

In conclusion, only at the implementation stage of the BEPS Package are all countries treated as 'horizontal equals' in order to ensure its proper execution. What is more, even when jurisdictions have decided not to join the Inclusive Framework, they might run the risk of being identified as 'jurisdictions of relevance', whose adherence to the BEPS minimum standards will still be required by the OECD in order to ensure a level-playing field. This is, in my opinion, incompatible with the principle of sovereign equality of states, in particular with the doctrine that a state cannot be bound by the decision of an international agency if it is not represented in its law-making body, let alone against its will.[76] Although the BEPS policy outputs are not legally binding and countries can choose not to adopt them, there is an expectation that countries, which are either part of the consensus or singled out by the OECD as relevant jurisdictions, shall implement them accordingly,[77] which will then be monitored and reviewed by peer countries. Besides, most countries are not as free as the United States to ignore the politics and power of peer pressure exerted by the G20 and the OECD, especially when threatened with possible blacklisting and defensive measures. As rightfully questioned by Essers, 'to what extent can a country afford to say no to such an instrument? And will countries have any influence after such an instrument has been developed?'[78]

2.3.3 Relationship between the G20 and the OECD

Although it is difficult to ascertain who has the actual leadership of the Project – whether it was the OECD that instilled the need to address BEPS in the G20's leaders or it was the G20 that instructed the OECD to address BEPS – the relationship between the G20 and the OECD has been, in the words of the OECD, 'mutually beneficial'.[79] As an informal forum without a permanent secretariat for institutional support for tax policy development, the G20 needs the OECD's pool of expertise and operational implementation and monitoring capabilities to ensure the global effectiveness of the BEPS Project, while securing its own position as the leader in the global economy and financial system. On the other hand, the G20's high-level political attention and commitment to the OECD's tax agenda provides the OECD greater certainty regarding budgetary contributions to fulfil its mandate,[80] while it also reinforces the OECD's relevance in the global tax policymaking and helps disseminate the OECD's BEPS policies across the world. As asserted by Eccleston et al., '[i]t is in this role as a handmaiden to the G20 in a super-ordinate relationship that the OECD can and will have real influence'.[81] Although this assertion might be true, the symbiotic relationship between the G20 and the OECD also has some major drawbacks. The OECD is not mandated to support the G20, yet it functions de facto as the secretariat for the G20.[82] After the G20 leaders have identified the need to prevent BEPS at the Los Cabos Summit in June 2012,[83] which was opportunistically interpreted by the OECD secretariat as a clear political mandate to advance its work on BEPS,[84] the OECD began feeding the G20 with action plan, reports, progress updates and other contributions on a regular and consistent basis. By enlisting the OECD's technical support in framing, developing and carrying out its policy priori-

74. OECD, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS* (2015).
75. OECD (2016), above n. 22.
76. H. Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 *The Yale Law Journal Company Inc.* 207 (1944), at 210.
77. OECD, Top 10 FAQ's about BEPS, answer to question 4, available at: <www.oecd.org/ctp/beps-frequentlyaskedquestions.htm> (last visited 10 August 2016).
78. Essers, above n. 25, at 57.
79. OECD, 'OECD and the G20', available at: <www.oecd.org/g20/about.htm> (last visited 10 August 2016).
80. The OECD depends to a large extent on G20 members for its budget, as it accounted for over 70% of the OECD's total funding in 2016 (and around 95% when considering that all EU member states are indirectly represented in the G20). *See* OECD (2016), above n. 66.
81. R. Eccleston, P. Carroll & A. Kellow, 'Handmaiden to the G20? The OECD's Evolving Role in Global Economic Governance', Conference paper presented at the 2010 Australian Political Studies Association Conference: Connected Globe Conflicting Worlds, 27-29 September 2010.
82. *See also* J. Wouters and S. van Kerckhoven, 'The OECD and the G20: An Ever Closer Relationship?', 43 *George Washington International Law Review* 345 (2011).
83. 'We reiterate the need to prevent base erosion and profit shifting and we will follow with attention the ongoing work of the OECD in this area.' G20 Los Cabos Communiqué, 18-19 June 2012, at para. 48.
84. *See* the Tax Annex to the Saint Petersburg G20 Leaders Declaration, 5 September 2013, at paras. 5 and 6.

ties, the G20 does not only usurp the OECD's resources and time, but is also able to circumvent the formal decision-making process within the OECD and thus impair the organisation's functioning.[85] Non-G20 OECD members have seemingly little leeway to intervene in the interplay between major powers represented in both the G20 and the OECD, as illustrated in the tax haven listing at the 2009 G20 London Summit, which include some of the OECD's members in the grey list, but spared some G20 members.[86] As such, the legitimacy of the OECD in the BEPS Project has been challenged from within, because non-G20 OECD members are being bypassed in the main agenda-setting and decision-making process and thus not involved in the Project in the same way as the other OECD members.

Conversely, similar observations have been made towards the non-OECD G20 countries. Christians asserts that these countries only have a peripheral role, because 'despite the specter of the G20 as a "new model of multilateral engagement," the United States and Europe continue to dominate a virtually impervious institutional architecture of tax policymaking in the form of the Organisation for Economic Cooperation and Development'.[87] Given the preponderance of the United States and Europe in the two institutions, critics view the G20 as part of the continuing 'G7-isation of the world', created to attain greater international support and legitimacy for the G7-driven OECD policies.[88] The fact that the G7, led by the US Treasury and the German finance ministry,[89] formed the G20 with its own members, arbitrarily handpicked the other twelve member countries without any objective and transparent selection criteria, strengthens this view. Consequently, the legitimacy of both the G20 and the OECD is affected by their close collaboration. The relationship between the G20 and the OECD thus serves as a double-edged sword: it provides mutual gain, but by the same token, it hampers and erodes each other's legitimacy.

2.4 Ideological Complaints

The ideological complaint contends that international law-making is subject to democratic deficits because global institutions promote the ideological policy preferences of Western governmental elites, such as neoliberal policies geared towards their economic growth.[90] The OECD has been viewed as the epitome of neo-liberalism; a 'market-liberal think tank', founded as 'the economic conscience of the free world that aimed at the construction of an international economic philosophy that guarded the principles of liberal capitalism and the interests of' a community of 'highly developed or advanced capitalist countries'.[91] The current architecture of the international tax system, the origin of which can be traced back to the work of four distinguished economists from the Netherlands, Italy, the United States and the United Kingdom who helped design it in the 1920s,[92] is built on the liberal concepts of tax neutrality, aimed at limiting the market distortions of double taxation and stimulating the free flow of international trade and investments, with a bias towards taxing rights for capital exporting countries under the OECD model. However, the 2008 global financial crisis and the 2011 sovereign debt crisis, as well as the emergence of the BRICS countries with their own successful economic models,[93] have affected the economic ideology of many traditional neoliberal countries in the OECD. As observed in an OECD study on liberalisation and state fragility:

> Bastions of free market thinking are moving towards tighter regulation, new austerity pacts, new debt

85. Wouters and Van Kerckhoven, above n. 82, at 370.
86. *Ibid*., at 370-1; D. Lesage, 'The G20 and Tax Havens: Maintaining the Momentum?', Prepared for the conference 'Governing the Global Economy: The Role of the G20' University of Toronto – Munk School of Global Affairs, at 4-5, available at: <www.g20.utoronto.ca/biblio/lesage-tax-havens.pdf> (18 June 2010).
87. A. Christians, 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20', 5 *Northwestern Journal of Law & Social Policy* 19 (2010).
88. J.J. Kirton, 'The G7 and China in the Management of the International Financial System', available at: <www.g7.utoronto.ca/scholar/kirton199903/index.html> (3 November 1999), and more recently in *G20 Governance for a Globalized World* (2016), at 73. For a similar view that the 'respective institutional capacities and roles of the G20 and the OECD suggest that the latter has a far greater role to play in developing tax policy ideas and bringing them to consensus positions, while the role of the former is in effect to syndicate those positions to a larger audience', as such, 'this relationship prevents meaningful participation by developing countries because they are included only in the diplomatic endorsement phase of policymaking rather than in the vital stage of idea development and negotiation', *see* Christians (2010), above n. 87. In a comparative study on nine policy issues where developed and developing countries have conflicting views, Martinez-Diaz concludes that the 'G20 primarily served as a vehicle for mobilising support for the G7 policies, especially on issues about with the G7 cared most strongly', but, however, stayed silent or neutral on policies favoured by the G24 (a group of developing countries) that would have imposed heavier costs on G7 firms and governments. L. Martinez-Diaz, 'The G20 after Eight Years: How Effective a Vehicle for Developing-Country Influence?', *Global Economy and Development Working Paper* 2007:12.
89. The G20 member countries were selected in 1999 by Timothy Geithner at the US Treasury in a transatlantic telephone call with his German Finance Ministry counterpart, Caio Koch-Weser, the selection process of which was of questionable legitimacy according to Wade. R. Wade, 'From Global Imbalances to Global Reorganizations', 33 *Cambridge Journal of Economics* 539, at 553 (2009). *See also* R. Wade and J. Vestergaard, 'Overhaul the G20 for the Sake of the G172', *Financial Times*, 21 October 2010.
90. Alvarez, above n. 27. *See also* Wheatley, above n. 27, at 31.
91. M. Schmelzer, *The Hegemony of Growth: The OECD and the Making of Economic Growth Paradigm* (2016), at 326 and 355.
92. Prof. Bruins of (the predecessor of) the Erasmus University Rotterdam, Prof. Senator Einaudi of Turin University, Prof. Seligman of Columbia University of New York, and Sir Josiah Stamp of London University. *See* League of Nations, 'Report on Double Taxation' (1923) and 'Report on Double Taxation and Tax Evasion' (1925).
93. *See, e.g.* M. Wolf, 'The West No Longer Holds all the Cards', *Financial Times*, 23 September 2009 and C. Roberts, 'Building the New World Order BRIC by BRIC', *The European Financial Review*, February-March 2011.

instruments and calls for global taxes on financial transactions. It could be said that many countries in the OECD and outside it have moved well beyond neo-liberalism and are now also sailing in uncharted ideological waters.[94]

The recent US tax reform proposal for a 'Destination Based Cash Flow Tax' (DBCFT), which would have a protectionist impact on trade and investment due to its 'border adjustment' element, may illustrate this paradigm shift.

Wheatley asserts that the imposition of global norms by international economic institutions, often in the pursuit of their – highly subjective and contestable – ideological 'shared values' of global justice and fairness, would be acceptable 'only if the policy issues under considerations were not political, [i.e.] if they were not subject to disagreement by reasonable persons'.[95] In the case of the BEPS Project, policy makers, tax practitioners, NGOs and the academia have heavily criticised the policy outcomes. Critics argue that the BEPS proposals 'offer a patch-up of existing rules, making them even more complex and in many cases contradictory, and do not provide a coherent and comprehensive set of reforms', and call for a more fundamental reform.[96] From the perspective of developing countries, which are disproportionally affected by BEPS since they derive a greater share of their revenue from corporate taxes,[97] the proposed anti-BEPS Package does not address their specific needs and many of the policy outcomes are considered ineffective and tending to the lowest common denominator due to the resistance of some powerful OECD states.[98] This has resulted, for instance, in weak proposals on CFCs, interest deductibility and innovation box schemes, all favoured by the United Kingdom.[99] In particular, the CbC-reporting, which was considered the most significant and major advance for developing countries at first, has been rendered de facto ineffective due to the high threshold of €750 million (thus targeting only the very largest multinationals), cumbersome filing arrangements (CbC-filing in the country of residence of the ultimate parent and then shared between jurisdictions through the accepted information exchange mechanisms), limited use of the information (exclusively for assessing high-level transfer pricing and BEPS risks and for economic and statistical analysis) and the fact that it is not made publicly available.[100] Especially considering the fact that for many developing countries aggressive transfer pricing practices by multinationals, in combination with the lack of information and comparable data available to them to address this, is one of their biggest BEPS concerns,[101] restraining developing countries from using CbC information for transfer pricing assessments and adjustments does not provide them a panacea against BEPS in the least. Other proposals in the BEPS Project, such as mandatory binding arbitration, which was primarily driven by the United States and supported by the G7 and other developed countries,[102] have been considered outright unsuitable for developing countries.[103] In my opinion, the BEPS policy outcomes are at odds with the G20 mandate that developing countries must reap the full benefit of the tax reform. From the standpoint of legitimacy, this demonstrates that Western-dominated global governance institutions such as the OECD are 'deeply inegalitarian', because under the pretence of shared interests and common values, their 'activities are primarily responsive to the interests and concerns of the world's most powerful states'.[104] As Edward H. Carr so eloquently put it: 'The doctrine of

94. P. Middlebrook, 'Building a "Fragile Consensus": Liberalisation and State Fragility', *OECD Development Co-operation Working Papers* 2012:7.
95. Wheatley, above n. 27, at 31-32.
96. The BEPS Monitoring Group, 'Overall Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project', available at: <https://bepsmonitoringgroup.files.wordpress.com/2015/10/general-evaluation.pdf> (5 October 2015); IMF, 'Spillovers in International Corporate Taxation', *IMF Policy Paper* (2014).
97. *See* IMF, above n. 96. A report commissioned by the Joint African Union Commission/UN Economic Commission for Africa (AUC/ECA) highlights that the African continent is losing more than $50 billion annually through illicit financial outflows and that large corporations (via the practices of commercial tax evasion, trade misinvoicing and abusive transfer pricing) are by far the biggest culprits thereof, followed by organized crime. High Level Panel on Illicit Financial Flows, *Report of the High Level Panel on Illicit Financial Flows from Africa*, Report commissioned by the AUC/ECA Conference of Ministers of Finance, Planning and Economic Development (2015).
98. India's comments in the UN Questionnaire on Countries' experiences regarding base erosion and profit shifting issues, above n. 18.
99. The BEPS Monitoring Group, above n. 96.
100. OECD, *Action 13: Country-by-Country Reporting Implementation Package* (2015).
101. In a short summary of the responses to the UN questionnaire on how some developing countries view the BEPS initiative and the G20/OECD Action Plan, transfer pricing, including excessive management fees, IP, royalties and R&D, was the most commonly raised BEPS issue. *See* the UN Committee of Experts on International Cooperation in Tax Matters, 'Responses to questionnaire for developing countries from the UN Subcommittee on Base Erosion and Profit Shifting', E/C.18/2014/CRP.12, available at: <www.un.org/esa/ffd/wpcontent/uploads/2015/01/10STM_CRP12_BEPS.pdf> (1 December 2014). *See also* High Level Panel on Illicit Financial Flows, above n. 97, at 37.
According to former UN Secretary-General Kofi Annan, transfer mispricing cost African countries an average of $38.4 billion every year between 2008 and 2010, which exceeds its inflows from either international aid or foreign direct investment. K. Annan, 'G20: How Global Tax Reform Could Transform Africa's Fortunes', *The Guardian*, 5 September 2013.
102. G7 Leaders' Declaration, Schloss Elmau, Germany, 7-8 June 2015. A group of 20 countries have expressed interest in adopting a mandatory binding arbitration: Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the UK and the US.
103. Sadiq, above n. 47. India has reportedly vetoed the inclusion of mandatory binding arbitration as one of the consensus item under the BEPS Action Plan <www.livemint.com/Politics/rutMHggqQOm2htzcrI9K7I/India-opposes-global-plan-to-make-tax-arbitration-binding.html> (23 September 2014). However, after the joint statement issued by the G7 leaders on their commitment to establish mandatory binding arbitration in the BEPS Project, this is now included in the OECD's work under Action 14. Christian Aid finds the G7's backing for mandatory binding arbitration 'deeply troubling' <www.christianaid.org.uk/pressoffice/pressreleases/june_2015/christian-aid-alarmed-at-g7-plan-for-compulsory-tax-arbitration.aspx> (9 June 2015).
104. T. Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy', 37 *Journal of Social Philosophy* 81, at 94 (2006).

the harmony of interests thus serves as an ingenious moral device invoked, in perfect sincerity, by privileged groups in order to justify and maintain their dominant position'. As such, '"[i]nternational order" and "international solidarity" will always be slogans of those who feel strong enough to impose them on others'.[105]

3 Evaluating the BEPS Project's Legitimacy Concerns

The perceived legitimacy deficits of the BEPS Project are multifaceted and the question arises whether these critiques are justified. The contrast between domestic democracy and global governance institutions is indeed striking: the lack of electoral representation, direct citizenry participation, global parliament, mechanisms for holding decision-makers in the global institutions accountable, etc. However, in response to the vertical complaints, proponents may question the extent to which democracy is required to evaluate the legitimacy of OECD/G20 as global tax regulators in the BEPS Project, considering the fact that some of the member countries (e.g. China, Russia, Saudi Arabia) are not democracies themselves. In addition, democracy is governed by the majority rule that accepts that a majority can make binding decisions for everyone; however, this rule is the precise antithesis of the principle of sovereign equality, which demands that all states should have an equal say in international decision-making.[106] As such, the notion of democracy at the level of global governance institutions is problematic and in conflict with the basic tenet of international law. According to Gregory Shaffer, global institutions should not be judged against some ideal type of national democracy, but rather, 'the legitimacy of institutions should be viewed in a broader sense as concerning the relative accountability of decision-making processes to those affected by them'.[107]

It is often argued that the principle of sovereign equality – that no state can be bound without or against its will – paralyses the functioning of global governance institutions and thus hampers their legitimacy. Considering the political salience surrounding BEPS, the G20 and the OECD have chosen to orchestrate the BEPS Project in such a way that will maximise the efficiency of their global problem-solving capabilities while keeping the larger public abreast of their progress. Indeed, legitimacy and effectiveness often go hand in hand. As Kal Raustiala observed: 'if state legitimacy is partly grounded in effectiveness, effective international economic institutions may be legitimate – because they are instrumentally useful – even though they lack accountability in the usual sense'.[108] In the absence of democratic legitimacy, proponents may claim that the BEPS Project has so-called *output* legitimacy through the positive effects it has in terms of promoting economic growth, improving social well-being of people across the globe, restoring faith in governments, as well as restoring fairness and coherence to the international tax systems and ultimately stopping corporate tax abuse altogether, which will offset its *input* legitimacy deficit.[109] The fundamental problem here is that it is difficult to measure the extent to which these positive output effects, if and when they occur, could be attributed to the BEPS Project. Besides, to judge the BEPS Project as legitimate solely based on the prospect of its (possible) positive future outcome is antagonistic and ambiguous at best.

In my view, the trade-off between legitimacy and efficiency in the global decision-making is a slippery slope that can lead to a bias towards the interests and concerns of the most powerful states and undermine the trust of the weaker states in the policy outcomes.[110] Indeed, the horizontal and ideological complaints lodged against the BEPS Project suggest that the actual decision-making rests in the hands of a small group of powerful states, thus in fact governed by a 'minority rule', and that the BEPS outcomes predominantly reflect their policy preferences. This observation brings forward the complicated relationship between legitimacy and power in the interaction between states. Even though in principle states possess equal sovereignty, the actual power for them to exercise it may vary. Interestingly, Buchanan rejects the idea that political equality among states is a necessary condition for legitimacy at the international level.

> The fiction that international law is or ought to be a system of equal sovereign states, founded on state consent, is a distraction from the daunting task of developing and implementing a genuinely more democratic form of global governance in which those who make, apply, and enforce international law are

105. E.H. Carr, *The Twenty Years' Crisis 1919-1939, An Introduction to the Study of International Relations* (1981), Reissued with a New Introduction and additional material by Michael Cox (2001), at 75 and 78.
106. C. Forcese, 'Hegemonic Federalism: The Democratic Implications of the UN Security Council's "Legislative" Phase', 38 *Victoria University of Wellington Law Review* 175 (2007).
107. S. Shaffer, 'Parliamentary Oversight of WTO Rule-Making: the Political, Normative, and Practical Contexts', 7 *Journal of International Economic Law* 629, at 633 (2004).
108. K. Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *Journal of International Economic Law* 841, at 862 (2003).
109. The dichotomy between input-oriented legitimacy ('government by the people') and output-oriented legitimacy ('government for the people') was proposed by Fritz Scharpf. According to Scharpf, democratic legitimacy, which rests almost exclusively on trust in institutional arrangements, is a two-dimensional concept that relies both on the democratic quality of the governing processes (input) and on the problem-solving quality of the adopted policies (output). From the input-oriented perspective, 'political choices are legitimate if and because they reflect the will of the people – that is, if they can be derived from the authentic preferences of the members of a community'. With regard to output-oriented legitimacy arguments, 'political choices are legitimate if and because they effectively promote the common welfare of the constituency in question'. *See* F.W. Scharpf, 'Problem-Solving Effectiveness and Democratic Accountability in the EU', *MPIfG Working Paper* 2003:1 and *Governing in Europe: Effective and Democratic?* (1999), at 6.
110. *See also* Jokela, above n. 38, at 9.

accountable to individuals and nonstate groups, not only, or even primarily, to states.[111]

Instead, Buchanan asserts that the most serious democratic deficit in the global policymaking is 'that a technocratic elite, lacking in democratic accountability to individuals and nonstate groups, is playing an increasingly powerful role in a system of regional and global governance'.[112] The emergence of the Platform for Collaboration on Tax, a central vehicle for enhanced cooperation between the technocrats employed at the IMF, OECD, UN and WBG on inter-alia 'the design and implementation of standards for international tax matters',[113] including the development of toolkits, reports and guidance notes on BEPS outcomes to better support governments in the implementation thereof, may subscribe to this concern.

The above analysis shows that there are some fundamental disagreements rooted in the concept of legitimacy for modern global governance institutions, understood as the principle of sovereign equality on the one hand, and a somewhat unrealistic notion that these institutions must share the same democratic standards as nation-states, on the other. Clearly, it is still an evolving concept and (unfortunately) beyond the scope of this paper to substantiate the conditions for legitimacy that will properly address all the concerns raised herein.

4 Conclusion

The BEPS Project, like any other OECD-led tax reforms, is a reflection of international politics where powerful states largely dictate the global course of actions and the voice of weaker states is often marginalised. And while the OECD lauds the Project as a 'success story',[114] in retrospect, it has fallen hostage to the lowest common denominator agreements among its leading member countries that are home to large multinationals. In a time when anti-globalisation sentiments are on the rise and nations are chasing the chimera of Westphalian sovereignty and narrow concepts of national interest, the OECD could have served as a critical counterforce to political opportunism, maybe even dispelled its unwanted reputation as 'the rich man's club' by providing an equal platform for developing countries to participate in the initial agenda-setting and decision-making process on BEPS. Instead, it maintained the status quo and ignored the wider call for a much-needed fundamental coordinated reform that addresses the underlying problems and biases of the current international tax system. If anything, the OECD's initiative seems to have exacerbated the race to the bottom as countries are trying to compensate for multinationals' increased tax bills caused by the BEPS proposals.

Despite its questionable legitimacy, many countries around the world have accepted the outcomes of the BEPS Project. Ironically, by doing so, they actually award greater legitimacy to the OECD's work, namely through the process of broad-based implementation of the BEPS minimum standards. Perhaps in the end, legitimacy is only a matter of perception, a process in which states come to terms with the international order of power politics, possibly take refuge in mock-compliance, and somehow find a way to justify, normalise and internalise these so-called 'international consensus' and 'global standards' into domestic laws.

111. A. Buchanan, *Justice, Legitimacy and Self-Determination* (2003), at 289-90.

112. *Ibid*., at 289.

113. *See* the press release of 19 April 2016 on the IMF website ('International Organizations Take Major Step to Boost Global Cooperation in Tax Matters', Press Release No. 16/176) and attached 'Concept Note', available at: <www.imf.org/external/np/sec/pr/2016/pr16176.htm> (last visited 17 September 2016).

114. P. Saint-Amans and R. Russo, 'The BEPS Package: Promise Kept', *Bulletin for International Taxation* 236 (2016).

The Peer Review Process of the Global Forum on Transparency and Exchange of Information for Tax Purposes

A Critical Assessment on Authority and Legitimacy

Leo E.C. Neve*

Abstract

The Global Forum on transparency and exchange of information for tax purposes has undertaken peer reviews on the implementation of the global standard of exchange of information on request, both from the perspective of formalities available and from the perspective of actual implementation. In the review reports Global Forum advises jurisdictions on required amendments of regulations and practices. With these advices, the Global Forum exercises regulatory authority. The article assesses the legitimacy of the exercise of such authority by the Global Forum and concludes that the exercise of such authority is not legitimate for the reason that the rule of law is abused by preventing jurisdictions to adhere to due process rules.

Keywords: Global Forum on Transparency and Exchange of Information, exercise of regulatory authority, due process requirements, peer review reports, legitimacy

1 Introduction

In her essay on the validity of global standards in tax law Ana Paula Dourado takes the position that the lack of respect for the rule of law disqualifies the OECD standard for exchange of information on request ('EOIR Standard' or 'the Standard') as a global standard.[1] Her main argument is that the current standard jeopardises taxpayers' fundamental rights as acknowledged in rule-of-law states. Her starting point is the coexistence of plural legal orders within domestic boundaries. In my own words: various groups in society (constituencies) may differ about what is right with respect to tax evasion, with the views of ruling authorities, for example, differing from those of blue-collar labourers.[2] The global legal discourse, however, is moving in the direction of finding solutions for global problems – such as tax evasion through the use of tax havens and secrecy jurisdictions – at a global level, with the trend being towards setting global standards. That discourse is itself a product of global identity and solidarity, along with a sense of global fairness and unfairness, and global human and fundamental rights. According to Dourado, the awareness of phenomena such as tax evasion and avoidance by certain groups of taxpayers, the consequences of banking and tax secrecy and tax havens for each country individually, the importance of exchanging information on tax matters, the right to a fair hearing in tax litigation, information duties and the principle of *nemo tenetur se ipsum accusarem* are all examples of global problems demanding global solutions and global tax standards. In the author's opinion, uniform standards can provide uniform solutions in those areas where pluralism is not to be favoured.

The concept of the validity of law adopted by Dourado – from Habermas' *Faktizität*[3] – is law that is a product of genuine argumentative interaction among representatives of different legalities. This validity of law as a product of an argumentative interaction is more difficult to achieve, however, if the rules are drafted by supranational legalities, as in the case of the exchange of information envisaged by the OECD.[4] On this basis, Dourado comes to her thesis that legal instruments and action taken by individual tax administrations have to respect taxpayers' rights. For Dourado, validity of law requires

> a communicative discourse (with separation of powers and different legal realities represented), safeguards of fundamental taxpayers' rights and related limitations on the activity of administration and courts, a clear prohibition of the use of illicitly obtained data and the absence of corruption, among other things.[5]

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1. A.P. Dourado, 'Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expression or Where the Truth Lies', EUI Working Paper RSCAS 2013:11, 2013.
2. *See* N. Krisch, 'The Pluralism of Global Administrative Law', 17(1) *The European Journal of International Law* (2006)
3. J. Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt-am-Main, 1992).
4. Dourado, above n. 1, at 3.
5. *Ibid.*, at 9.

doi: 10.5553/ELR.000086 - ELR December 2017 | No. 2

None of these criteria, however, is a condition for becoming a member of the Global Forum on Transparency and Exchange of Information ('Global Transparency Forum'), and nor is compliance with these criteria subject to peer review. Ana Dourado therefore questions the democratic legitimacy of the rules established by the OECD and the Global Transparency Forum.

The specific provision in tax treaties on the exchange of information between tax authorities has been in the Model of Tax Conventions ever since this was first drafted by the League of Nations in 1923. However, the provision has undergone major changes since 1998, when the OECD published its report on harmful tax competition,[6] focusing on transparency and the exchange of information with a view to combating tax evasion through the use of tax havens and secrecy jurisdictions. As a result of tax haven jurisdictions' strong opposition to the – in their view – one-sided opinion of the OECD, it was decided that a more inclusive organisation under the auspices of the OECD would be established. This organisation became the Global Forum on Taxation ('Global Tax Forum'),[7] a multilateral framework in which participating countries combine efforts to work towards a level playing field in the areas of transparency and the exchange of information in tax matters.[8] The Forum started work in 2000 and initially included OECD countries and the six countries politically committed to improving transparency and establishing an effective exchange of information in civil and criminal tax matters. Its first initiative was to develop a Model Agreement on Exchange of Information on Tax Matters (TIEA).[9] Historically, countries were not obliged to provide information if their domestic legislation prohibited the exchange of confidential information. However, this recognition of domestic sovereignty stood in the way of a global solution for tax evasion through the use of banks and other financial institutions in secrecy jurisdictions. Under the TIEA, therefore, jurisdictions were obliged to restrict domestic secrecy laws that could prevent the exchange of information relating to foreign residents. The provisions of this model were subsequently incorporated into the 2005 OECD Model Tax Convention (MTC) and also found their way into the 2010 UN Model Tax Convention and the 2010 Protocol to the Multilateral Convention.[10] The TIEA model has also been widely used to negotiate and conclude tax information exchange agreements, where the objective is 'the creation of an environment in which all significant financial centres meet the high standards of transparency and effective exchange of information on both civil and criminal taxation matters'.[11] Central to the global level playing field between OECD and non-OECD members is the pursuit of 'fairness', meaning that the high levels of transparency are accepted not only by the financial centres of the world, but also by the OECD countries themselves.[12] This purpose, in turn, gave rise to the idea of a review of countries' legal and administrative frameworks in the areas of transparency and exchange of information. The review was undertaken in the form of a standard questionnaire developed by the Global Tax Forum and which sought information on countries' legal and administrative frameworks for exchanging information, for obtaining information held by banks and other financial institutions and for ensuring the availability of ownership and accounting information and the accessibility of ownership, identity and accounting information.[13] The OECD publication '2006 Assessment by the Global Forum on Taxation' reflects the outcome of the first factual review of these frameworks.

In this way the Global Tax Forum has exercised considerable influence on the shaping of the universal rule and states' commitment to mutual administrative assistance in tax matters. However, the rule does not, in itself, create a strong compliance pull. Although most countries will certainly benefit from improved mutual assistance, others will bear the cost in the form of a higher administrative burden on their tax administrations and on those who have the information in their possession, as well as lower income from tax revenue and fees. It was consequently decided to seek to create a 'level playing field', without any 'free-riders'. As a result, OECD Member States such as Switzerland, Luxembourg and Austria have since been forced to relinquish their bank secrecy, while this obligation had already been imposed on UK overseas territories.

By March 2009, almost all jurisdictions had agreed to implement the new Standard, with heavy pressure and the threat of countermeasures being necessary to get some of them to agree. The Global Tax Forum had been tasked by the G20 with verifying the implementation of the information exchange provisions among tax authorities and supplying progress reports on the implementation of and practice under the new Standard. After being restructured in September 2009 to strengthen the implementation of the standards for transparency and exchange of information, the renamed Global Transparency Forum launched an ambitious peer

6. OECD Report: 'Harmful Tax Competition, an Emerging Global Issue', 1998. The report addresses harmful tax practices in the form of tax havens and harmful preferential tax regimes in OECD member countries and non-member countries and their dependencies, with a focus on geographically mobile activities such as financial and other service activities. It also defines the factors to be used to identify harmful tax practices and goes on to make 19 wide-ranging recommendations to counteract such practices.
7. The Global Forum on Taxation was restructured and renamed in 2009 by decision of the Council of the OECD establishing the Global Forum on Transparency and Exchange of Information ('Global Transparency Forum'). Decision adopted on 17 September 2009 C(2009)122/Final.
8. A different group of countries is involved in the Global Forum's work on tax treaties and transfer pricing.
9. *See Tax Co-operation – Towards a Level Playing Field, 2006 Assessment by the Global Forum on Taxation*, OECD 2006.
10. Council of Europe/OECD 1988 Convention on Mutual Administrative Assistance in Tax Matters as Amended by 2010 Protocol.
11. Global Forum meeting, Berlin, June 2004, report.
12. OECD Global Forum meeting, Berlin, June 2004, report para. 6: Definition of a Global Level Playing Field.
13. OECD, above n. 9, para. 4.

review process of national legislation in the realm of tax transparency and, having been instructed to oversee the compliance and peer review process, has since developed 'Terms of Reference' (see Sections 2 and 3 below). The first round of peer review reports was completed in November 2016, with the result that the Global Transparency Forum has now rated 99 of the 116 jurisdictions that participated in the second phase of reviews. In order to get a positive rating, some countries have been forced to amend their legislation on timely and effective processes of exchange.[14] The especially critical procedures in this respect relate to notification of the intention to exchange information, the possibility of reviewing decisions to exchange, the length of court proceedings, and the right to be heard with disclosure of documents. In the process, therefore, of moving towards positive compliance ratings, interested persons (specifically the information owner and the subject of the investigation) have lost valuable legal protection rights. Examples of countries in which this applies include the Netherlands, which introduced a bill on 25 September 2013 to amend the International Assistance (Levying of Taxes) Act.[15] This bill proposed abolishing the notification procedure and thereby restricting the opportunities for review by a court. In his explanatory note to the proposed amendment, the State Secretary argued that the peer review report recommended abolishing this notification procedure and also that the new EU Directive on Administrative Cooperation (DAC 1)[16] did not recognise this procedure.[17] The amendment also meant that the person would no longer be able to ask for a judicial review of the decision to grant the information request.[18] Since 1 January 2014, therefore, the possibility of a judicial review has no longer been available.[19]

Just over a year later, on 25 November 2014, Luxembourg introduced legislation to amend its Act of 31 March 2010.[20] Under Article 6(1) of the amended legislation, no legal remedy is available against a request for exchange of information or against a decision ordering the production of information. The only remedy available is against the penalty imposed for not complying with the order.[21] The Luxembourg government, too, argued that the Global Transparency Forum required Luxembourg to make these changes.[22]

In its *Cahier de droit fiscal international* of 2015, the International Fiscal Association (IFA)[23] also identified Austria, Liechtenstein, Portugal and Switzerland as jurisdictions under pressure from the Global Transparency Forum to remove their existing procedures for notifying taxpayers and their ability to challenge cross-border exchange of information (EOI).[24]

On the basis of its Terms of Reference, the Global Transparency Forum criticised the above countries, especially on elements dealing with the rights and obligations of taxpayers and third persons. The Forum's authority and the strength of its recommendations are such that these countries were forced to amend their laws. In that respect, the Global Transparency Forum is both a rule-maker and rule-adjudicator.

The changes in the laws of these jurisdictions imposed by the Global Transparency Forum were criticised by Baker and Pistone, who stated in their general report on the 2015 IFA conference (subject B) that 'We would take the opportunity to note that we find it wholly inappropriate that existing and apparently effective protections for taxpayers' rights should be removed through pressure placed on the states concerned.' In other words, the authors write that, in seeking to balance the rights of the persons involved against states' interests in an effective exchange of information procedure, the rights of taxpayers and third persons have been violated. Baker and Pistone write from the presumption that the administrative decision to exchange information is an infringement of a fundamental individual right and should be subject to judicial review, which cannot be denied or reduced without serious reasons. This presumption is based on the fact that information exchanged may significantly and adversely affect a person's interests.[25]

The basic question that this contribution seeks to answer concerns the Global Transparency Forum's legitimacy and authority to impose the above amendments of domestic legislation on member jurisdictions and third countries. Essentially this involves reflecting on how an international standard, through the authority of the Global Transparency Forum, impacts on domestic constitutional rights of the individual (i.e. the right to be heard and the right to have access to a court) and on how a standard developed by a network of state agents is able to prevail over the domestic legislation of a jurisdiction. My analysis will examine the remarks of Ana Dourado, as referred to above, from the perspective

14. Terms of Reference, para. 8: Exchange of information for tax purposes is effective when reliable information, foreseeably relevant to the tax requirements of a requesting jurisdiction is available, or can be made available, in a timely manner and there are legal mechanisms that enable the information to be obtained and exchanged.
15. *Wet Internationale bijstand bij de heffing van belastingen*.
16. Directive 2011/16/EU.
17. Parliamentary Papers II 2013/14, 33753, 3, at 10-11.
18. *Ibid*., at 34-35.
19. That statement was repeated during the parliamentary process of approving the bill on the implementation of the automatic exchange of tax rulings, Parliamentary Papers I 2016/17, 34527, B, at 2.
20. *Mémorial, Recueil de législation*, Appl. No. 214/27, 27 November 2014, at 4170.
21. This issue is now decided in CJEU 16-5-2017, *Berlioz Investment Fund S.A.*, C-682/15, ECLI:EU:C:2017:373, where the *Cour d'appel* has requested a preliminary ruling from the CJEU. *See also Cour d'appel Luxembourg*, 36893C.
22. *See Chambre députés*, projet loi Doc. parl. 6680; sess. extra ord. 2013-2014 et sess. ord. 2014-2015 and Peer review report on Luxembourg, phase 2, at 103 and 112.
23. For the IFA, *see* <https://www.ifa.nl/Pages/default.aspx>. The IFA is a non-governmental and non-sectoral international organization that offers a forum for experts from different sectors of society to exchange opinions on topics of international taxation with regard for each other's background and responsibilities.
24. *See* P. Baker and P. Pistone, *General Report IFA 2015*, 'The Practical Protection of Taxpayers' Fundamental Rights', at 51.
25. *See* A.-G. Kokott in *Sabou* C-276/12, ECLI:EU:C:2013:370, para. 51.

of the taxpayer or third-party information holder subject to the exchange of information.

The contribution is structured as follows: In order to come to the core of the answer, I will first look at the history and authority of the Global Transparency Forum and its structure, composition and mandate. The EOIR Standard is reflected in the Terms of Reference formulated for the peer review procedures, which aim to monitor and enforce the implementation of the Standard. Section 2 assesses the legal status of the Terms of Reference. Section 3 qualifies the exchange of information procedure as an act of state, while also explaining how the rights of defence are fundamental rights of persons involved in the process of exchange of information, and exploring the legitimacy framework and the structure in which authority is exercised in the global governance of tax. Section 4 examines this exercise of global authority as a form of the global administration of tax, with discussion of whether principles derived from global administrative law should apply. The contribution closes with conclusions in Section 5.

2 Global Transparency Forum

2.1 Introduction

In the introduction I stated that the Global Transparency Forum is jeopardising the procedural rights of taxpayers by requiring the relevant state to provide the requested information without delay and to remove impediments to the effectiveness of the procedure. This raises questions about the Global Transparency Forum's authority. In this section I will first look into the institutional aspects of the Global Transparency Forum, its membership and mandate. The Forum has developed the EOIR Standard, which is set out in the Terms of Reference and consists of various components and elements. Adherence to the Terms of Reference is subject to peer review, whereby a jurisdiction is assessed in two phases and ultimately receives a qualification. The EOIR Standard has to be enforced between jurisdictions, while rights of citizens are also to be respected.

2.2 Origins

The Global Transparency Forum was created in the early 2000s as part of the OECD's work on addressing the risks that tax havens pose to tax compliance.[26] Following the OECD's 1998 report on harmful tax competition, OECD member countries and jurisdictions that had agreed to implement the Standard for Transparency and Exchange of Information participated in creating the Global Forum. In 2006 this Forum published a report ('Tax Co-operation – Towards a level playing field, 2006 Assessment') that referred to the concept of the 'level playing field' as follows: 'The level playing field is fundamentally about fairness to which all parties in the Global Forum are committed.'[27] That fairness is meant to exist between OECD member states and non-member jurisdictions. The point here is that some important OECD Member States (i.e. Switzerland, Luxembourg and Austria) were still refusing to implement provisions for exchanging financial and ownership information held by banks and other financial institutions. In late 2008, however, newspaper publications on tax evasion by private persons forced governments to move forward with the transparency issue. This culminated in March 2009 in the 'surrender' of the above states and in the elimination of banking secrecy for tax purposes. As a result, much of the level playing field was achieved, and the G20, supplementing the OECD, had taken on a leading role in global tax governance.

2.3 Structure and Composition

The Global Transparency Forum is formally a programme under Part II of the OECD budget and has a self-standing, dedicated secretariat based at the OECD's offices in Paris. The OECD itself is an entity under international law that was established by treaty in 1961. It currently has 35 members and an annual budget of €350 million. Exceptionally, nationals of non-OECD member countries can join the Forum's secretariat. The Global Transparency Forum now has 139 members,[28] with the conditions for membership being the commitments: (1) to implement the international standard on transparency and exchange of information on request (as reflected in the Terms of Reference[29] developed by the Global Transparency Forum); (2) to participate and contribute to the peer review process; and (3) to contribute to the budget. All members have an equal voice in the decision-making process and all decisions are taken by consensus. All member jurisdictions have committed themselves to the EOIR Standard, while 90 of the 139 members have also committed themselves to the automatic exchange of information ('AEOI Standard'). The Global Transparency Forum is composed of government representatives and is therefore, in institutional terms, a 'public network', with legal personality derived as part of the OECD and without direct representation.[30] The Global Transparency Forum is consequently not a formal supranational authority, and any rules it proposes are not automatically legally binding. The work of the Global Transparency Forum is guided and prepared by a steering group.

26. The Global Transparency Forum is the continuation of its predecessor, the Global Forum on Taxation.

27. OECD, above n. 9, at 46.
28. At 6 March 2017, *see* <https://www.oecd.org/tax/transparency/about-the-global-forum/members/>.
29. Terms of Reference to Monitor and Review Progress towards Transparency and Exchange of Information for Tax Purposes, OECD, CTPA 2010.
30. For the foundations of 'networks' and their impact, *see* A.-M. Slaughter and D.T. Zaring, 'Networking Goes International: An Update', Washington & Lee Legal Studies Paper No. 2007-12, *Annual Review of Law & Social Science*, Vol. 2, December 2006. Available at SSRN: <http://ssrn.com/abstract=960484>.

2.4 Mandate

Under the Global Transparency Forum's original mandate, which expired on 31 December 2012, the Forum is charged with promoting effective implementation of the international standards of transparency and exchange of information for tax purposes. As set out in the Resolution establishing the Global Forum, its mission is to ensure a rapid and effective global implementation of the standards of transparency and exchange of information for tax purposes through in-depth monitoring and peer review. The original mandate was extended to 31 December 2015, when a new mandate was agreed by the Council of the OECD. The Global Forum has since obtained a new mandate from G20 that includes a mandate to create a mechanism to monitor and review implementation of the AEOI Standard, and to work to ensure that developing countries can benefit from this. This mandate expires on 31 December 2020.

2.5 EOIR Standard

As stated in the introduction, the provision for the exchange of information on request is not new. Historically, it was intended for the benefit of applying double tax agreements ('small' assistance clause). In recent years, however, it has also become a tool for enforcing domestic tax laws of the requesting state, without any requirement for a tax interest of the requested state. It has also extended to cooperation with respect to criminal tax investigations ('broad' assistance clause). Since 2003, the clause has sought to restrict domestic provisions preventing the exchange of information. States can no longer excuse themselves by claiming not to have the proper domestic legislation in place to provide information or having legislation that prevents an exchange. The EOIR Standard stipulates that states should have legislation in place that allows for the exchange of the requested information to the widest extent possible and that the receiving authority is bound to protect the confidentiality of the information and must use it for tax purposes only.[31] This 'speciality clause', however, has come under pressure as tax information can also be relevant for suppressing other financial crimes. The 'tax purposes only' label may be lifted with the agreement of the providing authority, but without requiring any form of approval by the subject. The EOIR Standard is currently moving towards becoming an Automatic EOI, while the new AEOI Standard is being reviewed by the Global Forum.[32]

31. These obligations are contained in Article 26(1) OECD MC, with Article 26(3) providing exemptions from the obligations and Article 26(5) restricting the exemptions provided for in Article 26(3).
32. *See* more on EOIR Standard: *Klaus Vogel on Double Taxation Conventions*, 4th edition by Reimer and Rust (ed.), Kluwer Law International (2015); X. Oberson, *International Exchange of Information in Tax Matters* (Edward Elger, 2015); R. Danon, D. Gutmann, X. Oberson & P. Pistone (eds.), *Modèle de Convention fiscal OCDE concernant le revenu et la fortune, Commentaire* (Helbing Lichtenhahn, Editions Francis Lefebvre 2013); K. Vogel and M. Lehner (eds.), *DBA Doppelbesteuerungsabkommen, Kommentar*, 6. Auflage (Verlag C.H. Beck, München, 2015).

2.6 Terms of Reference

2.6.1 Sources

The Terms of Reference developed by the Global Tax Forum derive from three different sources. The primary source is the 2002 Model Agreement on Exchange of Information on Tax Matters and its Commentary (TIEA-MA), which includes the EOIR Standard as developed by the OECD. In addition to this primary source, the peer review group uses secondary sources in the form of reports developed by OECD and the Global Transparency Forum, and which provide context for understanding and interpreting standards. One of the important documents in this respect is the standard for the maintenance of reliable accounting records devised by the Joint Ad Hoc Group on Accounts in 2005.[33]

2.6.2 Components and Elements

The Terms of Reference for assessing adherence to the EOIR Standard contain three basic components, broken down into ten essential elements. These are:

a. Information that must be available in the requested state on:
   1. Ownership and identity information;
   2. Reliable accounting records; and
   3. Banking information for all accountholders;
b. Information that must be accessible in the requested state:
   1. The requested state should have the power to obtain and provide information from any person within their territorial jurisdiction who is in possession or control of such information;
   2. The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information;
c. Both states must have a mechanism for exchange of information (legal basis) so that:
   1. Exchange of information mechanisms provide for effective exchange of information;
   2. The jurisdictions' network of information exchange mechanisms cover all relevant partners;
   3. The jurisdictions' mechanisms for exchange of information have adequate provisions to ensure the confidentiality of information received;
   4. The exchange of information mechanisms respect the rights and safeguards of taxpayers and third parties; and
   5. The jurisdiction provides information under its network of agreements in a timely manner.

2.7 Monitoring and Enforcement

These Terms of Reference convert a contracting party's commitment to adhere to the EOIR Standard into an obligation under international law to provide administrative assistance to a requesting state and to implement

33. Terms of Reference to Monitor and Review Progress towards Transparency and Exchange of Information for Tax Purposes, OECD, CTPA 2010.

all such laws that are necessary in order to comply with the terms. By accepting membership of the Global Transparency Forum, jurisdictions commit to the Terms of Reference and become subject to the peer review process. Jurisdictions' commitments are based on that membership and are independent of any treaty obligation. In that respect, the Forum resembles a multilateral convention, but with a stronger enforcement mechanism and without any need for parliamentary approval of the international commitments.

Although the EOIR Standard is not a legal instrument, the Global Forum monitors both formal and practical legislative adherence in an attempt to ensure that the Standard is implemented with no or little deviation. In the European Union, adherence is enforced by the Directive on Administrative Cooperation (DAC 1).[34] A number of countries and jurisdictions are stalling with the implementation of the Standard and not fully applying it in practice. This has had consequences: some EU Member States have compiled their own 'blacklists', which were published by the Commission on 17 June 2015 ('The pan-EU list of third-country non-cooperative jurisdictions').[35] The Top 30 of non-cooperative jurisdictions consists of countries featuring on at least ten Member States' own blacklists. This publication provoked a strong reaction from the secretariats of the OECD and Global Forum,[36] which explained that the EU Commission had incorporated the Global Forum's Terms of Reference into its principles of good governance in tax matters. At the same time, however, both secretariats complained that EU Member States had not followed the assessments of the Global Forum, while also claiming that only the Global Forum can assess countries' adherence to the exchange of information. It is unclear as to what extent this reaction from the OECD and Global Forum secretariats has influenced individual EU Member States to decide to follow the assessment of the Global Forum rather than to go it alone.

Other than ranking a jurisdiction's compliance, the Global Forum has no mechanism to enforce a jurisdiction to effectively engage in exchange of information. The pan-EU list of third-country non-cooperative jurisdictions, to be prepared by the Code of Conduct Group,[37] allows the European Commission to consider 'measures' against non-compliant third states. Although the list will not be a legally binding instrument, it will have political force. At the end of 2017 the list will be added to the Code of Conduct by the ECOFIN Council.[38] The latter can then instruct the Commission to draft a directive to make the list a legally binding instrument. As EU Member States have to transpose EU directives into their national legislation, any Member State failing to implement a directive can be challenged in an infringement procedure at the EU Court of Justice (CJEU).[39]

2.8 Rights of Citizens

The Terms of Reference used as the benchmark for the peer review process refer only marginally to rights of citizens. Only B.2 (rights and safeguards of persons in the requested jurisdiction) has a bearing on basic rights of citizens. However, the benchmark is formulated to the effect that rights (notification and appeal rights) should be restricted insofar as they could hinder an effective and expedient exchange of information. In the OECD Commentary on OECD MTC, para 19.11, reference is made to judicial or administrative procedures for access to protected information. The Commentary makes clear that such procedures 'should not be so burdensome *[LN: for the requested state]* and time-consuming as to act as an impediment to access to banking information'. It should also be noted that B.2 refers only to persons in their capacity as information holders in the requested jurisdiction and does not as such provide rights to taxpayers. We should additionally bear in mind that Article 26 of the OECD MTC, when implemented, provides only for rights and obligations of the contracting states. The addressee of any request made is the requested state. However, rights of other persons (such as taxpayers and third-party information holders) can also be affected by the exchange of information.

An additional issue is that the reference in C.4 to rights and safeguards of taxpayers and third parties refers mainly to the obligation of the requesting state to respect the confidentiality of the information received and its obligation to use the received information only for the purposes for which it was requested (purpose restriction). This reference is not intended to give rights to the taxpayer or the third party. Similarly, it does not define the rights that should be respected, except for the positive obligation on the requesting state to protect the confidentiality of the received information as an extension of the confidentiality obligation imposed on the requested state. We can thus conclude that citizens in this process cannot derive rights from the provisions in Article 26 OECD MTC.

2.9 Peer Review

The EOIR Standard is reflected in the Terms of Reference, with compliance to be ensured through an in-depth peer review process. All Global Forum members, as well as jurisdictions identified by the Forum as relevant to its work, will undergo peer reviews of their legal and regulatory frameworks for transparency and exchange of information in tax matters and for implementing the standards in practice. As mentioned above, the EOIR Standard has been broken down into three main categories, comprising ten essential elements.

34. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11 March 2011, at 1-12.
35. Press release memo/15/5175 dd 15 June 2015.
36. Letter of 19 June 2015 to Global Forum members.
37. Code of Conduct group, established by ECOFIN Council meeting, 1 December 1997, <http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/coc_en.pdf>.
38. Council of Economics and Finance Ministers (ECOFIN) of the European Union.
39. Article 258 TFEU.

These make up the Terms of Reference for assessing compliance and implementation of the EOIR Standard.

The Global Forum has decided that the peer review process should consist of two phases. The first phase will assess a jurisdiction's legal and regulatory frameworks for exchanging information (i.e. the theoretical part), while the second phase will assess the jurisdiction's effective implementation of the EOIR Standard in practice (i.e. the practical part). The peer review group's evaluation reports have to be adopted by all the Global Forum members, while members are also expected to act on any recommendations in the review and to report back to the Global Forum on actions taken.

Once a jurisdiction has undertaken to implement the international EOIR Standard, it obviously has to proceed to do so and then to exchange all information 'foreseeably [of] relevance' for the enforcement of taxes. This should be defined 'to the widest possible extent' without entering the territory of 'speculative requests', being requests that have 'no apparent nexus to an open inquiry or investigation'.[40] Foreseeably relevant information includes accounting information. The Joint Ad Hoc Group on Accounts (JAHGA) has qualified 'accounting information' in its report and has determined that it applies to 'Relevant Entities and Arrangements', which are broadly defined to include: (i) a company, foundation, Anstalt and any similar structure; (ii) a partnership or other body of persons; (iii) a trust or similar arrangement; (iv) a collective investment fund or scheme; and (v) any person holding assets in a fiduciary capacity (e.g. an executor in the case of an estate).[41] The JAHGA report therefore more or less imposes a requirement on jurisdictions hosting entities and arrangements to be able to make accessible and reliable accounting records of those entities and arrangements available. Many jurisdictions (tax havens) have consequently introduced a legal obligation to maintain an administration. The Global Forum conducts peer reviews of its member jurisdictions' ability to cooperate with other tax administrations in accordance with the internationally agreed standard.

The peer review group will qualify the level of adherence in phase 1 (the theoretical and substantive phase) in one of three possible ways: 'The element is in place', 'The element is in place, but certain aspects of the legal implementation of the element need improvement' or 'The element is not in place'. The classifications in phase 2 (the practical phase) are 'compliant', 'largely compliant', 'partially compliant' or 'non-compliant', while the classifications in the overall assessment are as in phase 2.

The Global Forum has now completed 235 peer reviews and assigned compliance ratings to 113 jurisdictions that have undergone phase 2 reviews. A total of 22 jurisdictions have been rated 'compliant', 77 'largely compliant', 12 'partially compliant' and 5 'non-compliant'.[42] Jurisdictions without sufficient elements in place cannot move on to phase 2 and so are at risk of countermeasures.

2.10 Section Conclusion

It can be concluded from this section that, from the perspective of the OECD and Global Forum, the exchange of information is a process operating between competent authorities. This is because the Terms of Reference refer only to rights and obligations of contracting parties and make no provision for the subject of the investigation (i.e. the taxpayer under investigation) or the third-party information holder. However, the subject and the information holder have legal rights, too. The exchange of information concerns the exchange of the taxpayer's personal or other information, or information on the taxpayer originating from the third party. The EOIR Standard requires a speedy process, without delays attributable to interference by the subject. The Global Forum's focus is clearly not on seeking a balance between, on the one hand, administrative effectiveness and, on the other hand, the recognition of basic procedural rights of persons involved, including the judicial review of acts of state. And this different focus, in turn, has an impact on the rights of the subject, as we shall see in the next section.

3 Rights of Defence

3.1 Introduction

As mentioned in the introduction to the contribution, the perspective for assessing the legitimacy of the peer review process is that of the person subject to an investigation in the requesting state, with specific regard for the fairness of the procedure. Under the rule of law, the rights of defence are some of the most important rights available to a subject seeking to protect himself against a governmental decision that severely impacts on the subject's basic civil rights. These rights relate to fair treatment and an equitable procedure. The position of the subject in the EOIR process (in either capacity) must be recognised as it is the subject's civil rights that are at stake. The subject basically has three distinct rights: due process fairness, confidentiality of personal data, and data protection. Recognising the procedural rights of the persons involved in the EOI procedure will often lead to a delay in the process and will in any event have an impact on the effectiveness of the administrative procedure. The Global Forum consequently has a clear bias towards effectiveness over fairness, based on the pre-

40. It is questionable whether these terms have autonomous meaning. As case law in various countries shows, courts in these jurisdictions try to give a domestic meaning to the terms, but this plurality of meanings is not accepted by the Global Forum.

41. JAHGA report 'Enabling Effective Exchange of Information: Availability Standard and Reliability Standard' in *Tax Co-operation – Towards A Level Playing Field*, OECD 2006, <www.oecd.org/ctp/harmful/42179473.pdf>.

42. *See*: <www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings/>. These five jurisdictions include three jurisdictions that have not undergone a phase 2 review.

sumption that the subject can bring his case before the court in the requesting state. However, this bias leaves the affected third party without recourse to adjudication. The following subsections touch upon various aspects of the rights of defence available to taxpayers and third parties in the requested state.

3.2 Fundamental Rights of the Taxpayer

The protection of taxpayers' rights has recently received much attention.[43] Minimum standards (good practice) and best practices are circulating among authorities and interested parties. Citizens have basic rights that should not be neglected in any transnational exchange of information, whether under an EU Directive or a bilateral or multilateral tax convention. The rights that have been agreed internationally are the right to be informed, the right to be able to participate in the decision-making process, the right to be heard in the event of a direct and immediate impact on the person, the right of access to judicial review by an independent court, and the right to privacy and data protection. In a pluralistic legal environment, however, these rights are not uniform. If the rules are to be applied uniformly, it would consequently be helpful for the instrument providing the legal basis for the EOI process also to contain basic protection rights for the persons involved, such as a provision to the effect that when an exchange of information takes place under the EU Directive on Administrative Cooperation (DAC),[44] the affected person has all the rights and freedoms granted by the EU Charter of Fundamental Rights (ECFR),[45] including the freedom of the right of respect for private and family life (Article 7), protection of personal data (Article 8), the right to property (Article 17), the right to good administration (Article 41), the right to access to documents (Article 42), the right to an effective remedy and to a fair trial (Article 47), and the presumption of innocence and the right of defence (Article 48). Although these rights and freedoms are not absolute, any limitation on exercising them must be provided for by law and must respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52, para. 1). Rights corresponding with the rights granted under the European Convention on Human Rights shall have the same meaning and scope as those rights, although Union law can provide greater protection (Article 52, para. 3). Recognised fundamental rights derived from the constitutional traditions common to EU Member States shall be interpreted in harmony with those traditions (Article 52, para. 4).

Good tax administration takes into account a certain protection of taxpayers' confidential information. Most countries recognise the confidentiality of information given by taxpayers and consequently impose strict secrecy obligations on their administration.

The requesting state has to decide which taxpayer rights may be involved and how these rights can be best protected. In the competent authority letter, as the starting point for the investigation, the requesting state will provide information on the taxable subject and the relevance of the requested information for the assessment procedure. The Commentary on the OECD MTC takes the position that the competent authority letter is subject to a duty of confidentiality.[46] The Commentary authorises the disclosure of a minimum of information (but not disclosure of the letter itself) if such is necessary to enable the requested state to obtain or provide the information to the requesting state, without frustrating the efforts of the requesting state. In this, the Commentary seems to take precedence over domestic due process rules as, under the latter rules, the competent authority letter is not generally privacy-protected information, given that it is relevant for reviewing the legality of the investigation order and so normally needs to be disclosed. Only in exceptional circumstances, when disclosure would threaten the success of the investigation, may non-disclosure be appropriate. Having received the results of the request, the requesting state then has to protect the personal rights of third parties in the requested state. The personal rights of legal entities are specifically emphasised in this respect. Legal entities do not enjoy a high level of protection as they lack the dignity of a moral person. However, although the privacy article in the ECFR (Article 7) applies only to natural persons, Article 8 of the European Convention on Human Rights (ECHR) extends the protection of home and correspondence to legal persons.

The requested state, which is obliged to perform the request, has to decide whether to use all its discretionary powers to obtain the information and whether it needs to consider the safeguards offered by the requesting state to the taxpayer in respect of the information supplied. This is because the obligation to perform the request is subject to certain restrictions.[47] These restrictions must be taken seriously as national sovereignty may conflict with the principle of mutual trust and good faith, as applied in international law.[48] Where the law does not provide straightforward procedural protection, the general principle of equality of arms serves as an

43. *See* Baker and Pistone, above n. 24; G. Kofler, M. Poiares Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World*, a publication of the Group for Research on European and International Taxation (<www.greit-tax.eu>). *See also* 'CFE: Towards Greater Fairness in Taxation: A Model Taxpayer Charter' at <www.taxpayercharter.com> and P. Baker and P. Pistone, 'BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations', 5-6 *EC Tax Review* 335 (2016).
44. Directive 2011/16/EU.
45. EU Charter of Fundamental Rights, (OJ) 2010 C83/02 and again in (OJ) 2012 C326/391.
46. Para. 11, Commentary.
47. Article 26(3) OECD MTC limits the main rule by releasing the requested state from the obligation to disclose information in certain circumstances (*e.g.* a sovereignty clause, reciprocity clause, privilege against self-incrimination, information that cannot be obtained in normal administrative procedure, and if disclosure would conflict with public order).
48. Article 26 Vienna Convention on the Law of Treaties, and A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (2007), 179.

arbitrator in the adjudication of rights: in other words, there should always be a balance between taxpayers' obligations to disclose non-public information and taxpayers' rights to retain a level of dignity, free from state interference. The global tax governance institutions, however, do not seem to recognise any right of the individual in the requested state to be free from interference by that state for the purposes of assisting in the enforcement of the requesting state's tax laws. Indeed, the Global Transparency Forum has specifically ordered states to restrict domestic due process rules that assist subjects in the requested state to defend their basic rights.

3.3 Confidentiality and Data Protection

The Terms of Reference recognise the importance of confidentiality for the subject in two elements. On the one hand, they protect the confidentiality of information collected and exchanged and impose the same confidentiality norms for received information on the requesting state as the latter provides for its own information under its own laws (i.e. the principle of equal treatment).[49] On the other hand, the requirement that only information foreseeably relevant for the requesting state can be exchanged implies a proportionality test. In this way, the interests of third-party informers (no obligation to provide more than is relevant) and taxpayers (purpose restriction) are protected. However, the Standard also undermines the rights of third parties and taxpayers by extending the restricted purpose to 'other use' if such other use is permitted under the laws of the requesting state and the requested state agrees to such use. Neither the taxpayer nor the third party has any say in this other use. The OECD standard of protection then applying is the standard of the requesting state, even if the requested state itself has a higher standard of confidentiality. This is a strange provision because it may reduce the protection afforded by the requested state to the taxpayer or the third-party informant.

In the EU, this will lead to a conflict between the rights afforded to taxpayers and the obligations of the requested state under the OECD MTC or similar arrangements. Within the EU legal framework, the protection in the receiving country should be at least equal to the protection afforded by the state seeking to exchange the information. If protection is not on an equal footing, the exchange should be restricted. In the past, existing differences between EU Member States prohibited the processing of personal data. The Data Protection Directive (95/46/EC) (DPD) consequently sought to equalise the differences by imposing equivalent protection in all Member States.[50] Under Article 25(1) DPD, transfer to third countries (outside the EU) may take place only if the third country in question ensures an adequate level of protection of the personal information. In the famous case of *Schrems* v. *Data Protection Commissioner*, the CJEU ruled that the legal framework of protection against abuse in the United States was generally not sufficient to allow information to be transferred to and held in the United States by Facebook.[51]

Contrary to its general obligations under international agreements (the United States has undertaken to exchange information on deposit interest with 86 jurisdictions), the United States has only qualified 18 jurisdictions with which it will exchange information on non-alien deposit interest.[52] Having reviewed its domestic confidentiality provisions, the United States has only partly confirmed the reciprocity promised under the FATCA IGA agreements. For the vast majority of countries, it is correct to state that more of their taxpayers' assets are held in or through the United States than vice versa. Some governments are denied reciprocity by the United States because these countries use their tax administration, and the information received from it, against citizens or foreign competitors, while some tax administrators selectively use tax information against political rivals.[53] Some governments simply lack the capacity to protect tax information because of a lack of resources, lack of protection against cybercriminals, or a lack of will, while others do not consider tax information confidential or pass it on to other government departments. William Byrnes has therefore concluded that the Protocol amending the Multilateral Convention on Mutual Assistance in Tax Matters (allowing the automatic exchange of information) may potentially lead to substantially more identity theft, crime, industrial espionage, financial fraud and suppression of political opponents and religious or ethnic minorities by authoritarian and corrupt governments, including Russia, China, Colombia and Nigeria.[54]

On the other hand, the restriction to the effect that the information received is to be used only for tax purposes has been criticised by the Financial Transparency Coalition on the grounds that this prevents prosecution of criminals for financial offences other than strict tax fraud.[55] A recent EU Commission initiative for intensified collaboration between anti-money-laundering enforcement officers and tax authorities is another sign of 'creep' in the restricted purpose.[56] In this way, the fight against tax evasion through transparency and

49. Article 26(2) OECD MTC.
50. DPD, preamble 7 and 8.

51. CJEU 6 October 2015, C-362/14 (*Schrems* v. *Data Protection Commissioner*), Celex 62014CJ0362.
52. *See* W. Byrnes, *White, Grey and Black Hat Tax Administrations – A proposal for a U.S. Carrot & Stick Approach*, Part I, Kluwer International Blog, 16 August 2016 referring to Rev. Proc. 2012-24, superseded by Rev. Proc. 2014-64 listing as appropriate jurisdictions Australia, Canada, Denmark, Finland, France, Germany, Guernsey, Ireland, Isle of Man, Italy, Jersey, Malta, Mauritius, Mexico, Netherlands, Norway, Spain and the United Kingdom for interest paid after 1 January 2015.
53. *See*, as a general example, ECtHR case *Yukos* v. *Russia*, Appl. No. 14902/04.
54. *See* Byrnes, above n. 52.
55. *See* <https://financialtransparency.org/information-exchange-needs-go-beyond-tax/> (accessed 13 February 2017).
56. *See* Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, Celex 52016PC0452. Especially targeted here is information on the beneficial owners of intermediary entities and other relevant customer due diligence information, if the authorities are to effectively identify and address tax evasion.

exchange of information is becoming part of a larger objective: the prevention of illicit flows of funds.[57]

3.4 Legal Qualification Process of EOIR

The mutual administrative assistance treaties concluded by states are more than just inter-state agreements as they also create obligations for a state's citizens to cooperate by providing personal protected information to other states for the purposes of enforcement and collecting taxes in those other states. In this way, national laws are put in service of the interests of other states, with the result that one state exercises transnational authority with the permission of the other state. However, while international cooperation has advantages for both the requesting and the requested state, the burdens are not equally shared. Some states more often than not find themselves on the requesting side, while others are on the requested side. This requires differential treatment.[58]

The current view of the CJEU (in *Sabou*)[59] and the ECtHR (in *Othymia*)[60] is that the exchange of information upon request does not constitute an act giving rise to an obligation to hear the person concerned (taxpayer) either before the investigation takes place or before the results of the investigation are exchanged with the requesting country. The party concerned is not entitled to receive notification prior to the exchange: 'It cannot be a requirement of Article 8 of the Convention [ECHR] that prior notice of lawful tax investigations or exchanges of tax-related information be given to all persons potentially implicated' (*Othymia, 44*). In most countries, the exchange of information process is seen as mere 'fact gathering' and not as a proper administrative procedure.[61] This underlines that the protective rights are granted only at the level of the requesting state. Both courts also make a distinction between the 'investigation' stage and the 'contentious' stage. A request for information forms part of the investigation stage: 'is part of the process of collecting information'.[62] The rights of defence are consequently seen as coming into play only when the process enters the contentious stage, which begins when the taxpayer is sent the proposed adjustment.[63] In the opinion of the CJEU, respect of the taxpayer's rights of defence does not require the taxpayer to take part in the request for information or to be heard when inquiries are being carried out or before the requested Member State sends the information to the requesting Member State.[64] The positions adopted by the CJEU and ECtHR are currently, however, subject to debate.

It is argued that the taxpayer has no right to be informed or to participate in any way in the process of EOI decision-making because this process is part of the administrative/procedural stage of an investigation. At that point, there is no discussion and, therefore, no right to interfere. That approach, however, is flawed,[65] and the error is evident in *Sabou*. The actions taken by the requested state to obtain the information from the information holder cannot be reviewed by the adjudicating court in the requesting state for their compatibility with the rights granted under the ECFR or ECHR, given that the sovereignty clause prevents a court in the requesting state from reviewing acts of state of another state. This is a flaw in the international process. However, the domestic court does have procedural autonomy to evaluate evidence obtained in the exchange procedure.[66]

The taxpayer has general rights to privacy and confidentiality at all stages of the process; there is, for example, a prohibition on exchanging a trade, business, industrial, commercial or professional secret or trade process. But how can an infringement of this provision be challenged if there is no access to a court?

The adjudication of conflicts in EOI processes is based on a national procedural (administrative) framework, whereas the exchange in substance is based on international commitments. In this context of European (and global) legal pluralism, one cannot ignore a parallel denationalisation of political, and especially legislative, institutions and the importance of reconnecting legislative and judicial functions across levels of governance. A further question, therefore, is whether such adjudication should take account of the transnational environment in which the exchange takes place and, if so, what effects this will have on national procedures? In national procedures, domestic authorities often have a carve-out for tax procedures. Such procedures often do not follow the general principles of administrative law in that they frequently violate requirements of administrative due process. The basic requirements of administrative due process are threefold: (a) the requirement to carry out a procedure; (b) the right to be heard in that procedure; and (c) the requirement to give reasons for the procedure.[67]

3.5 Exceptionality

In searching for 'fairness' in the international exchange procedure we face claims for 'exceptionality' by the

57. In their statement of 14 April 2016, the five EU Ministers of Finance attending the G20 focused on the fight against tax evasion, aggressive tax planning and money laundering and underlined the common patterns in money laundering, tax evasion and illicit finance.
58. *See* M. Keen and J. Ligthart, 'Information Sharing and International Taxation: A Primer', 13 *International Tax and Public Finance* 81-110; Discussion Paper, University of Tilburg, CentER, Discussion Paper No. 2004-117; M. Keen and J. Ligthart, 'Revenue Sharing and Information Exchange under Non-Discriminatory Taxation' (June 2005), CentER Discussion Paper No. 2005-69.
59. Case C-276/12, *Sabou*. ECLI:EU:C:2013:678. *See also* L.E.C. Neve, case note on *Sabou in AB 2014/37*.
60. ECtHR 16 June 2015, *Othymia Investments BV*, Appl. No. 75292-10. *See also* T. Barkhuysen and M.L. van Emmerik, case note on *Othymia* in *AB 2017/2*, who plead for re-introduction of the notice of intention to exchange.
61. X. Oberson, IFA General Report 2013, 'Exchange of Information and Cross-border Cooperation between Tax Authorities', 54.
62. Case C-276/12, *Sabou*, ECLI:EU:C:2013:678, rec. 42.
63. *Ibid*., rec. 39.
64. *Sabou*, rec. 44.
65. Baker and Pistone (2015), above n. 24.
66. Case C-437/13, *Unitrading*, ECLI:EU:C:2014:2318, rec. 35.
67. *See* G. della Cananea, *Due Process of Law beyond the State* (OUP, 2016).

competent authorities in these proceedings, either claims for confidentiality of communication, or claims for exceptions to transparency. The Global Transparency Forum's attitude is a good example of the kind of 'exceptionality' that the Forum is requesting for itself by seeking to remove basic rights, such as the right to be notified of an intended EOI, and the right to challenge any decision in this field. The EU Commission is another good example of the kind of 'exceptionality' discussed here. In the preamble to the Directive on Administrative Cooperation 2011/16/EU (DAC 1), the Commission advises Member States to restrict transparency by invoking the general exception of Article 13(1)(e) Data Protection Directive 95/46/EC (DPD).[68] This means, in my opinion, that the Commission is advising Member States, when implementing the DAC 1, also to include a general exception to the notification requirement foreseen in the DPD. In this way, a right that is given to a subject (the right to access data) is restricted without any procedural compensation. Invoking the priority of national interests, especially in taxation matters, for a general and generic purpose is contrary to the spirit of the DPD.[69] I recognise that the levying of taxes is of great interest for any state, but that interest cannot be regarded as legitimate justification for denying due process when fundamental civil rights are at stake.

3.6 Infringements of Civil Rights

In the past, international cooperation between fiscal authorities of contracting states was often seen as a means of strengthening powers to enforce domestic tax laws, with the exchange of information originally restricted to readily available or accessible information for which no investigation and cooperation of another subject was necessary. Over time, however, the contracting parties' commitments extended to an obligation to cooperate in providing information for which an investigation was necessary. This, however, touches upon the private sphere of the individual, which is when the data and privacy protection provided for in Article 8 ECHR[70] and Articles 7 and 8 ECFR[71] come into play.

The international exchange of information can result in an infringement of third parties' rights through the disclosure, for example, of protected information. However, although an individual has standing under the ECHR if his rights are infringed by a Member State of the Council of Europe, it is difficult to allocate responsibility for the infringement in a transnational investigation involving cooperation between two or more states. The question arises as to which state is responsible for any violation of the rights of persons protected under the ECHR if a request for assistance is to be complied with. Each state is responsible for actions within its own jurisdiction. But is this appropriate if an act in State A is seen as preparatory for a decision in State B? This is important because qualifying an act of State A as 'preparatory' in nature deprives the subject of the opportunity to take legal action against the act of State A, while the subject is also unable to have the act reviewed in State B.[72]

Ensuring the legal protection of citizens is a collective responsibility of all Member States within the Council of Europe. However, ECtHR case law does not accept common responsibility, but instead divides the responsibility of the states.[73] The fact that the ECtHR found a common responsibility of Denmark and Turkey for the extradition procedure in *Sari*, but did not find individual neglect meant that the ECtHR was unable to decide on either state's responsibility for not hearing the case within a 'reasonable time'. This may create complications in composite procedures or transnational acts. States have an inter-state obligation to uphold the rule of law. The ECHR comprises a network of mutual and bilateral undertakings, while the objective obligations of states must benefit from collective enforcement.[74] In my opinion, this means that both states in EOI procedures are responsible for proper performance of the process and for upholding the rule of law. Legitimacy deficits must, therefore, have an impact on the value of the evidence collected in such a process.

Although the use of evidence obtained contrary to the provisions of the ECHR creates responsibilities for states under the ECHR,[75] this does not mean that evidence obtained in violation of ECHR obligations cannot be used in the adjudication process.[76] The responsibility of the state is for the reciprocal engagements between contracting states, as well as to protect subjects within its jurisdiction against infringements by other subjects or other states. An example of when the transnational element comes into play can be seen in *Ireland* v. *UK*,[77] when Ireland challenged the UK for not observing the latter's commitments under the ECHR. The Court confirmed that the UK was obliged to observe the ECHR commitments, but did not find a violation of such commitments.

In the EU, the fundamental rights set out in the ECFR protect citizens against infringements by EU institutions and infringements by states in the execution of EU-based regulations (primary or subsidiary), whereas

68. Preamble 27. However, it is appropriate to consider limitations of certain rights and obligations laid down by Directive 95/46/EC in order to safeguard the interests referred to in Article 13(1)(e) of that Directive. Such limitations are necessary and proportionate in view of the potential loss of revenue for Member States and the crucial importance of information covered by this Directive for the effectiveness of the fight against fraud.
69. Article 13, Exemptions and Restrictions (1) reads: '(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters'.
70. ECHR, ETS No. 4 and subsequent amendments in ETS 44, 45, 55, 118, 155, 140 and 194.
71. EU Charter of Fundamental Rights, Celex 12012PTXT, OJ 2012/C 326/02.
72. In general, acts of a preparatory nature lack direct effect on subjects' legal position and are, therefore, not justiciable.
73. *Sari* v. *Turkey and Denmark*, ECtHR, No. 21889/93.
74. *Ireland* v. *UK*, ECtHR, No. 5310/72 para. 239.
75. *X* v. *Germany*, European Commission of Human Rights (EComHR), No. 1611/62.
76. Especially in procedures where criminal or administrative penalties can be imposed, the ECtHR will consider the 'fairness' of the procedure in total. *See P.G. & J.H.* v. *United Kingdom*, ECtHR No. 44787/98.
77. *Ireland* v. *UK*, ECtHR, No. 5310/71.

ECHR rights impose both positive and negative obligations on states. The CJEU and ECtHR also have different jurisdictions in terms of subjects and subject matters. Such differences can be observed with respect to jurisdiction (Member State action versus EU citizens), the scope of review, and the effect and enforcement of judgements. Article 6 ECHR (right of review by court) deals only with civil and penal claims, rather than with the exercising of public authority in tax matters (unless there are monetary effects).[78]

The EU has changed bilateral and multilateral cooperation, such that its perspective now centres on the interests of Union citizens. We therefore now need principles that are much more oriented towards citizens' fundamental rights than to the economic well-being of the EU Member States. As seen in *Van Gend & Loos*, the subjects of the new legal order comprise not only the Member States, but also their nationals.[79] We have thus moved from a Member State approach to a Union approach, and this influences subjects' procedural rights. But we continue to see a concentration of legal remedies in the requesting state, as reflected in the repeal of the notification procedure and the prohibition of a judicial review in the Dutch International Assistance (Levying of Taxes) Act [*WIBB*], both of which are contrary to the interests of the subjects.

3.7 Competence of ECtHR and CJEU as Regards Procedural Tax Law

Human rights and the protection of these rights have moved from the social platform to the legal platform. We are currently also seeing a constitutionalisation of international law, whereby constitutionally protected civil rights are becoming increasingly important in the application of international law. This constitutional perspective on the body of international law, especially that part of international law dealing with governance, has been gaining importance ever since international law started institutionally regulating the conduct of subjects worldwide. This new perspective on international law can also be seen from a global administrative law perspective, with the intention being to apply the principles of administrative and constitutional law in the field of international law, and the core idea being that the exercising of institutional authority should be restrained and controlled by procedures and processes under law. On the transnational level, individual autonomy should be protected against the authority exercised by the state and its agents in international institutions and networks.

This greater focus on human rights in international law applies also in tax law. Daniel Gutmann provides two reasons for this recent trend:[80] first, the new threats increasingly linked to globalisation and the reinforcement of tax administrations' powers, and, second, the promotion of social goals such as 'solidarity' or environmental protection, and their effects on tax matters.[81] Article 1, Protocol 1, of the ECHR balances the rights to tax natural and legal persons against the state's obligation to protect peaceful enjoyment of property. A problematic issue in this respect, however, is the legitimacy of double taxation as no individual state can be held responsible for the existence of double taxation, and taxpayers are reliant on national tax authorities' discretion when it comes to eliminating it in practice.[82]

A similar field of conflict can be seen in the international procedure for the exchange of information. The increased powers legitimately attributed to tax authorities to enforce tax legislation, also in cross-border situations, need to be balanced by a symmetrical acknowledgement of fundamental taxpayer rights.[83] Gutmann concludes, therefore, that the new powers of tax authorities should be balanced by new rights or by the correct implementation and application of existing rights in tax proceedings. A general reference to the important interests of states in the levying of taxes does not constitute a substitute for neglecting taxpayers' individual rights. Similarly, the reference to the protection of the 'internal market' in *Othymia Investments BV* does not prohibit the protection of the interests of the individual.[84]

The right to a fair trial is dealt with in Article 6 ECHR, while the right of review, extended to everyone, is limited in paragraph 1 to 'the determination of his civil rights and obligations or of any criminal charge against him'. The ECtHR will therefore explore the civil character of tax disputes on its own, irrespective of the nature of the rule or the origin of the competent authority. The criteria used by the Court to recognise a dispute as 'civil' are the existence of a private contract or that the action represents a challenge to private property. With respect to sanctions, the Court will explore the possible penal (or repressive) character of a tax sanction. Tax sanctions in the form of an administrative sanction fall within the scope of Article 6 ECHR on the basis of the general nature of the sanction, its deterrent or repressive nature and its severity.[85] Conflicts in this field will gain importance as more and more sanctions are based on administrative rather than penal law provisions.

In a mutual legal assistance case between Switzerland as the requested state and Italy as the requesting state, the European Commission on Human Rights was asked to decide on the application of Article 6 ECHR with respect to the subject's rights of defence (including the right to review documents). The Commission decided that the Swiss competent authority's decision related exclusively to the obligations assumed by Switzerland under international agreements. The procedure to oppose this decision (*G.A. & A.M.* v. *Switzerland*) thus

78. *Ferrazzini* v. *Italy*, ECtHR, No. 44759/98.
79. Case, 26/62 *Van Gend & Loos*, ECLI:EU:C:1963:1 (direct effect for the individuals).
80. D. Gutmann, 'Taking Human Rights Seriously: Some Introductory Words on Human Rights, Taxation and EU', in G. Kofler, M. Poiares Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World* (IBFD, 2011), ch. 6.
81. Gutmann, above n. 80, at 108.
82. *Ibid*., at 109.
83. *Ibid*., at 110.
84. ECtHR, *Othymia Investments*, No. 75292/10, para. 41.
85. ECtHR 24 February 1994, *Bendenoum*, Appl. No. 12547/86.

escapes the application of Article 6 ECHR.[86] The procedure of mutual administrative assistance for EOI is often seen as similar to a procedure under a mutual legal assistance treaty. Article 6 ECHR will therefore not apply directly (by reference to *G.A. & A.M.* v. *Switzerland*) to an exchange of information procedure that is not of civil or penal origin. Nevertheless, the due process principles derived from Article 6 ECHR will exercise influence on domestic judicial procedures. For a different view of CJEU on this issue, see the following discussion on the *Berlioz* case.

3.8 *Berlioz* Case – CJEU C-682/15: Important Issues Decided by CJEU

A case that provides a good overview of the conflicting interests discussed above is that of *Berlioz Investment Fund S.A.*, which has recently been decided by the CJEU. Berlioz, as a third party, is obliged by the laws of Luxembourg to reply to questions of the competent authority. Under the amended legislation, Berlioz cannot object to the request, nor ask for judicial review, while refusing to cooperate attracts a fine of €250,000. Berlioz refused to reply to certain questions and was fined. It subsequently asked for judicial review of the fine and the underlying order. I will explain the questions, the Attorney-General's advice to the CJEU and the ruling of the CJEU below. The decision was taken on 16 May 2017.[87]

The CJEU has been called on, in a preliminary ruling request, implicitly to decide on the validity of recent amendments of procedural laws in Luxembourg. In the case of *Berlioz* (C-682/15) the CJEU has been asked to answer six questions relating to a request from France to Luxembourg for exchange of information. The questions 3 and 5 of the Luxembourg Court Administrative were taken together by the CJEU.

Essentially, the ruling of the CJEU was as follows:

i. The first question relates to the application of the ECFR. In order for it to be applicable, the scope of the ECFR must be analysed under article 51. The ECFR is applicable when Union law is implemented. The CJEU concludes that the ECFR is applicable because Member States are required to take every necessary measure to guarantee the effectiveness of the Directive on Administrative Cooperation 2011/16/EU (DAC 1). 'A mechanism for imposing sanctions is most certainly a necessary measure to ensure the effectiveness of the system for the exchange of information established by Directive 2011/16.'[88] In the judgement of *Sabou*, the CJEU confirmed that the rules on requests for information and on the use of that information form part of the application of EU law. In that case the CJEU considered that 'the questions referred … concern[ed] the implementation of EU law and [that] the Court [had] jurisdiction to examine the application, in [that] context, of fundamental rights'.[89] The applicability of the ECFR is thus confirmed.
ii. The second question concerns the right to an effective remedy under Article 47 ECFR. The persons on whom a fine was imposed question the validity of the request for information. The issue here is whether the investigation into the validity of the information request is conditional upon a breach of a specific right or freedom guaranteed in the ECFR. The right to an effective remedy is a general principle of law and the Court can thus review whether the measure is in conformity with the Treaties (TFEU and TEU), with general principles of law and with fundamental rights. Thus if the request for information is made in the context of a procedure that constitutes the implementing of the law of the Union, the Court can review the legality of that request.[90]
iii. The third question, taken together with the fifth question, asks whether the national court has 'unlimited jurisdiction' to assess the proportionality of the penalty and the possibility to examine the legality of the information order on which the penalty is based. The court must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. It thus cannot be the case that the court is restricted in reviewing the order for information. For two reasons, the court hearing the action against the pecuniary administrative penalty must be able to examine the legality of the information order on which the penalty is based:
    a. the court is not bound by the administrative order, and
    b. the legality of the order is unmistakably a question of law.

    The CJEU further reviews whether the review, which the tax authority and the court of the requested state must carry out, is limited to the procedural regularity of the request for information. As the request has the legitimate objective of combating tax evasion and tax avoidance pursued by Directive 2011/16, the court must be capable only of verifying, on the basis of a brief examination, that the information order is based on a request for information that demonstrates a link between, on the one hand, the information requested, the taxpayer concerned and any third party asked to provide information and, on the other, the tax objective pursued. In order to entail a finding of illegality, the deficiency between the request for information and the tax objective must be manifest. This means that the court does not have to confirm the information stated as facts in the request. It may rely on the stated

86. EComHR 1 December 1986, *G.A. & A.M.* v. *Switzerland*, Appl. No. 11514/85. Its prospective value, however, is limited as the Commission gave an importance level indication of only 3. As the decision was a non-receivable decision, no appeal to the ECtHR was possible in those days.
87. CJEU, 16-5-2017, *Berlioz* (C-682/15), ECLI:EU:C:2017:373.
88. *Ibid.*, rec. 41.
89. CJEU, 22-10-2013, *Sabou* (C-276/12), ECLI:EU:C:2013:678), rec. 27.
90. CJEU, 16-5-2017, *Berlioz* (C-682/15), ECLI:EU:C:2017:373, rec. 52.

doi: 10.5553/ELR.000086 - ELR December 2017 | No. 2

facts. A request is only illegal when the tax objective is not manifest.[91]

iv. The fourth question concerns the scope of the concept of 'foreseeably relevant'. Is 'foreseeable relevance' a condition of the validity of the request for information? The concept places a limitation on the obligation to answer a request and constitutes the criterion by reference to which the legality of the information order should be examined by a tribunal for the purposes of Article 47 of the ECFR. The concept is thus a condition that the request must satisfy.[92]

v. The sixth and last question of the referring court asks about disclosure of the competent authority letter. The adversarial principle is a fundamental principle as it permits the exercise of the rights of defence. The link between the requested information and the tax objective pursued by the requesting authority is necessarily developed in the request for information. The initial request for information made by the requesting state must necessarily be brought to the attention of the tribunal hearing the action against the pecuniary penalty, as otherwise it would be unable to carry out the review of legality required by Article 47 ECFR. But the request need not necessarily be brought to the attention of the third party as it cannot be precluded that communication of the request for information to the requested third party might damage the effectiveness of the exchange of information or reduce the prospects of success of the investigation carried out by the requesting authority. Disclosure may consequently be restricted if those reasons are imminent. The restriction on the disclosure should be 'necessary' in order to preserve the fundamental right of another individual or to safeguard an important public interest. Combating tax evasion and tax avoidance constitutes such an important public interest. But the competent authority has to prove to the courts that the interests of the state would be compromised by a precise and full disclosure to the person concerned of the grounds which constitute the basis of the decision at issue.[93] The minimum information that must be provided to the party shall therefore include at least: (a) the identity of the person under examination or investigation; (b) the tax purpose for which the information is sought.

As can be seen from the above questions referred by the Luxembourg Court of Appeal and the ruling of the CJEU, the amendments imposed by the Global Transparency Forum on Luxembourg, the Netherlands and other countries in the peer review report are currently illegitimate as these measures preclude a party from access to judicial review by a Court. Given the requirement of Article 19 TEU and given the fact that exchange of information for tax purposes is a field covered by Union law, the Member States must provide remedies sufficient to ensure effective legal protection. Therefore, the rule of law is applicable also to the global EOIR Standard as reflected in the DAC.

3.9 Section Conclusion

This section on the rights of defence has shown that the Global Forum does not recognise due process rights of the individual. There is a tendency to claim an exceptional status, owing to the important interests of state that are at stake. Slowly, however, the position of the individual subject is becoming recognised as being of legal importance. As the order to provide information has an impact on the subject's legal position, while non-performance attracts a penalty, an order to provide information should be seen as an administrative act. The subject's evolving position is also reflected in the ruling of the CJEU, who now finds that the legality of an order to provide information should be subject to scrutiny by an independent court.

4 Legitimacy in Global Governance of Tax

4.1 Introduction

After the Second World War, international policymakers pursued a limited form of internationalisation of their economies with the establishment of the Bretton Woods/GATT institutions, which subjugated international economic integration to the needs and demands of national economic management and democratic politics.[94] From 1980 onwards, this strategy changed dramatically as global policy began to be driven by an agenda of 'deep' integration, elimination of barriers to trade and capital movements. This 'deep' economic integration cannot be achieved in situations where nation states and democratic policies exert considerable force.[95] Globalisation of trade and capital requires globalisation of governance, which in itself restrains national sovereignty.

Global governance seeks to integrate the nation-state system with democratic politics and economic and political integration. In the view of Dani Rodrik, however, only two of these three aims are possible.[96] Accordingly, it will be very difficult to integrate national constitutional rights and global regulations without any democratic foundation. Global governance lacks administrative fairness for the subjects of the regulations. The protection of subjects' interests is subordinated to the efficiency of the procedure. According to Rodrik, a nation-state system and democracy are not compatible with economic integration. He suggests, therefore, to limit the political integration and have more rules on the economic inte-

91. *Ibid.*, rec. 89.
92. *Ibid.*, rec. 74.
93. *Ibid.*, rec. 101.
94. D. Rodrik, 'Feasible Globalizations', NBER Working Paper No. 9129, September 2002 JEL No. F0, 3.
95. *Ibid.*, at 2.
96. *Ibid.*, at 14.

gration until such time as democratic principles and the rule of law become an integral part of global integration. This questions the legitimacy of global governance, as it currently operates, in the field of tax.

4.2 Legitimacy

Global governance in tax brings with it a tension between local and global obligations, with the global standard for administrative cooperation between states being implemented domestically and forced upon local taxpayers. The original inter-state obligation to cooperate with the home state in enforcing bilateral treaty obligations has been converted into a global obligation for taxpayers to assist in suppressing tax evasion worldwide. Taxpayer have thus become instrumental in achieving the goal of global equivalence. The same taxpayers, however, wish to balance their obligations under international law with their global constitutional right to defend themselves against intrusions into their private and family life, and generally to exercise their civic right to respect and dignity, also against interests of other states. The international law enforced upon them can demand compliance only if the rule enforced by that law is itself legitimate. By that I mean that the rule is democratically constituted and enforces an acceptable goal in a fair manner. The suppression of tax evasion is certainly an acceptable goal of great importance for the well-being of all citizens of a state.[97] However, that does not make enforcement of a rule legitimate, even if it is effective. Legitimacy has both an *input* side (Member States are themselves bearers of legitimacy) and an *output* side (effective and efficient performance of the task). But effective performance of a task is not sufficient to constitute legitimacy if that performance violates principles of justice as accepted in the rule of law.[98]

What is meant by 'legitimacy'? The term relates to the justification and acceptance of political authority.[99] According to Bodansky, legitimacy is a third basis of compliance between rational persuasion on the one hand and power on the other. Legitimacy has a normative quality in that it represents justification.

According to Samantha Besson, the key to the authority of international law in pluralist legal orders lies in 'lifting the state veil'[100] and focusing on the individual as the ultimate subject of authority in international law.[101]

97. *See also* EComHR, *X (Hardy-Spirlet)* v. *Belgium*, Appl. No. 9804/82, 7 December 1982.

98. *See also* P. Baker, 'The Rights to Confidentiality and Privacy in an Age of Transparency: A European Perspective', summary of talk delivered at First International Conference on Taxpayers' Rights held in Washington DC in November 2015, <https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Baker_TPRights_PrivacyandDataProtection_Nov2015_508.pdf>.

99. D. Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Springer, 2008).

100. S. Besson, 'The Authority of International Law – Lifting the State Veil', 31 *Sydney Law Review* 343-80 (2009). Available at SSRN: <http://ssrn.com/abstract=1588040>.

101. Besson, above n. 100.

4.2.1 Kumm's Legitimacy Concept

Mattias Kumm states that international law has moved away from the domain of foreign affairs to a domain of governance, and is no longer the exclusive territory of states wishing to regulate bilateral affairs. The scope of international law has thus expanded to fields of transnational adjudication and enforcement, and this has consequences for its legitimacy. Emancipation from state control requires new accountability mechanisms. International law is being challenged in domestic settings in the name of democracy and constitutional self-government.[102] Kumm analyses legitimacy for four distinct principles: (i) the formal principle of international legality; (ii) the jurisdictional principle of subsidiarity; (iii) the procedural principle of adequate participation and accountability, and (iv) the substantive principle of achieving outcomes that are not in violation of fundamental rights and are reasonable. International law is connected to the national constitution in a different way from domestic law and needs, therefore, to improve its decision-making at an international level. This can be done, provided that the above principles are respected. The change from bilateral affairs to governance of globalisation also has an impact on the position of the subject. Governance of global developments affects the subject in that it seeks to govern the conduct of persons beyond the state instead of to govern acts of states. As more and more people are affected by global governance of transnational activities, the question of the legitimacy of the resulting rules comes to the fore.

4.2.2 Legitimacy of Global Administration of Tax

The globalisation of governance in international tax with a view to suppressing global tax evasion can be seen as the global administration of tax. The question then is: Do principles of administrative law apply to this global administration? Administrative law is meant to control and restrain the exercising of public power. The current view is that global governance in the area of international tax should be exercised in respect of the rule of law and democracy. Domestic administrative action in the field of international tax should be based on global principles such as equality before the law, democracy and respect for taxpayers' rights. However, the current sources of law for international exchange of information are mainly rules set by non-legislative bodies (the OECD and Global Transparency Forum as government networks). Domestic and international elements have become interwoven in the process of regulation, whereby domestic constitutional rights are being exchanged for universality of the rule. In other words, the universality of an efficient system for exchanging information has gained priority over constitutionally protected rights of defence. The better way would have been to re-enforce protection of legal interests and to include civic rights in the global rule, irrespective of the plurality of national constitutional rights or the absence of such

102. M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15(5) *EJIL* (2004).

doi: 10.5553/ELR.000086 - ELR December 2017 | No. 2

rights. In order to overcome the political trilemma of Rodrik, global governance should be amended to incorporate relevant elements of nation-state constitutional rights for the individual. These rights can be found in global administrative law principles such as transparency, consultation, participation, rationality and legality, effective review of rules and decisions.

International law basically has a state-oriented character. Rather, however, than expanding horizontally to embrace new states, it has extended itself vertically to include individuals, groups and international organisations within its scope.[103] The end of the Second World War saw the recognition of individual responsibility under international law without and beyond the state, while the growing interest in human rights has contributed to the increasing role of the individual in international law. Emphasis on the dignity of man provides an ethical basis for international law.

4.3 Section Conclusion

In order for a rule to be legitimate, any weak legitimacy in the constitution of the rule must be compensated by strong procedural legitimacy in its application. As explained earlier, the democratic legitimacy of the Global Transparency Forum is non-existent. Therefore, any legitimacy the Global Transparency Forum may have relates to the efficacy of the output and must be based on respect for the rule of law.

The previous section concluded that observance of the rule of law in the form of procedural fairness is crucial to the legitimacy of the EOIR Standard. As we have seen, however, that Standard does not provide for any procedural fairness in the EOI process. For Ana Dourado, this conclusion constituted sufficient grounds for stating that the EOIR Standard cannot be accepted as a global standard. To become acceptable on a global level, it needs to be strengthened by the addition of procedural fairness, both for the taxpayer subject to an investigation and for the person ordered to cooperate in the information collection process. As P. Baker puts it, 'Nothing authorizes tax administrations to ignore the rights of taxpayers.' The provisions in the Terms of Reference on respect for rights of information holders (B.2) and data protection in the exchange process (C.4) are designed to be subordinate to an efficient exchange process. For this reason, the Global Transparency Forum has forced some states to renounce notification and to restrict access to justice for those wishing to challenge the legality of the exchange of information, as well as to impose a prohibition on disclosing competent authority letters, as evidenced by the examples given in the opening section. The sources for the EOIR Standard and the resulting Terms of Reference do not give the Global Transparency Forum a mandate to include limitations on the rights of defence in the Terms of Reference. Indeed, the Global Transparency Forum has no executive authority to impose the above restrictions on states that have made commitments to transparency.

The amendments made to local procedural rules as a result of the Global Transparency Forum's work cannot be challenged under local law. The only remedy, therefore, must be sought in international customary law that supersedes domestic law and in international and supranational law. Under the ECHR, persons concerned have standing against the acting state for any infringement of their human rights, as guaranteed by the Article 8 with respect to natural persons and, in some instances, also legal persons. Under the ECFR, persons concerned have a right to respect for private life (Article 7) and to data protection (Article 8). This protective framework of constitutional defence rights takes priority over national law. The ECFR comes into play if primary EU law (TEU, TFEU or ECFR) or secondary law (DAC 1 and DPD) 'touch' upon national law (Article 51(1) CFR).

5 Conclusion

The EOIR Standard for tax purposes, as developed by the OECD and implemented through the peer review procedures of the Global Transparency Forum, is not legitimate because it denies the person concerned recourse to the defence rights provided by the rule of law. This conflict between efficiency and effectiveness in the application of basic personal rights for the person concerned can only be resolved by the law. In adjudicating conflicts of this nature, the courts have to take into consideration that the rule forced upon the persons concerned lacks legitimacy. The Standard should therefore be revised to include rights of defence for the persons concerned in the form of a right to be notified of any intended exchange of information (now acknowledged in *M.N. and others* v. *San Marino*), a right to have the legality of the order reviewed by an independent court (now acknowledged in *Berlioz*) and a right to data protection (now acknowledged in *Schrems* v. *Data Protection Commissioner*). These rights must apply to all persons concerned, whether they are taxpayers or third-party informants. The level of protection afforded to the taxpayer should be at the level of the requested state with regard to the collection and exchange of information and at the level of the requesting state with regard to the use of data as evidence for the assessment.

I regard the Data Protection Directive and forthcoming General Data Protection Regulation (GDPR) as containing important procedural safeguards against the improper use of exchanged data.[104] Tax data may flow freely within the EU, but a data flow outside the EU is restricted. In my opinion, this will lead to a proliferation

103. For a brief summary of the development of international law over the centuries and decades, *see* M.N. Shaw, *International Law*, 6th ed. (Cambridge University Press, 2008), 43-68.

104. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Regulation (EU) 2016/679) OJ L 119, 4 May 2016, 1-88.

of the EU's data protection rules on a global scale. Another important element of the legal protection shield in Europe is that information obtained through administrative assistance must be reviewed for compliance with human rights standards, as reflected in the ECHR, in the country where that information is collected.[105]

In balancing the rights of the person concerned to privacy and data protection against important interests of both the requested and the requesting states, there must be a judicial review of the requested state's adherence to human rights concepts of the requesting state. The protection shield's equivalence in both states must be a condition for the use of the received information in the requesting state. This will also mean a proliferation of European human rights norms in global exchange of information procedures. The proportionality and necessity arguments should restrict the volume of exchanges, while the legitimacy argument should imply a thinner version of the international tax governance rules, including full recourse to the rule of law.

The Terms of Reference for peer review by the Global Transparency Forum currently take no account of the rights of the persons involved.[106] This lack of legal protection of such persons violates the rule of law in respect of due process, privacy protection and data protection. As such, I support Ana Dourado's conclusion that the EOIR Standard lacks legitimacy.

105. For an example of such a review, *see* ECtHR 7 July 2015, *M.N. and others* v. *San Marino*, Appl. No. 28005/12, where the court imposed a notification obligation on San Marino prior to the exchange of information in order to protect the right to a judicial review of the order's legality.

106. With regard to the preservation of confidentiality in the exchange process, recent OECD reports (BEPS Action 5 on Harmful Tax Practices: Transparency Framework – Peer review documents, OECD, 2017, at 13 and BEPS Action 13 on Country-by-Country Reporting – Peer review documents, OECD 2017, 15-16) have included more extensive terms of reference elements than those of the Global Transparency Forum, especially in respect of the domestic enforcement of the confidentiality rules. Nevertheless, those elements are still insufficient to comply with the stricter EU data protection rules set out in the GDPR.

Legal Legitimacy of Tax Recommendations Delivered by the IMF in the Context of 'Article IV Consultations'

Sophia Murillo López*

Abstract

This contribution examines the legal legitimacy of 'Article IV Consultations' performed by the IMF as part of its responsibility for surveillance under Article IV of its Articles of Agreement. The analysis focuses on tax recommendations given by the Fund to its member countries in the context of Consultations. This paper determines that these tax recommendations derive from a broad interpretation of the powers and obligations that have been agreed to in the Fund's Articles of Agreement. Such an interpretation leads to a legitimacy deficit, as member countries of the Fund have not given their state consent to receive recommendations as to which should be the tax policies it should adopt.

Keywords: legitimacy, International Monetary Fund (IMF), Article IV Consultations, tax recommendations, global tax governance

1 Introduction

1.1 The IMF's 'Article IV Consultations'

Since its incorporation, the International Monetary Fund ('IMF' or the 'Fund') has had as its primary objectives 'the wish to promote international monetary cooperation and exchange rate stability, to assist in the establishment of a multilateral system of payments, to assist in the elimination of foreign exchange restrictions and to provide temporary (i.e., short-term) assistance to correct balance of payments imbalances'.[1] To achieve these primary objectives, the IMF performs its work on three core fronts: (i) *surveillance*, i.e., monitoring the economic and financial policies of its member countries to ensure sound economic growth; (ii) *lending*, i.e., providing loans to member countries to resolve problems connected to their balance of payments (such as payments to international creditors, the building of international reserves and measures to stabilise currencies) and iii) *technical assistance*, i.e., providing member countries with practical assistance in financial and economic affairs.[2]

The first of these core fronts, surveillance, comprises both multilateral and bilateral surveillance activities by the Fund. Multilateral surveillance focuses on assessing the multidimensional features of the global and regional economy, monitoring economic trends and analysing the effect of member countries' policies on the wider economy. Reports issued in the framework of multilateral surveillance include the *World Economic Outlook*, the *Global Financial Stability Report* and *Fiscal Monitor*.[3]

Bilateral surveillance, on the other hand, takes the form of 'Article IV Consultations' as they are performed under Article IV (*Obligations Regarding Exchange Arrangements*) of the Fund's Articles of Agreement.[4] The IMF's work during Consultations involves conducting regular, often annual, monitoring of its 189 member countries' individual economies.[5] Consultations are generally aimed at giving the Fund's views on how individual countries can ensure economic growth and promote international monetary stability, as well as

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1. *See* Art. 1, Articles of Agreement of the International Monetary Fund, 27 December 1945, 2 UNTS 39 (hereinafter 'Articles of Agreement'). The full text of the Articles of Agreement is available at: <https://imf.org/external/pubs/ft/aa/> (last visited 27 September 2016).
2. G. Loibl, 'International Economic Law', in M.D. Evans (ed.), *International Law* (2010) 722, at 725.
3. For the World Economic Outlook, *see* <http://imf.org/external/pubs/ft/weo/2016/02/> (last visited 27 September 2016). The Global Financial Stability Report can be consulted at: <http://imf.org/external/pubs/ft/gfsr/index.htm> (last visited 27 September 2016). For *Fiscal Monitor*, *see* <www.imf.org/en/publications/fm> (last visited 27 September 2016).
4. For the purpose of this contribution, I will refer to Art. IV of the Articles of Agreement of the IMF as 'Art. IV', and to the IMF's Art. IV Consultations as 'Consultations'. According to the information published by the IMF, available at: <http://imf.org/external/about.htm>, the Fund conducted over 130 consultations in 2013, 132 consultations in 2014 and 124 consultations in 2015.
5. The full list of the organisation's member countries is available at: <https://www.imf.org/external/np/sec/memdir/memdate.htm> (last visited 27 September 2016).

advising them on risks that may threaten the international monetary system.[6]

In practice, a Consultation process begins with an official visit (known as a 'mission' in IMF jargon) to a member country. During this mission, IMF staff seek to collect economic, financial and monetary information on the relevant country and to discuss the country's economic development and policies with government officials. The main conclusions of Consultations are included in a report compiled by the staff. This report is then presented to the managing director (as chairman of the Executive Board), who is responsible for encapsulating the views of executive directors and presenting the summary to the country's government officials.[7] The Fund conducted over 130 Consultations in 2013, 132 Consultations in 2014 and 124 Consultations in 2015.[8]

1.2 Blurred Legitimacy

Individual recommendations given by the IMF to countries in the context of Consultations usually also include proposals relating to tax policies that the Fund considers should be modified in national tax systems. It is arguable, however, whether countries have consented to receive recommendations from the Fund as to their tax systems. This matter is of particular relevance considering that, theoretically, all countries have tax autonomy to design their tax systems.[9]

Although member countries of the Fund have given their state consent to be part of the Fund (validated through the ratification of the Fund's Articles of Agreement), the scope of powers of the organisation as well as the obligations derived from their condition as member countries must be interpreted in accordance with the treaty provisions and general principles of treaty interpretation.

For the purpose of the examination, a literal reading of Article IV revealed that this provision (in Section 3) enables the Fund to oversee the compliance of member countries with the obligations set forth in Section 1 of the Article, which bind member countries 'to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates'.[10] Under the same section of the Article, each member country is particularly directed to:

> (i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
> (ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;[11]

Hence, even though it may be derived from Article IV that the Fund has the power to monitor its member countries' economic and financial policies, it is questionable whether this power enables the Fund to deliver its members with specific tax recommendations that touch upon fundamental aspects of national tax systems. In principle, there are no legal consequences attached to non-compliance with the obligations set forth in Article IV, and, consequently, countries are not legally obliged to follow the tax recommendations given by the Fund during a Consultation. Yet a non-cooperating country could be affected by consequences other than those of a legal nature, such as a downgrading of its reputation by the international community.[12]

Hence, considering the role that the IMF has in global economic governance, I have concerns about the legitimacy of the tax recommendations under analysis.[13] According to Franck, '[i]n the international context, legitimacy is achieved if – or to the extent that – those addressed by a rule, or by a rule-making institution, perceive the rule or institution to have come into being and to be operating in accordance with generally accepted principles of right process.'[14] Further, as rightly stated by Bodansky, '[w]hen international institutions were relatively weak, legitimacy was not a pressing issue. However, the aggregated powers that have since been conferred on these institutions to address collective problems mean that questions arise regarding their legitimacy.'[15]

6. According to the IMF, the international monetary system comprises 'the system of exchange rates and international payments that enables countries (and their citizens) to transact with each other'. More information on the work of the IMF is available at: <http://imf.org/external/about.htm> (last visited 27 September 2016).
7. According to an IMF decision: 'It is expected that no later than sixty-five days after the termination of discussions between the member and the staff, the Executive Board will reach conclusions and thereby complete the consultation under Article IV.' IMF, *Decision on Bilateral and Multilateral Surveillance* (N. 15203-(12/72)) (2012) in IMF, *Selected Decisions and Selected Documents of the International Monetary Fund* 37 (2014), at 27, (hereinafter '2012 Decision'). *See also* L. Martinez-Diaz, 'Executive Boards in International Organizations: Lessons for Strengthening IMF Governance', *IEO Background Paper*, at 8 (2008).
8. *See* <http://imf.org/external/about.htm>
9. For the purpose of this contribution, I understand tax autonomy as the power that states have to define their tax policies, with the exclusion of those obligations acquired in treaties with other states and/or international organisations.
10. Art. IV Articles of Agreement.
11. *Ibid*.
12. For an analysis of public blacklisting by international organisations as a means of bringing about compliance, *see* J.C. Sharman, 'The Bark is the Bite: International Organizations and Blacklisting', 16 *Review of International Political Economy* 573 (2009).
13. This contribution is not aimed at analysing the role of the IMF in international governance. Numerous authors explain this theory; for that purpose *see*, among others: A Vetterlein and S Park (eds.), *Owning Development: Creating Policy Norms in the IMF and the World Bank* (2016); D. Swank, 'The New Political Economy of Taxation in the Developing World', 23 *Review of International Political Economy* 185 (2016); D. Bradlow, *The Changing Role of the IMF in the Governance of the Global Economy and its Consequences*, Paper prepared for the Annual Banking Law Update, University of Johannesburg, May 3, 2006.
14. T. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* 46, at 51 (1992). *See also* T.M. Franck, *The Power of Legitimacy among Nations* (1990), for previous work by the author on international legitimacy.
15. D. Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (2008) 309, at 309.

doi: 10.5553/ELR.000090 - ELR December 2017 | No. 2

Legitimacy, in that sense, is a fundamental principle to be pursued in the current context of globalisation and state coordination, as it guarantees that states' interests are not weakened by the actions of international organisations and related arrangements.[16] In the case of the IMF, legitimacy is a highly relevant objective, given the organisation's influence on the adoption of economic, financial and tax policies by its member countries.

At an individual level, a legitimacy deficit could also result in having citizens question their country's government officials on the motives underlying the adoption or derogation of certain tax policies, as per the recommendations flowing from a Consultation. Ultimately, 'in a democratic society, the payment of taxes also gives to the taxpayer the right to participate and to have a say in the design of the tax system', in accordance with the principle of 'no taxation without representation'.[17]

The following case may help to exemplify the delivery of tax policy recommendations by the Fund, within a Consultation: The *Concluding Statement of the 2014 Article IV Mission* for Costa Rica recommended, among other things, that the country move from a territorial system of income tax to a global system, as well as extending the General Sales Tax (GST) to include additional goods and services, and increasing the GST tax rate by 2%.[18]

The IMF's views on Costa Rica's fiscal policies remained consistent throughout the 2016 Consultation report.[19] As a collateral effect, Costa Rican news media focused attention on the IMF recommendations, implying both that the country is required to follow these recommendations and that an urgent need for tax reform exists to avoid possible disaster in the Costa Rican economy.[20] Government officials also sought to justify tax-related bills on the grounds that the IMF has 'approved of' and 'urges' the country to adopt the policies proposed in those bills.[21]

In this case the measures recommended by the IMF concerned intrinsic elements of the country's tax structure. The adoption of the recommendations by Costa Rica (which will most likely occur after the corresponding bills have been approved by Congress) will possibly have major effects, not only from an economic, but also from a social perspective. The 2% increase in the GST tax rate (from the current 13% to 15%) can be expected to have an impact on households' disposable income, and this could, in turn, adversely affect economic inequality ratios.[22]

The case of Costa Rica should not be seen as isolated, to the extent that IMF Consultation reports consistently include tax recommendations on issues ranging from tax administration to member countries' overall tax structures. Indeed, Seabrooke has extensively studied the content of the Fund's tax advice to countries, determining that the organisation has a catalogue of 'IMF-friendly' tax reform policies.[23] According to this author:

> [I]n the [tax] policy area the Fund has a clear norm expressed as an 'IMF friendly' tax policy mix. Throughout the post-war period the Fund has encouraged its member states to integrate themselves into a free trading international political economy. It consistently advocates moving tax burdens away from international trade and import and export taxes, as well as taxes on capital income, and towards broad domestic sources, particularly consumption taxes.[24]

16. State coordination encompasses any form of dialogue between states to discuss and, to a certain extent, negotiate public policies falling within their scope of interest. State coordination may take various forms, ranging from legally constituted organisations or institutions to arrangements, such as meetings or forums, of a less formal nature (legally speaking). Collaterally, these organisations and arrangements produce actions that have effects on participating and, in some cases, even on non-participating states. State coordination is currently being demanded in all areas of governance, including environment, fisheries, trade, finance, tax, customs, human rights and law enforcement, to name but a few. Consequently, governance concerns that used to be regarded as solely territorial, and decided by a sovereign power, have now become global or regional concerns, and are hence of a multilateral nature.
17. I. Mosquera Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism', 3 *World Tax Journal*, at 5 (2015).
18. IMF, *Costa Rica: Concluding Statement of the 2014 Article IV Mission*, 10 November 2014, available at: <http://imf.org/external/np/ms/2014/111014.htm> (last visited 27 September 2016). In this report, the IMF states: 'In particular, we support broadening the VAT base to include services and basic goods, the latter accompanied by actions to mitigate the impact on lower income households, as well as the move to a global income tax. If implemented, the plan will greatly enhance macro stability, thus stimulating growth…Although significant revenue gains may be accrued by reducing tax exemptions and other special treatments, the substantial budget consolidation required will likely demand increases in tax rates in the future. Thus the mission recommends raising the VAT rate from 13 to 15 percent gradually and increasing marginal tax rates on higher brackets as part of the introduction of a global income tax, thereby addressing also distributional concerns. The government has confirmed its willingness to raise VAT rates in steps starting in 2016 consistent with the consolidation recommended by the mission.'
19. IMF, *Costa Rica – Concluding Statement of the 2016 Article IV Mission*, 7 March 2016, available at: <http://imf.org/external/np/ms/2016/030716.htm> (last visited 24 September 2016).
20. *See* <http://qcostarica.com/costa-rica-receptive-to-imfs-vat-calls/>, <http://qcostarica.com/imf-time-is-running-out-for-costa-rica/> (last visited 24 September 2016); <http://player.gfrvideo.com/gn-elfinanciero/videofmipidehacerlareformafiscalenel2016-195110.html> (last visited 27 September 2016).
21. *See* <http://gobierno.cr/fmi-dio-aval-a-politica-monetaria-de-costa-rica-y-reitero-urgencia-de-reforma-fiscal/#more-10377> (last visited 20 September 2016). *See also* <http://informa-tico.com/4-08-2015/propone-fmi-racionalizar-gasto-publico-costa-rica-i-parte> (last visited 20 September 2016); <http://elfinancierocr.com/finanzas/FMI-Costa-Rica-consolidacion-ambiciosa_0_626337367.html> (last visited 24 September 2016).
22. Regarding the effects of implementing these and other reforms, *see* F. Rodríguez Garro, F. Sancho Mora & R. Fonseca Hernández, 'Efectos de la Reforma Tributaria en Costa Rica: Implementación del IVA', 70 *Revista Centroamericana de Administración Pública* 273 (2016); M. Loría and C. Umaña, 'La propuesta de consolidación fiscal: algunas reflexiones para su discusión', 1 *Serie Programa Visión ACADEMIACA* (2014).
23. *See* L. Seabrooke, 'Bitter Pills to Swallow: Legitimacy Gaps and Social Recognition of the IMF Tax Policy Norm in East Asia', in A Vetterlein and S Park (eds.), *Owning Development: Creating Policy Norms in the IMF and the World Bank* (2016), at 151. *Also see* A. Broome and L. Seabrooke, 'Seeing like the IMF: Institutional change in small open economies', 14:4 *Review of International Political Economy* 576, at 583 (2007).
24. Seabrooke, above n. 23, at 147.

1.3 Aim and Methodology

Departing from the above, this contribution aims to examine the legal legitimacy of tax recommendations delivered by the IMF to individual countries within a Consultation procedure. The question addressed is *to what extent are these tax recommendations legally legitimate?* In order to answer this question, the ideas of legal legitimacy elaborated by Bodansky will be used.[25]

The approach I am undertaking is innovative, since no research has been found that specifically analyses the legitimacy of tax recommendations delivered by the IMF in the context of Article IV Consultations.[26] For two reasons, this analysis does not seek to provide an exhaustive or comprehensive list of all the legitimacy matters that could be connected to the IMF, its role in global governance or of the IMF Consultations in general. Additionally, this contribution does not attempt to analyse the legitimacy of the Consultation Procedures specifically undertaken by the IMF in Costa Rica or any other country.

The corresponding examination will be discussed in four sections. After the introduction, comprising the first section, the second section provides a general overview of the IMF. The third section presents the analysis of the legitimacy of tax recommendations contained in Consultation reports. The fourth and final section summarises the results and conclusions of the analysis developed in the contribution.

25. D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *The American Journal of International Law* 596 (1999).

26. As indicated earlier in this paper, several authors (*e.g., see* Seabrooke, above n. 23; E. Riesenhuber, *The International Monetary Fund Under Constraint: Legitimacy of its Crisis Management* (2001); T. Bernes, 'IMF Legitimacy and Governance Reform: Will the G20 Help or Hinder?', *Remarks delivered at the G20 Seoul International Symposium: Toward the Consolidation of G20 Summits – from Crisis Committee to Global Steering Committee*, September 28-29, 2010; A. Weber, 'Legitimacy of IMF Endangered', *Deutsche Bundesbank* (2009); J. Best, 'Legitimacy Dilemmas: The IMF's Pursuit of Country Ownership', 28 *Third World Quarterly* 469 (2007)) have analyzed the legitimacy of the IMF. Other authors have also studied the legitimacy of IMF Surveillance, in general terms (*see* M. Mussa, 'IMF Surveillance', 87 *The American Economic Review* 28 (1997); R. Lavigne, P. Maier & E. Santor, 'Renewing IMF Surveillance: Transparency, Accountability, and Independence', 4 *The Review of International Organizations* 29 (2009); M. Edwards, K. Coolidge & D. Preston, 'Who Reveals? Transparency and the IMF's Article IV Consultations', Paper presented at the MidWest Political Science Association, 31 March 2011), as well as the output legitimacy of specific tax measure implemented by countries, following IMF's recommendations (*see e.g.*, B. Momani, 'Assessing the Utility of, and Measuring Learning from, Canada's IMF Article IV Consultations', 39 *Canadian Journal of Political Science* 249 (2006); M. Edwards and S. Senger, 'Listening to Advice: Assessing the External Impact of IMF Article IV Consultations of the United States, 2010-2011', 16 *International Studies Perspectives* 312 (2015)); M. Weisbrot and H. Jorgensen, 'Macroeconomic Policy Advice and the Article IV Consultations: A European Union Case Study', *Center for Economic and Policy Research* (2013).

2 The IMF: General Description

State coordination in economic areas developed particularly rapidly towards and immediately after the end of the Second World War. This included the creation of three important international institutions during the Bretton Woods Conference, held in Bretton Woods, New Hampshire, United States, in 1944: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (better known as the World Bank) and the General Agreement on Tariffs and Trade (GATT).[27] The 44 states participating in the conference had as an objective the creation of an international economic system that would avoid the economic and financial distortions that had led to the Great Depression in the 1930s.[28] Further, the international regulations and institutions created during this conference continue to constitute the backbone of the current economic system.[29]

The IMF currently has 189 member countries and is governed by four main organs: the Board of Governors, the Executive Board, the staff and the managing director.[30] Christine Lagarde, from France, has been managing director and chairman of the Executive Board since 5 July 2011. In addition, the Fund has 17 departments carrying out its surveillance, policy, analytical and technical work.

The Board of Governors is the highest decision-making body in the IMF, and is composed of one governor and one alternate governor for each member country.[31] Under Article XII, Section 2(b), however, 'the Board of Governors may delegate to the Executive Board authority to exercise any powers of the Board of Governors, except the powers conferred directly by this Agreement on the Board of Governors.'[32] Under Section 2(g) of the same Article, 'The Board of Governors, and the Executive Board to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Fund.' Therefore, the Board of Governors can be said to hold the supreme powers (functional and regulatory) of the Fund.

The Board of Governors and the managing director of the Fund are responsible for electing the Executive Board, which is composed of 24 directors who meet on a

27. Loibl, above n. 2 at 723.

28. *Ibid*.

29. Since then, a number of additional organisations and institutions have been established that have advanced these developments, with the increasing coordination in international finance law, for example, resulting in 1960 in the establishment of the Organisation for Economic Coordination and Development (OECD) as the successor to the Organisation for European Economic Cooperation (OEEC) and in the G20's decision in 2009 to create the Financial Stability Board as the successor to the Financial Stability Forum. *See* P. Subacchi and S. Pickford, *International Economic Governance: Last Chance for the G20?* (2015).

30. Art. XII Articles of Agreement.

31. *Ibid*.

32. *Ibid*.

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weekly basis to discuss the Fund's regular dealings.[33] Executive Board voting is based on the number of votes that each director has; this, in turn, depends on the quotas paid by member countries to the Fund.[34] The managing director is the head of the organisation's staff and chairman of the Executive Board. The managing director is appointed by the Executive Board for a renewable term of 5 years and is assisted by a first deputy managing director and three deputy managing directors.[35]

Since the Board Reform Amendment of 26 January 2016, member countries have been able to decide on their quota increases. This is especially relevant because voting shares may vary according to new quota increases. Hence, as stated by the Fund, 'Unlike the General Assembly of the United Nations, where each country has one vote, decision making at the IMF was designed to reflect the relative positions of its member countries in the global economy.'[36] This voting system differs from the general practice in the majority of international organisations, where each member is likely to have one vote only. As a result, unlike equal voting systems, the IMF presents a different arrangement enabling economically powerful countries to exert control over the IMF.

The Articles of Agreement include details of the procedure applying to amendments. Under this procedure, a proposal of amendment may be presented by a member, a Governor or the Executive Board. The proposal is then communicated to the chairman of the Board of Governors for approval by a majority of votes cast. Once the proposal has been approved by the Board of Governors, the Fund has to ask each member whether it accepts the proposed amendment. If three-fifths of the members, representing eighty-five percent of the total voting power, accept the proposed amendment, the Fund will certify the fact by addressing a formal communication to all members.[37] Amendments enter into force for all members 3 months after the date of the formal communication, unless a shorter period is specified in a circular letter or telegram from the Fund.

IMF staff is currently spread over three main areas, aligned with the core work fronts of the organisation (surveillance, lending and technical assistance). As Consultations take place in the context of the IMF's surveillance work, this is the area on which this contribution will focus.

As mentioned earlier, the IMF undertakes both multilateral and bilateral surveillance. These activities influence the current panorama of taxation as they elaborate on recommendations to be followed by countries in formulating their tax systems and policies. The IMF's Fiscal Affairs Department is responsible for determining the tax policy advice given to countries.[38] In the view of the organisation, the IMF's technical assistance on tax matters ensures the stability of countries by fostering the collection of tax revenues and enhances their overall economic and financial growth. As the Fund sees it:

> Fiscal policy affects macroeconomic stability, growth, and income distribution. Citizens expect their governments to ensure value-for-money for public spending, a fair and efficient tax system, and transparent and accountable management of public sector resources.
>
> The IMF has been a leading source of fiscal policy and management expertise worldwide. The IMF monitors and analyzes global fiscal trends and advises IMF member countries on fiscal issues directly.[39]

3 Legal Legitimacy under Review

3.1 Introduction

This section of the contribution aims to respond to the question, presented at the beginning of the contribution, of whether the tax recommendations given by the Fund in the context of Consultations are legitimate. As stated in Section 1 of this article, legitimacy is a long-ago and widely discussed subject among legal theorists, resulting in numerous definitions of the term. In agreement with Wolfrum: 'legitimacy is being used differently, although it mostly means to refer to the justification of authority, this notion being understood as the equivalent of having the power to take binding decisions or to prescribe binding rules'.[40]

For the purpose of this paper, the analysis will be carried out applying the knowledge elaborated by Bodansky in regard to legal legitimacy. In this author's view:

> To the extent that authority is exercised at the international level by institutions rather than by international rules directly, then, in addition to general consent, we also need a concept of "legal legitimacy" – "the condition of being in accordance with law or principle," as the Oxford English Dictionay puts it. *Legal legitimacy is what connects an institution's continuing authority to its original basis in state consent*. The authority of the International Court of Justice, for example, derives from its Statute, to which UN member states consented. And the Court's continuing authority depends on its acting in accordance with the Statute. If it went outside or against the

33. *Ibid*.
34. For more information on the voting powers, *see* <http://imf.org/external/np/sec/memdir/eds.aspx> (last visited 30 September 2016).
35. *See* <http://imf.org/external/about/mgmt.htm> (last visited 30 September 2016).
36. Art. XII, Section 5 Articles of Agreement; <http://imf.org/en/About/Factsheets/Sheets/2016/07/27/15/24/How-the-IMF-Makes-Decisions> (last visited 30 September 2016).
37. Art. XXVIII (a) Articles of Agreement. In many countries, the procedures for acceptance of amendments are the same as those for treaty ratification. Ultimately, however, these procedures depend on the internal standards set by each member country for regulating the subject.
38. *See* <http://imf.org/external/np/exr/key/fiscal.htm> (last visited 30 September 2016).
39. *Ibid*.
40. R. Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (2008) 1, at 6.

> Statute, then its actions would lack legitimacy.[41] [emphasis added]

As Bodansky rightly indicates, from a legitimacy perspective it is not sufficient for an international organisation to have 'general' consent from its member countries. 'General' consent refers to the consent given by countries to an ongoing system of governance, such as the ratification of a treaty that creates an international organisation.[42] State consent, however, cannot be disregarded once a treaty enters into force.[43] It continues to be highly relevant during the course of the work carried out by international organisations, provided that it is a filter to assess the said work and eventually hold accountable the organisation if it goes beyond the powers it has been granted. Following Bodansky, this connection between state consent and an institution's continuing authority is achieved through legal legitimacy.[44]

From the foregoing, the assessment of legal legitimacy will be performed taking into consideration the two following elements: (i) state consent and (ii) authority. Both of these elements are considered sine qua non conditions of legal legitimacy. The validation of state consent and authority should not be taken lightly, and a mistaken understanding could even lead to the conclusion that each of these elements can exist one without the other. To avoid falling into such grey areas I have made the following assumptions:[45]

The authority of an international organisation, and more specifically its continuing authority, is legitimate if the said authority is exercised in agreement with the consent given by the parties that give life to the organisation. Hence, for the purpose of the analysis, authority (first element of the analysis) refers to the powers or rights of an international organisation (in this case the IMF) to act (e.g., to give orders, make decisions and enforce obedience). State consent (second element of the analysis), understood as permission or an agreement by a sovereign country for something to happen or to do something, enables the authority of international organisations.[46] The exercise of authority, without consent, is legally void and constitutes abuse of power or arbitrariness.

I argue that an international organisation has authority if it acts in accordance with an international treaty signed and ratified by the relevant parties. Contrarily, it would lack such authority if the acts of the international organisation fell outside the scope of powers granted to the organisation by the parties to an international treaty.

In regard to the above, I consider it important to provide a brief reference to the theories that have been extensively developed in international law about the competences of international organisations (in the next section). These theories help determine to what extent an act by an international organisation falls within or outside the scope of powers that the international organisation has.

3.1.1 Some Notes Regarding the Competences of International Organisations

Two main theories have been developed about the scope of powers of international organisations: the theory of attributed powers and the theory of implied powers.

The theory of attributed powers is based on the principle of speciality or the principle of attribution, presented in 1926 by the International Court of Justice (ICJ) on *Jurisdiction of the European Commission of the Danube*. In its opinion, the Court responds to the question of the scope of the powers of the European Commission of the Danube, making clear that:

> As the European Commission is not a State, but an international institution with a special purpose, *it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose*, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.[47] [emphasis added]

This theory was also developed by the ICJ in 1996 in *Legality of the Threat or Use of Nuclear Weapons*, stating:

> The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are vested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.[48]

In its opinions the Court establishes that the powers that international organisations have are restricted to those powers conferred by the states that create these organisations. Further, for the ICJ the powers of an international organisation are limited by the common interests

41. Bodansky, above n. 25, at 605.
42. *Ibid*.
43. Indeed, authors such as Wolfrum explain that '[t]he consent of a State will undoubtedly be sufficient as a mechanism to invoke the legitimacy of [an] … specific and static [obligation] [that] can be implemented by an isolated act or omission. The same is true even if the obligation is of a continuing nature but the commitment does not change over time as far as its substance and scope is concerned. There is, de facto, the danger, though, that the legitimizing effect of the original consent may fade over time. This would be particularly true if, due to changing circumstances, the burden of implementing a given obligation increased significantly'. R. Wolfrum, above n. 40, at 9.
44. Bodansky, above n. 25, at 605.
45. *See* Annex 2-Figure 1: Legal legitimacy Flow Diagram. I have elaborated a flow diagram that summarises my views on how to determine the legal legitimacy of acts by international organisations.
46. The Oxford English Dictionary defines consent as: 'permission for something to happen or agreement to do something'.
47. ICJ, Jurisdiction of the European Commission of the Danube, Advisory Opinion, 8 December 1927. The Convention establishing the Definitive Statute of the Danube was signed on 23 July 1921 pursuant to Article 349 of the Treaty of Peace of Versailles (and the corresponding articles of the other peace treaties concluded in 1919 and 1920).
48. ICJ, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 8 July 1996.

to be attained by it per the determination of the constitutive members.

Hence, according to the theory of attributed powers international organisations only have the powers bestowed upon them by member states in an international convention. Contrarily interpreted, an international organisation is not able to exercise powers that fall outside the scope of the functions it has been assigned in its legal instruments. The current text of Article 5 of the Treaty on the European Union serves as an example of this idea:

> Article 5
> 1. The limits of Union competences are governed by the *principle of conferral*. The use of Union competences is governed by the principles of subsidiarity and proportionality.
> 2. *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*. Competences not conferred upon the Union in the Treaties remain with the Member States.[49] [emphasis added]

In spite of the sovereignty protection involved in the theory of attributed powers, it has often been criticised in the literature for two main reasons. First, the theory is questioned as to its implications for the autonomy of international organisations as subjects having an independent will from that of their member states.[50] Second, for practical reasons, it is objected that international organisations are 'living creatures', in a constant evolution, which would impede their founding members from foreseeing all the powers that will be required by international organisations for their operation.[51] Following Klabbers, 'in those circumstances, the organization should not be limited by those powers granted to it upon its creation; instead, the organization must be allowed some flexibility. It must be allowed certain powers which, while not expressly granted, are granted by implication.'[52] This claim lays down the foundations of the theory of implied powers.

This second theory generally supports the idea that in addition to those powers expressly conferred on international organisations in their legal instruments, there are certain powers that may be implied from the functions and purposes that they have been assigned. The theory of implied powers has also been developed by the ICJ in its jurisprudence, stating that 'the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities.'[53] Consequently, where an international organisation requires a specific capacity to fulfil and perform its objectives, that particular capacity is deemed as granted by its constitutive members although not expressly indicated in the organisation's constitutive documents. The doctrine of implied powers was applied by the Permanent Court of International Justice to the International Labour Organization in 1926.[54] The ICJ also took recourse to this doctrine in 1949 when referring to the powers of the United Nations.[55]

In my view, regardless of the election of either theory, it can be generally concluded that international organisations have a limited competence to act (unlike states, which have been fully vested with rights, powers and obligations). It can also be settled that international obligations may act only in accordance with their legal powers, whether these powers are explicitly recognised in the text of the respective constituent treaty or because they derive from the functions and objectives of the organisation. Ultimately, what is at stake is the *principle of consent*, which continues to be an axiom of the political system and an implication of state autonomy.[56]

3.2 Assessment

3.2.1 Article IV of the Articles of Agreement

Consultations are performed by the Fund as part of its surveillance activities regulated under Article IV (Obligations Regarding Exchange Arrangements) of its Articles of Agreement.[57]

Under Section 1 of Article IV (*General obligations of members*), member countries have a general obligation 'to collaborate with [the Fund] and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates.'[58] This general obligation is supported by four specific obligations (in the same section), which may be summarised as follows. Each member country is mandated to: (i) '… direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price

49. Art. 5 of the Treaty on the European Union.
50. J. Klabbers, *An Introduction to International Institutional Law* (2002), at 66.
51. *Ibid*.
52. *Ibid*.
53. ICJ, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 8 July 1996.
54. ICJ, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, Advisory Opinion No. 13 of July 23rd, 1926 (Series B, No. 13, at 18-21).
55. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports (1949), at 182-3; *cf*. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports (1954), at 57.
56. Following L. Henkin, 'state consent is the foundation of international law. The principle that law is binding on a [s]tate only by its consent remains an axiom of the political system, an implication of [s]tate autonomy.' L. Henkin, 'General Course on Public International Law', *IV Recueil des Cours*, at 46 (1989).
57. *See* Annex 1. It should be noted that Article IV was amended by the Second Amendment of the Articles of Agreement of the IMF in 1978. The surveillance functions were assigned to the Fund in the modifications introduced by this Second Amendment. Previously the Fund relied solely on Art. IV, Section 4(a) to either call on or recommend members to take certain action or refrain from taking action to achieve the objectives set out in this provision. Prior to the Second Amendment of Art. IV, Section 4(a), set forth a general obligation to collaborate as follows: 'Each member undertakes to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations.'
58. Art. IV, Section 1, Articles of Agreement.

stability';[59] (ii) 'seek to promote stability by fostering' economic, financial and monetary conditions;[60] (iii) 'avoid manipulating exchange rates or the international monetary system';[61] and (iv) 'follow exchange policies compatible' with the commitments undertaken in the same section.

In order to ensure that member states fulfil their obligations under Section 1 of the Article, Section 3(a) establishes two different mandates for the Fund. First, it is impelled to 'oversee the international monetary system in order to ensure its effective operation',[62] while, second, it is obliged to oversee members' compliance with obligations contained in Section 1 of Article IV.[63]

Accordingly, Section 3(b) of Article IV sets forth the specific obligations to be met by the Fund in seeking to fulfil the general obligations contained in Article IV, Section 3(a). Under this provision, the Fund is compelled to exercise 'firm surveillance' over members' exchange rate policies, as well as adopting principles to guide members with respect to these policies.[64] Article IV, Section 3(b), also creates obligations to be complied with by the Fund's member countries and that, in principle, enable the Fund to accomplish its surveillance functions. In this sense, members are required to (i) provide the Fund with all necessary information to exercise its surveillance and (ii) to consult with the Fund, as required by the organisation, on their exchange rate policies.[65]

Although the IMF's surveillance activities are specifically regulated under Section 3 of Article IV, Section 1 becomes relevant in view of the reference made to it in Section 3(a).

3.2.2 *State Consent*

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[66]

The aim of this section is to analyse the first of the conditions of legal legitimacy, departing from the assumptions that were made in the previous section. State consent, as already defined, comprehends the consent of a country to confer authority on an international organisation. For the purpose of the assessment, the validation of state consent is to determine whether member countries of the IMF have given their consent to receive tax recommendations from the Fund in the context of Article IV Consultations.

In an initial stage, state consent is given by countries by means of the signature and ratification of the treaties establishing an international organisation. Once the treaty enters into force, the powers that the corresponding organisation will have will depend on the text of the corresponding treaty or the interpretation given of the functions of the organisation, as per the theories on the capabilities of international organisations. Regardless, a fundamental proposition of legal legitimacy is that state consent continues to inform the authority exercised by international organisations throughout time.

Although repetitively stated, it is necessary to recall that the tax recommendations delivered by the Fund during Consultation Procedures are interpreted to derive, according to the IMF, from Article IV of the Fund's Articles of Agreement. Hence, for the Fund, the power that the organisation has to perform its surveillance procedures (including the tax issuance of the tax recommendations) has legal basis in this provision.

Furthermore, opinions issued within the IMF lead to the conclusion that in the opinion of the Fund's Executive Board, tax policies can be the subject of bilateral surveillance by the Fund, insofar as these are connected to the domestic stability of a member country. On 18 July 2012 the Fund's Executive Board adopted the *Decision on Bilateral and Multilateral Surveillance*, in which it took the view that:

> In its bilateral surveillance, the Fund will focus on those policies of members that can significantly influence present or prospective balance of payments and domestic stability. The Fund will assess whether exchange rate policies are promoting balance of payments stability and whether domestic economic and financial policies are promoting domestic stability and advise the member on policy adjustments necessary for these purposes. Accordingly, exchange rate policies will always be the subject of the Fund's bilateral surveillance with respect to each member, as will

59. Art. IV, Section 1(i), Articles of Agreement.
60. Art. IV, Section 1(ii), Articles of Agreement.
61. Art. IV, Section 1(iii), Articles of Agreement.
62. Art. IV, Section 3(a), Articles of Agreement.
63. *Ibid*.
64. Art. IV, Section 3(b), Articles of Agreement.
65. Art. IV, Section 3(b), Articles of Agreement. As explained by the IMF's legal department in a 2006 analysis of the legal framework of Art. IV: 'While the present Article IV sets forth obligations of members, it also sets forth obligations for the Fund. Under Article IV, Section 3(a), the Fund is required to oversee the international monetary system to ensure its effective operation and to oversee the compliance of each member with its obligations under Article IV. Because of the particular importance of members' exchange rate obligations, the Articles give the Fund even more specific direction with respect to how members' compliance with these obligations is to be monitored: Article IV, Section 3(b), requires the Fund to exercise firm surveillance over the exchange rate policies of members and to adopt specific principles for the guidance of members with respect to those policies. To enable the Fund to perform its surveillance obligation, Article IV, Section 3(b), also requires each member to provide the Fund with the information necessary for this purpose and to consult with the Fund upon request.'
66. *The Case of the S.S. Lotus* (*France* v. *Turkey*), 1927 PCIJ Series A, No. 10.

monetary, *fiscal*, and financial sector policies…[67] [emphasis added]

It is recognized that a member's overall mix of economic and financial policies, including both exchange rate and domestic policies, contributes to the members' balance of payments stability and domestic stability and may impact the stability of the international monetary system.[68]

Accordingly, the issuance of tax recommendations by the Fund during a Consultation is considered by the organisation as derived from the general obligations foreseen in Article IV of the Articles of Agreement, which bind member countries to 'endeavor to direct [their] economic and financial policies toward the objective of fostering orderly economic growth' and to 'seek to promote stability by fostering orderly underlying economic and financial conditions'.[69]

In light of the theory of attributed powers, nevertheless, the powers of the IMF would be restricted to those explicitly conferred in the Articles of Agreement, and the text of Article IV does not indicate a right of the IMF to oversee countries' tax policies. Therefore, the understanding of the IMF cannot be accepted under this theory.

Taking recourse to the theory of implied powers provides a wider interpretation of the powers of the Fund. Hence, it could be argued that i) tax policies heavily influence countries' economic growth and stability; and ii) public finances comprehend taxation and, therefore, the surveillance of tax issues falls within the authority of the IMF.

This approach, however, raises questions about the interpretation of the general obligations established in Article IV. Particularly, what specific actions should member countries take in order to comply with these general obligations?[70]

Article XXIX of the Articles of Agreement establishes the procedure to be followed when a question of interpretation of the provisions of the agreement arises between any member country and the Fund or between any of its members. Article XXIX, nevertheless, does not clearly indicate how member countries of the Fund or its organs (in application of the treaty provisions) should give meaning to the terms of the treaty.[71] Article 31 of the Vienna Convention on the Law of Treaties must be used as ancillary provision to fill the legal vacuum of the Articles of Agreement in this regard.[72] In conformity with Article 31, para. 1, of the Vienna Convention: 'A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.' [emphasis added][73]

In connection, the scopes of the obligations in Section 1 of Article IV are to be interpreted in conformity with the general object underlying the constituency of the Fund. The purposes of the IMF are regulated under Article I of the Articles of Agreement.[74] A reading of this provision leads to the conclusion that the members of the Fund have not intended for the organisation to have powers that enable it to dictate the national tax policies to be implemented by member countries. This conclusion may also be deducted when considering IMF documents that clearly indicate that 'although the text of the preamble does not give rise to obligations, it can be used as a tool to interpret those obligations that are set forth in Article IV, Section 1. Similarly, it provides a useful means of understanding the scope of the Fund's surveillance responsibilities under Article IV, Section 3'.[75]

Finally, it could be argued that the power of the IMF to conduct surveillance of tax matters is connected to the general functions and work of the organisation. This approach seems to have been used in the past by the Fund, which has recognised that: 'In reality, all policies contribute to a country's internal and external balances and may ultimately impact global stability. Ultimately, what matters is the policy mix.'[76] Particularly, in 2015 the IMF issued guidance for staff to conduct Article IV surveillance, stating that:

Article IV consultations should cover all economic and financial policies that affect the member's own stability. These always include exchange rate, monetary, fiscal and financial sector policies. (…) Appropriate fiscal policy is vital to maintain a country's domestic and balance of payment stability, *and often global stability. Threats to stability can result directly from fiscal policy missteps. Equally important, fiscal policy is often part of the policy mix to address macro-criti-*

67. 2012 Decision, above n. 7. This decision repeals Decision N. 13919-(07/51), adopted by the Executive Board on 15 June 2007. Guidance note EBS/97/125, issued on 2 July 1997 by the IMF, may be also regarded as creating a precedent for the Executive Board's opinion on their role to assess country's tax matters. In this guidance note, the Board indicates that '…the Fund should be concerned with issues such as institutional reforms of the treasury, budget preparation and approval procedures, *tax administration*, accounting, and audit mechanisms, central bank operations, and the official statistics function. Similarly, reforms of market mechanisms would focus primarily on the exchange, trade, and price systems, and aspects of the financial system. In the regulatory and legal areas, Fund advice would focus on *taxation*, banking sector laws and regulations…' [emphasis added].
68. *Ibid*.
69. Art. IV, Section 1(i), Articles of Agreement.
70. In 2006, the IMF's Legal Department, in consultation with the Policy Development and Review Department, issued the report *Article IV of the Fund's Articles of Agreement: An Overview of the Legal Framework* (hereinafter 2006 Decision) aimed at 'assist[ing] the Executive Board in its consideration of the steps that could be taken to provide members with more specific guidance as to their obligations under Article IV.' In this document, the Legal Department recognises that any interpretation of Article IV would be a challenging mission, given that the substance of the Article was negotiated by a small number of member countries with underlying political reasons, outside the Executive Board. The document also makes clear that certain executive directors and staff criticised the Article on the grounds of its ambiguity and vagueness.
71. *See* Annex 1.
72. Vienna Convention on the Law of Treaties, 23 May 1969, 8 ILM 1969, at 679 (hereinafter 'Vienna Convention').
73. Art. 31 (1), Vienna Convention.
74. *See* Annex 1.
75. 2006 Decision, above n. 70.
76. 2012 Decision, above n. 7.

cal challenges that are not necessarily directly related to public finances (e.g., slow growth, high unemployment, and inequality). [emphasis added][77]

In spite of the above, although the IMF was one of the international organisations created at the Bretton Woods Conference to avoid the global economic and financial crisis seen in previous years, the effects that national policies have nowadays on global stability cannot be easily contained. National tax policies continue to be part of the state's autonomy and, although the IMF may wish to control the corresponding spillovers by dictating the policies that should be implemented by its member countries, it does not have the consent of its member countries to do so. To that extent, the use of the theory of implied powers would also be insufficient to argue that the IMF has power to issue tax recommendations during an Article IV procedure.

In conclusion, the general obligations deriving from Section 1 of Article IV cannot be interpreted in a manner that enables the Fund to determine what should be the design of a country's tax system or the tax policies that the country should adopt, as these are prerogatives of a country's tax autonomy. A broad interpretation cannot constitute an instrument allowing international organisations to perform actions that are beyond the scope of the agreements reached by their constituent members.

It is also concluded that the Fund has accidentally or intentionally forgotten its obligations under the Articles of Agreement, since Article IV states that the guiding principles adopted by the IMF, pursuant to the same provision, '(…) shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members'.[78]

3.2.3 Authority

In line with the assumptions explained in Section 3.1, legal legitimacy may be determined taking into consideration two sine qua non conditions: state consent and authority.[79] These conditions operate concomitantly: state consent enables authority, and the absence of the former invalidates the latter.

For the purpose of this contribution, the assessment of authority aims to determine whether the IMF has the power to make tax recommendations to its member countries during Article IV Consultations. The examination of state consent, however, yielded negative results. I have mainly assessed that member states of the IMF have not given their consent to receive tax recommendations from the Fund, provided that the powers contained in Article IV of the Articles of Agreement are restricted to economic and financial matters. Under these circumstances, the question of whether the IMF has the authority to deliver the corresponding tax advice must also be answered negatively. The acts by the IMF towards the issuance of the said advice can be qualified as resulting from an abuse of authority to that effect.

3.3 Looking Ahead

Legitimacy, as developed by Thomas Franck, is a matter of degree.[80] As a result, the legitimacy deficiency that has been identified as conflicting with legal legitimacy does not necessarily imply that the recommendations delivered by the Fund in the Consultations are wholly illegitimate. Accordingly, the aim of this contribution is not to seek to strike out these recommendations. On the contrary, the objective of the above discussion is to highlight matters that, in the current circumstances, entail a weakening of the legitimacy of the tax recommendations examined and, to a certain extent, of the Consultations themselves.

In light of the assessment, I believe that the issue arising from the non-existence of state consent and legal legitimacy could be solved with an amendment to Article IV of the Fund's Articles of Agreement. Such an amendment would be aimed at including, within the text of this provision, the powers and rights of the IMF to oversee and issue recommendations on national tax policy.

Looking ahead, the following list also presents a number of related topics that could be explored in the future:

- Can the continuing practice of the IMF, regarding the delivery of tax recommendations, consolidate the acts of the organisation as customary law?
- Under the current state of things, what would be the legal validity of tax surveillance by the IMF if it were concluded that it was performed ultra vires?[81]
- What procedures would be available to states to object to the acts by the IMF concerning tax surveillance? And what would be the convenience of having an appellate body that ultimately revises the decisions by the IMF?

4 Concluding Remarks

This contribution has aimed to assess the legitimacy of tax recommendations made by the IMF to member countries in the context of bilateral surveillance proce-

77. IMF, *Guidance Note for Surveillance under Article IV Consultation* (2015).
78. Art. IV Articles of Agreement. This respect to the domestic social and political policies of members is also recognised by the Fund in the 2012 Decision, which further clarifies that: '[M]embers have legitimate policy objectives, including domestic social and political policy objectives, that are beyond the scope of Article IV and, accordingly, beyond the scope of this Decision, although when adopting policies to achieve these objectives, members need to ensure that such policies are consistent with their obligations under Article IV…[This] decision does not, and cannot be construed or used to, expand or broaden the scope – or change the nature – of members' obligations under the Articles of Agreement, directly or indirectly….'
79. *Also see* Annex 2.
80. T. Franck, 'Legitimacy: A Matter of Degree', in T. Franck (ed.), *The Power of Legitimacy among Nations* (1990) 41, at 47.
81. *See* E. Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations', 77 *The American Journal of International Law* 239 (1983); E. Cannizzaro and P. Palchetti, 'Ultra Vires Acts of International Organizations', in J. Klabbers & A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2011).

dures, known as 'Article IV Consultations'. As explored, although the IMF has the powers to evaluate the economic and financial situation of a country, these powers do not enable it to give tax recommendations to its member countries as there is no state consent in this regard. In conclusion, the legal legitimacy (as a means of achieving a connection between state consent and an institution's continuing authority) of the tax recommendations is considered precarious. This is particularly relevant insofar as the tax recommendations delivered by the Fund touch upon fundamental aspects of the design of national tax systems and must be regarded as prerogatives linked to countries' tax autonomy.

On a side and final note, I believe that the conflicting issue that has been raised should be considered not only from a legal legitimacy perspective, but also in regard to the legitimacy of the outcomes produced – that is, against the medium- and long-term economic and social consequences that the adoption of certain recommendations could have.[82] In this sense, even if it could be argued that the tax recommendations are legitimate, these recommendations should be based on a country-specific analysis. Such an analysis would allow the Fund and the corresponding country to determine the specific consequences that the policies under review will have for the country's situation. This, in turn, will enable compliance with the provision in Article IV regarding respect for member countries' domestic policies, which is precisely what countries agreed to when joining the IMF.

Annex 1: Relevant provisions of the IMF Articles of Agreement

Article I: Purposes

The purposes of the International Monetary Fund are:

i. To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.
ii. To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.
iii. To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.
iv. To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.
v. To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.
vi. In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article.[83]

Article IV: Obligations Regarding Exchange Arrangements

- *Section 1: General Obligations of Members*

Recognising that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular, each member shall:

i. endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
ii. seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;
iii. avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and
iv. follow exchange policies compatible with the undertakings under this Section.

- *Section 2: General Exchange Arrangements*

(a) Each member shall notify the Fund, within thirty days after the date of the second amendment of this Agreement, of the exchange arrangements it intends to apply in fulfillment of its obligations under Section 1 of this Article, and shall notify the Fund promptly of any changes in its exchange arrangements.

(b) Under an international monetary system of the kind prevailing on 1 January 1976, exchange arrangements may include (i) the maintenance by a member of a value

82. This matter is an object of analysis under commonly known theories of 'output legitimacy'. For instance, *see* R. Wolfrum, above n. 40, at 7. For this author: 'If a particular body, such as the Security Council or an international court or tribunal, although established in accordance with the applicable rules and taking decisions according to the established procedure, does not achieve results which the community as the addressee of such decisions considers to be adequate, this may, in the long run, lead to an erosion of its legitimacy.'

83. Art. I Articles of Agreement.

for its currency in terms of the special drawing right or another denominator, other than gold, selected by the member, or (ii) cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members, or (iii) other exchange arrangements of a member's choice.
(c) To accord with the development of the international monetary system, the Fund, by an eighty-five percent majority of the total voting power, may make provision for general exchange arrangements without limiting the right of members to have exchange arrangements of their choice consistent with the purposes of the Fund and the obligations under Section 1 of this Article.

- *Section 3: Surveillance over Exchange Arrangements*

(a) The Fund shall oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations under Section 1 of this Article.
(b) In order to fulfill its functions under (a) above, the Fund shall exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies. Each member shall provide the Fund with the information necessary for such surveillance, and, when requested by the Fund, shall consult with it on the member's exchange rate policies. The principles adopted by the Fund shall be consistent with cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members, as well as with other exchange arrangements of a member's choice consistent with the purposes of the Fund and Section 1 of this Article. These principles shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members.

- *Section 4: Par Values*

The Fund may determine, by an eighty-five percent majority of the total voting power, that international economic conditions permit the introduction of a widespread system of exchange arrangements based on stable but adjustable par values. The Fund shall make the determination on the basis of the underlying stability of the world economy, and for this purpose shall take into account price movements and rates of expansion in the economies of members. The determination shall be made in light of the evolution of the international monetary system, with particular reference to sources of liquidity, and, in order to ensure the effective operation of a system of par values, to arrangements under which both members in surplus and members in deficit in their balances of payments take prompt, effective, and symmetrical action to achieve adjustment, as well as to arrangements for intervention and the treatment of imbalances. Upon making such determination, the Fund shall notify members that the provisions of Schedule C apply.

- *Section 5: Separate Currencies within a Member's Territories*

(a) Action by a member with respect to its currency under this Article shall be deemed to apply to the separate currencies of all territories in respect of which the member has accepted this Agreement under Article XXXI, Section 2(g) unless the member declares that its action relates either to the metropolitan currency alone, or only to one or more specified separate currencies, or to the metropolitan currency and one or more specified separate currencies.
(b) Action by the Fund under this Article shall be deemed to relate to all currencies of a member referred to in (a) above unless the Fund declares otherwise.[84]

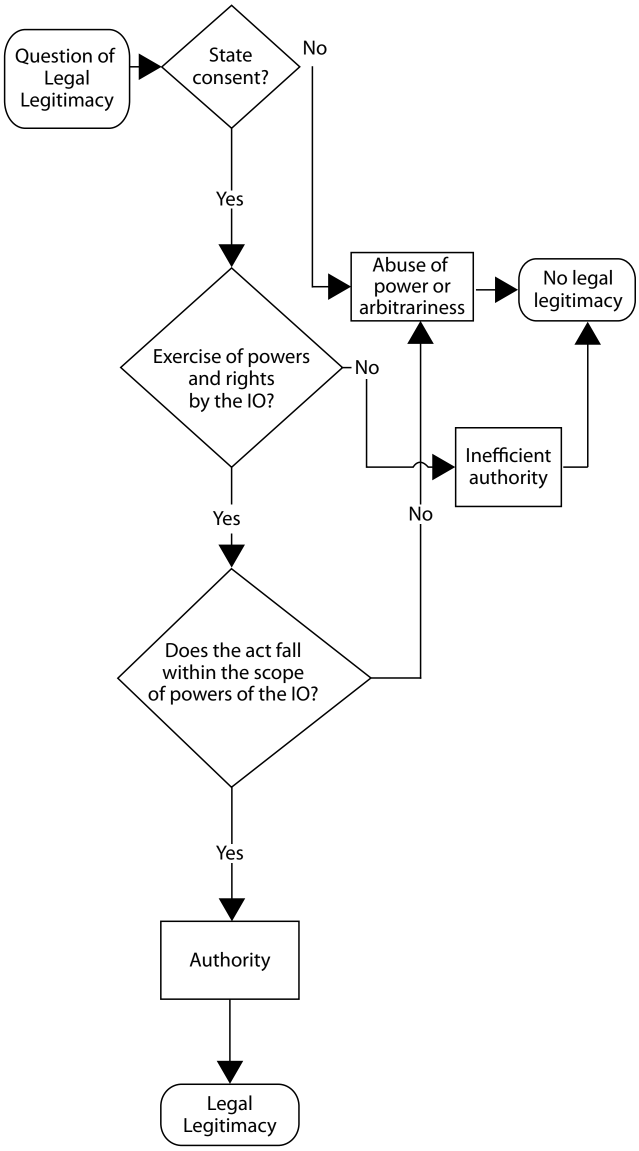
Article XXIX: Interpretation

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for its decision. If the question particularly affects any member, it shall be entitled to representation in accordance with Article XII, Section 3(j).
(b) In any case where the Executive Board has given a decision under (a) above, any member may require, within 3 months from the date of the decision, that the question be referred to the Board of Governors, whose decision shall be final. Any question referred to the Board of Governors shall be considered by a Committee on Interpretation of the Board of Governors. Each Committee member shall have one vote. The Board of Governors shall establish the membership, procedures, and voting majorities of the Committee. A decision of the Committee shall be the decision of the Board of Governors unless the Board of Governors, by an eighty-five percent majority of the total voting power, decides otherwise. Pending the result of the reference to the Board of Governors the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Board.
(c) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.[85]

84. Art. IV Articles of Agreement.
85. Art. XXIX Articles of Agreement.

Annex 2

Figure 1 Legal legitimacy flow diagram



Legality of the World Bank's Informal Decisions to Expand into the Tax Field, and Implications of These Decisions for Its Legitimacy

Uyanga Berkel-Dorlig*

Abstract

The emergence of global tax governance was triggered by common tax problems, which are now still being faced by international society of nation-states. In the creation of this framework, international institutions have been playing a major role. One of these institutions is the World Bank (Bank). However, those who write about the virtues and vices of the main creators of the framework usually disregard the Bank. This article, therefore, argues that this disregard is not justified because the Bank has also been playing a prominent role. Since two informal decisions taken in the past have contributed to this position of the Bank, the article gives in addition to it answers to the following two related questions: whether these informal decisions of the Bank were legal and if so, what implications, if any, they have for the Bank's legitimacy.

Keywords: World Bank, legality, legitimacy, global tax governance, tax policy and tax administration reforms

1 Introduction

Taxes are usually a (main) source of income for many modern states[1] and can thereby have a direct impact on their existence. Consequently, the questions 'whether to tax?' and – if so – 'to what extent?' are considered to be issues that touch upon state sovereignty, which should be respected and protected by international law. However, in today's world, tax issues seem no longer confined to nation-state territory. Rapid technological advancements and acceptance of neoliberal capitalism as the guiding economic ideology in the world[2] evoked tax competition among states.[3] This tax competition has subsequently become one of the causes of disparities between the domestic tax systems of states,[4] leading to the current worldwide aggressive tax planning practice with massive avoidance of direct taxation by multinational enterprises (MNE) and high-net-worth individuals (HNWI).[5]

Tax avoidance and evasion are not new phenomena. Every state with a capitalist economic system that derives its income from taxes has to do with it.[6] The current avoidance in direct taxation, however, has a far further impact that goes well beyond national borders. Disparities between national tax legislations, sometimes combined with bilateral tax treaties that are supposed to remove double taxation, result in division of the world's wealth among states and within a state in a way that was not always intended with creation of these legal measures. These implications have lifted direct tax issues[7]

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1. There are nowadays – to my knowledge – no states that form their complete budget from sources other than taxes. Even the countries that are listed as 'tax havens' derive a part of their income from taxes such as value added tax, customs and import duties, and sometimes even from corporate income tax.
2. Before the fall of communism in the Soviet Union in the late 1980s, the Cold War practically divided the world into two rival camps: the West and the East. After its fall, neoliberal capitalism spread from the West to the East.
3. Capitalism considers 'capital' as the major factor of production. Consequently, every state tries to attract as much as capital through many various legal and non-legal measures. One of the legal measures concerns taxation: capital exporting countries try not to burden their capital, while capital importing countries try to attract as much capital as possible through tax legislation and conclusion of tax treaties. The phenomenon that results from these regulatory actions of states in the field of taxation is called in the literature as tax competition.
4. But tax laws of some states – even though not created with the aim of attracting investment or capital – may just differ from each other, which would lead to similar disparities.
5. Strictly speaking, the former is a legal vehicle that aims to benefit individuals, among whom is the latter group.
6. Capitalism is based on the concept of private property – including capital – and the principle of maximisation of gains from this private property. On the one hand, the state should not own anything owing to the concept of private property. On the other hand, the state should not have any – or the least possible – control over private property. This loss of state control is aggravated by the understanding that taxes are a burden on private property, which made the payment of taxes 'undesired' or 'involuntary'. As a result of it, some people (try to) evade or avoid taxation, while taxes – though not directly aimed at maximisation of the gains from the private property or capital – are necessary for the existence of a state that should maintain this capitalist system through the provision of public goods.
7. Indirect taxes are already harmonised on the regional level (*e.g.* in the European Union) or coordinated by the WTO on the international level.

from the domestic to the international level by making them one of the major problems – next to environment or security – that have to be tackled on a global level. The global financial and economic crisis in 2008 placed the issue only on top of the political priority list by drawing the attention of the Group of Twenty (G20).[8]

These international direct tax problems can, however, not be solved unless the reign of neoliberal capitalism is ended[9] or a jointly coordinated action among states is initiated against them that should mitigate the adverse effects of neoliberal capitalism. The former is not an option now as the neoliberal capitalism with its market-oriented economy – *though* not a perfect one – seems to be a system that is being aspired to by the most people in the world. Furthermore, its current alternatives seem to be various forms of nationalism and communism, all with their own flaws. The latter option – the coordination of tax policies on an international level – has therefore been advocated by many scholars within academia and is being embraced by the world's political and economic leaders as a solution to these problems.[10] And since international institutions (IIs)[11] are perfectly suited to such endeavours, a handful of them that were already active in the field of taxation were, accordingly, entrusted with this task. This designation subsequently led to the initiation – as well as supervision of the implementation – of a surge of tax policy norms seemingly aimed at tackling international tax problems. As a result, these IIs created a framework encompassing all these processes, which is termed by some scholars as 'global tax governance' (GTG).[12]

Those who write about the virtues and vices of the main creators of this framework usually disregard the World Bank (Bank),[13] which in my opinion is not justified. I will therefore try to depict how and to what extent the Bank participates in the creation and implementation of such tax policy norms. Since these modes of participation of the Bank are based on its two related informal decisions to expand its activities into, respectively, domestic and international tax fields, I will explore these activities separately in two successive subsections. Subsequently, I will make an attempt to answer – equipped with the tools of legal doctrinal method[14] – the following two questions: whether these decisions of the Bank were legal; and if so, what implications, if any, they have for the Bank's legitimacy. But before discussing all these matters, I will provide an overview of the Bank's most important features in the following section.

2 Overview of the Bank

2.1 Introductory Remarks

There are not very many intergovernmental organisations (IGOs) in the world that are as well known among people as the Bank. Yet their knowledge about this institution is usually vague, limited or erroneous because of the complexity of this IGO. Hence, an overview of the most important aspects of the Bank is presented in Subsections 2.2. to 2.5. These aspects will not only enable us to understand this IGO, but also serve as a basis for making an analysis in Section 4 to answer the research questions posed earlier.

2.2 Structure and Mandates

The Bank is one of the prominent global players in the field of development. In July 1944, the foundation for this multilaterally established IGO was laid down through the creation of the International Bank for Reconstruction and Development (IBRD) by representatives of 44 states at the Bretton Woods Conference.[15] After the entry into force of its Articles of Agreement (Articles) in 1946, the IBRD officially started its work with 38 members.[16] At that time, the majority of its members were located in Europe and the western hemisphere.[17] The activities of the IBRD have been supplemented by the International Development Association

8. Since its London Summit in April 2009, the G20 has shifted its focus on direct tax issues. *See* <https://www.theguardian.com/business/2009/mar/20/g20-tax-haven-blacklist> and <https://www.oecd.org/g20/topics/taxation/> (last visited: 9 October 2017).
9. Many problems of international taxation result, in my opinion, from the current globalisation, which is based on neoliberal capitalist principles. These neoliberal principles are deregulation (downsizing the role of the government), liberalisation (market liberalisation through, *inter alia*, removal of trade and capital barriers) and privatisation (privatisation of state properties). Privatisation shifted capital from the state into the private domain. Liberalisation made the capital mobile, and deregulation loosened the control of the state over private capital. However, I do not say with this that ending neoliberal capitalism is the best option to solve these problems.
10. G20 and G-8 have been endorsing the international tax cooperation during their meetings. *See* I.J.M. Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilaterlism', 7 *World Tax Journal* (2015).
11. I understand by this term not only intergovernmental organisations (IGOs), but also other forms of cooperation such as transnational networks and platforms. As Junne indicated, national governments are usually reluctant to entrust IGOs with this task. Consequently, other alternative structures for international coordination were regarded to be more suitable for that purpose. *See* G.C.A. Junne, 'International organizations in a period of globalization: New (problems of) legitimacy', in J. Coicaud and V. Heiskanen (eds.), *The Legitimacy of international organizations* (2001) 189, at 211-19.
12. I refer here to the scholars who understand under this framework processes that create and implement such international norms. However, some scholars seem to understand by this term the norms that are being created. *See* J. Wouters and K. Meuwissen, 'Global Tax Governance: Work in Progress?', *Leuven Centre for Global Governance Studies Working Paper*, at 59 (2011) and P. Dietsch and T. Rixen (eds.), *Global Tax Governance: What Is Wrong and How to Fix It* (2016).
13. I refer herewith only to two lending institutions of the World Bank Group: the IDA and IBRD. *See* more about it in Section 2.1. of this article.
14. Conceptual analysis and moral reasoning.
15. This conference, officially called the United Nations Monetary and Financial Conference, was held from 1 to 22 July 1944 in Bretton Woods, New Hampshire, the USA. *See* <http://worldbank.org/en/about/archives/history/exhibits/bretton-woods-monetary-conference> (last visited 8 October 2017) and D. Kapur, J.P. Lewis & R. Webb, *The World Bank: Its First Half Century – Volume I: History* (1997), at 9.
16. I.F.I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures – Volume II* (1995), at 2.
17. Nine of these states were from Asia and Africa, and the rest belonged to Europe and the western hemisphere. *See id*.

(IDA) from 1960.[18] Such a move was necessary since the IBRD was not allowed to provide 'concessional' lending (zero or very low interest credits) or grants from its capital.[19] Both lending institutions operate under the Bank's name and have one and the same staff and project evaluation standards.[20] Together with three other affiliates – the International Finance Corporation (1956), the Multilateral Investment Guarantee Agency (1988) and the International Centre for the Settlement of Investment Disputes (1966) – the Bank belongs to the World Bank Group (WBG).

According to Article I of its Articles, the IBRDs main mandate is 'to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes'. In conformity with this mandate, the reconstruction of Europe after World War II initially formed the Bank's main mission, and the first non-project reconstruction loans were provided to Western European states.[21] But shortly after its start, the bilateral United States' Marshall Plan replaced the Bank's work in those states.[22] And as West Europe began to show clear signs of recovery, the Bank decided, in the late 1950s, to focus entirely on loans for development, shifting its activities to its developing members.[23] For a long time, the Bank understood 'development' to mean 'having dams, bridges, and a (relatively) high GNP per capita'.[24] Later, during the Presidency of Robert S. McNamara at the Bank, 'poverty alleviation' or 'the guarantee of a certain level of welfare to one's population' became another component of development. Since 2013, the Bank has had twin goals that should reach this development: 'eradicating the extreme poverty and boosting shared prosperity'.[25] In addition to this mandate, the IBRDs Articles mention other purposes of this institution such as promotion of 'the long-range balanced growth of international trade and *maintenance of equilibrium in balances of payments* (emphasis added) by encouraging international investment for the development of the productive resources of members',[26] promotion of 'private foreign investment by means of guarantees or participation in loans and other investments made by private investors'[27] and supplementation of 'private investments by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources'.[28] The IDA has a similar mandate, which is pursuant to its Articles 'to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world included within the Association's membership, in particular by providing finance to meet their important developmental requirements on terms which are more flexible and bear less heavily on the *balance of payments* (emphasis added) than those of conventional loans, thereby furthering the developmental objectives of the International Bank for Reconstruction and Development (hereinafter called "the Bank") and supplementing its activities'.[29] Although these mandates are extensively interpreted in practice by the Bank's management, the founding documents contain *one* explicit limitation to this possibility of interpretation:[30] prohibition of political activity.[31]

2.3 Organisation and Distribution of Voting Power

The IBRD nowadays consists of 189 members or 'shareholders'.[32] The membership of IBRD is, however, conditional on the membership of International Monetary Fund (IMF), which is open only for sovereign states.[33] A state may acquire membership of the IDA if it has membership of the IBRD.[34] At the moment the IDA has 173 members.[35] These members together hold *in principle* the ultimate policy-making power on any issues that determines the course of the Bank. In practice, however, the members have a say only in matters concerning each of the institutions of the Bank through their (Alternate) Governors in the Boards of Governors (BoGs).[36] The BoGs consist of one Governor and one Alternate Governor appointed by each member.[37] The appointed (Alternate) Governors at the IBRD serve ex officio as the (Alternate) Governors of IDA, provided that states that they represent have membership of the IBRD.[38] Any meetings of the BoGs are considered to be validly held when the majority of all Governors, who together represent two-thirds of the total voting power of that particular organisation, are present.[39]

As the BoGs usually convene once a year during the WBG and IMFs Annual Meeting in autumn,[40] they

18. Art. I of Articles IDA (Effective 24 September 1960).
19. IDA 13, 'The IDA Deputies: An Historical Perspective', *IDA* (November 2001), at 1.
20. F.J. Garcia, 'Justice, the Bretton Woods Institutions and the Problem of Inequality', *Boston College Law School Faculty Papers*, at 5 (2008).
21. The IBRD's first loans were provided to France, the Netherlands, Denmark and Luxembourg in 1947. *See* Kapur *et al*. (1997), above n. 15, at 10.
22. The official name of this bilateral assistance was the 'European Recovery Program'. It was announced in June 1947. *Id*.
23. In 1948, the Bank provided its first loan for developmental purposes to Chile. *See* M. Finnemore, *National Interests in International Society* (1996), at 94.
24. *Id*., at 92.
25. World Bank Group, The World Bank Group A to Z (2016), at 67.
26. Art. I (iii) of Articles IBRD.
27. Art. I (ii) of Articles IBRD.
28. *Id*.
29. Art. I of Articles IDA.
30. Shihata (1995), above n. 16, at 132-33.
31. To be found in: Art. III (5[b]); Art. IV (10); and Art. V (5[c]) of the IBRD Articles. Also in Art. V (1[g]); Art. V (6); and Art. IV (5[c]) of the IDA Articles.
32. *See* <http://worldbank.org/en/about/leadership/members#1> (last visited 9 October 2017).
33. Art. II (1) of Articles IBRD.
34. Art. II (1) of Articles IDA.
35. *See* <www.worldbank.org/en/about/leadership/members#2> (last visited 9 October 2017).
36. Art. V (2[a]) of Articles IBRD and Art. VI (2[a]) of Articles IDA.
37. Art. V (2[a]) of Articles IBRD and Art. VI (2[b]) of Articles IDA.
38. Art. VI (2[b]) of Articles IDA.
39. Art. V (4[f]) of Articles IBRD and Art. VI (2[f]) of Articles IDA.
40. The BoGs may convene on their own decision or on the BoD's request more than once a year. *See* Art. V (2[c]) of Articles IBRD and Art. VI (2[d]) of Articles IDA.

delegated their powers – with the exception of some[41] – to the Boards of Directors (BoDs).[42] The BoDs are responsible for the Bank's general operations[43] and consist of the Bank's President and 25 Executive Directors (EDs).[44] According to Article V, Section 4, Subsection b Articles of IBRD, *five* of these EDs are appointed by the IBRDs 5 largest shareholders,[45] whereas the rest are nominated out of several constituencies by other members.[46] The IDAs BoDs is composed ex officio of each (Alternate) ED at the IBRDs BoDs, provided that they represent members having IBRD membership.[47] The BoDs gather twice or more often per week.[48] The quorum for these meetings is the majority of EDs representing at least one-half of the total voting power of this IGO.[49] The EDs choose the Bank's President (President) for an extendable 5-year term,[50] who chairs the meetings of the BoDs[51] and leads, at the same time, the staff of the Bank.[52] The staff under the responsibility of the President carries out the Bank's ordinary business.[53] The President does not participate in the voting process during the meetings of the BoDs unless votes are equally divided, in which case he has a deciding vote.[54]

Matters within each of the institutions of the Bank are usually decided by a *majority* of votes cast.[55] In certain situations specified in their founding documents, they may deviate from this general rule. However, the votes are allocated within each institution of the Bank unevenly owing to the difference in their membership. Moreover, the voting power in each institution is distributed unequally among the members because of the '*weighted* voting system'. This system is the survival of the compromise that resulted from the Bretton Woods Conference. At this conference, the representatives discussed two approaches for the determination of voting power of each member state: one was based on the legal principle of the equality of states, and the other on the actual contributions or quotas.[56] As a result, they agreed on a combination of both the approaches, consisting of basic votes and additional votes, depending on the number of subscribed shares in the capital stock of that institution.[57] Nevertheless, these general approaches are elaborated differently in each of the Articles of the Bank's institutions. Whereas the basic votes of an IBRD member are determined by multiplying the aggregate sum of the voting power of all members by 5.55%,[58] the basic vote of an original IDA member is a fixed amount of 500.[59] The same is true with regard to additional votes. An IBRD member may acquire one additional vote for each share of stock[60] with a par value of $100,000,[61] while an original IDA member may acquire one additional vote for each $5,000 of its initial subscription.[62] It should, however, be noted that the above rules with regard to IDA's votes do not apply to IDA's members that could not be seen as the 'original member' of this institution in accordance with Article II, Section 1, Subsection a of its Articles. According to Article V, Section 3, Subsection a, Paragraph i of the IDAs Articles, the rules with regard to their voting rights are determined by the BoGs. During the IDAs third replenishment, the IDAs voting powers were realigned with relative contributions of its members without making a general adjustment in its Articles.[63] The IBRD has also revised its distribution of voting power several times. However, these revisions led to adjustments of the IBRD's Articles. The last of such a revision took place in 2010[64] but resulted only in a substantial increase in the voting powers of a few large economies, with a slight increase or even decrease in the voting powers of other developing members.[65]

2.4 Finances

The IBRD has traits similar to a banking institution. Its primary source of income is the international financial market, to which it issues bonds and other debt securities.[66] These financial papers are bought by various par-

41. The excluded powers differ per institution. *See* Art. V (2[b]); Art. V (4[b]); Art. VIII (a) of Articles IBRD and Art. VI (2[c]) of Articles IDA.
42. Art. V (4[a]) of Articles IBRD and Art. VI (4[a]) of Articles IDA.
43. *Id*.
44. Since 1 November 2010, the number of EDs has increased to 25. *See* <http://worldbank.org/en/about/leadership/directors> (last visited 9 October 2017).
45. These countries are the United States, France, the United Kingdom, Germany and Japan. *See* <http://siteresources.worldbank.org/ESSDNETWORK/Resources/481106-1129303936381/1777397-1129303967165/chapter1.html> (last visited 9 October 2017).
46. Saudi Arabia, the Russian Federation and China choose their own representatives. *See* S. Park, 'The World Bank – Plus Ca Change? Comment', in A.T. Weller and X. Yi-chong (eds.), *The Politics of IOs: Views from Insiders* (2015), at 87.
47. Art. VI (4[b]) of Articles IDA.
48. *See* <http://siteresources.worldbank.org/ESSDNETWORK/Resources/481106-1129303936381/1777397-1129303967165/chapter1.html> (last visited 9 October 2017).
49. Art. V (4[f]) of Articles IBRD and Art. VI (4) of Articles IDA.
50. Section 13(c) By-Laws of IBRD (As amended through 26 September 1980).
51. Art. V (5[a]) of Articles IBRD and Art. VI (5[a]) of Articles IDA.
52. Art. V (5[b]) of Articles IBRD and Art. VI (5[b]) of Articles IDA.
53. *Id*.
54. Art. V (5[a]) of Articles IBRD and Art. V (5[a]) of Articles IDA.
55. Art. V (10[b]) of Articles IBRD and Art. VI (3[b]) of Articles IDA. This rule is nowadays considered to be of symbolic value as all matters within the two institutions of the Bank are decided on consensus. However, as Shihata noted, this rule is one of the factors that influence the current decision-making process within the Bank. *See* I.F.I. Shihata, *The World Bank Legal Papers* (2000), at 580.
56. A. Buira, 'The Bretton Woods Institutions: Governance Without Legitimacy?', in A. Buira (ed.), *Reforming the Governance of the IMF and the World Bank* (2005) 2, at 9.
57. *Id*.
58. Art. V (10 [a(i)]) of Articles IBRD. Before 2012, this basic vote was fixed and amounted to 250.
59. Art. VI [3(a)] of Articles IDA.
60. Art. V (3 [a(i)]) of Articles IBRD.
61. Art. II (2[a]) of Articles IBRD.
62. Art. VI (3[a]) of Articles IDA.
63. The BoGs had such a right based on Art VI (2 [c(ii)]) of the IDA's Articles. *See* IDA 13 (2001), above n. 19, at 3-4.
64. Development Committee, 'World Bank Group Voice Reform: Enhancing Voice and Participation of Developing and Transition Countries in 2010 and Beyond', DC2010-0006, 19 April 2010; and World Bank Group, 2015 Shareholding Review: Report to Governors, 10 October 2015 Development Committee meeting, DC2015-0007, 28 September 2015.
65. *See id*. and <http://reuters.com/article/us-worldbank/china-gains-clout-in-world-bank-vote-shift-idUSTRE63O1RQ20100425> (last visited: 9 October 2017).
66. The World Bank, *A Guide to the World Bank* (2011), at 67.

ties ranging from large public and private institutions to individuals.[67] Since the debt papers are guaranteed by all members of this institution, they have a Triple-A credit rating, and as such, the IBRD pays a *low* market interest rate to its creditors. This minimum level of costs for funding enables this institution to set lower interest rates for its clients – with a small margin – than the market interest rates that these members would have received if they sold their own financial papers to the international financial market.[68] In addition to this low interest rate, the IBRD offers its clients more flexible terms for its lending instruments than the international financial market.[69]

According to its Articles, the IBRD may also derive income from subscriptions to its capital. Article II, Section 5 in conjunction with Article II, Section 7, Paragraph i of the Articles of IBRD stipulates that a country that joins the Bank pay 2% of its subscription to the IBRDs capital in gold or United States dollars. Whenever IBRD needs a funding for its operations, it may place a call on the 18% of the subscription, which could be paid to this institution in the currency of that member state.[70] In case IBRD makes or facilitates loans specified in Article IV, Section 1, Subsection a, Paragraphs ii and iii Articles of IBRD, it may place a call on the remaining 80% of the subscription that could be made in gold or United States dollars or in any other currency of the member's choice.[71] Until now, the IBRD has never invoked these provisions with regard to 'unpaid balance' in its Articles, since the Bank has always been able to pay its creditors back.[72] Furthermore, its operating expenses have so far always been met from its operational income deriving from the small margin on its interest rates and interest income on its equity.[73] The net amount that remains each year – after deduction of expenses – is used to fill up its reserves, and the amount that is left is transferred to the IDA.[74] Furthermore, the IBRD administers its own and donor states' trust funds.[75]

The finances of the IDA differ greatly from those of the IBRD. Its main source of income consists of donations from its 52 *donor* members.[76] To these donors belong not only 'old' wealthy economies – such as the United States or France – but also 'new' ones, like the Russian Federation, Brazil or Turkey.[77] This funding is refilled by the donors every 3 years.[78] In addition, the IDA derives its financial means from the contributions to its capital by its members,[79] and through repayments of loan principal on its 20- to 40-year credits.[80] Furthermore, the IDA receives funding from the IBRD[81] and IFC.[82]

2.5 Services

At the moment, the Bank serves its 144 members as its clients.[83] These services are provided in two different fields: finance and knowledge.[84] The Bank's primary operations or activities take place in the financial field. However, it is not a commercial, but a cooperative institution that operates for the benefit of its members.[85] Owing to that position and its mandate, the Bank's financial activities aim only at granting loans for developmental and reconstruction purposes to its members. The IBRD grants a loan to public institutions of its clients for development projects at 'preferential' terms or rates close to commercial rates.[86] Private institutions may also borrow from IBRD funds, provided that their borrowing is guaranteed by a member. On the other hand, IDA's credits could be borrowed by low-income members on so-called 'concessional' terms or very low and sometimes zero-interest rates.[87] The IDA also provides grants to its clients suffering from debt distress.[88] Besides its credits and grants, IDA helps its clients with the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI).[89]

The major eligibility test to borrow from IDA or IBRD resources is determined by two factors: (a) relative *poverty*; or (b) lack of *creditworthiness* for market-based loans. Relative poverty is defined through calculation of per capita gross national income (GNI)[90] based on the Bank's Atlas method.[91] If the GNI of that member is below a certain level, which is determined each year, then that member is eligible to borrow from IDA funds.[92] Some members, whose GNI lies above the threshold but that do not meet the requirement for creditworthiness are also allowed to borrow from this institution.[93] Some IDA eligible members, which are creditworthy, may also borrow from certain IBRD funds.[94] These members are usually called *blend* bor-

67. *Id*.
68. *Id*., at 68.
69. For example, client states may choose a loan period for up to thirty years, including grace period. *See id*., at 67.
70. Art. II (5[i]) in conjunction with Art. II (7[i]) of Articles IBRD.
71. Art. II (5[ii]) in conjunction with Art. II (7[i]) of Articles IBRD.
72. The World Bank (2011), above n. 66, at 68.
73. *Id*.
74. Art. V (14) of Articles IBRD.
75. The World Bank (2011), above n. 66, at 67.
76. *Id*., at 68.
77. *Id*.
78. *Id*.
79. Art. II (2) of Articles IDA.
80. The World Bank (2011), above n. 66, at 68.
81. Art. V (14) of Articles IBRD.
82. The World Bank (2011), above n. 66, at 68.
83. *See* <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last visited 9 October 2017).
84. World Bank Group (2016), above n. 25, at 141.
85. The World Bank (2011), above n. 66, at 68.
86. Garcia, above n. 20.
87. *See* <https://ida.worldbank.org/about/what-ida> (last visited 9 October 2017).
88. *Id*.
89. *Id*.
90. Formerly known as GNP.
91. *See* <https://datahelpdesk.worldbank.org/knowledgebase/articles/378832-what-is-the-world-bank-atlas-method> (last visited 9 October 2017).
92. $1,165 in fiscal year 2018. *See* <http://ida.worldbank.org/about/borrowing-countries> (last visited 9 October 2017).
93. *Id*.
94. *Id*.

rowers.[95] At the moment, 69 are IBRD, 59 are IDA and the remaining 16 members are blend borrowers.[96]

The Bank may provide, in accordance with its Articles, its financing only for 'specific projects', except in 'special circumstances'.[97] On the basis of these provisions, the Bank has now three *main* financing instruments. The most frequently used and oldest lending instrument[98] is Investment Project Financing (IPF),[99] which was formerly known as 'investment loans'[100] and 'investment guarantees'. As of fiscal year 2015, around 70% of the Bank's loans consisted of this type of loan.[101] The operations financed with this lending instrument have a duration of 5 to 10 years.[102] The aim of this lending instrument is to provide financial means and related operational support on the basis of various projects such as goods, works and services within the framework of economic and social development.[103] The second largest financing instrument is Development Policy Financing (DPF),[104] which takes a share of 29%.[105] The Bank replaced with this single and quick-disbursing lending instrument all its policy-based or adjustment loans in August 2004.[106] It is used to restore the member's balance of payments disequilibrium, and supports government policy and institutional reforms such as tax reform.[107] The DPF attaches to the IBRD's loans, IDA's credits and grants, as well as IBRD and IDA's guarantees, a condition or 'conditionality' encompassing a policy reform and actions that should be implemented by its borrowers.[108] The last and – at the time moment – the least used lending instrument is Program-for-Results Financing (PfR). It was created in 2012 and accounts for 5%.[109] It links 'disbursements directly to the delivery of defined results'.[110]

In addition to its lending operations, the Bank carries out analytical and research work activities. These activities are performed usually in combination with its lending operations and sometimes on a stand-alone basis. In the analytical field, the Bank has an instrument that is called Advisory Services and Analytics (ASA).[111] By using this instrument it provides its clients 'with customized expertise and analytics, either as stand-alone services or as a complement to financial support programs'.[112] The ASA encompass Economic Sector Work (ESW), Non-Lending Technical Assistance (TA) and impact evaluation and training.[113] Out of these instruments the ESW is targeted to 'influence policy choices and programs' through diagnostic and analytical reports.[114] It can be divided into three sub-activities, namely core diagnostic work (CDW), sector and thematic studies (STS) and other ESW. The CDW is performed prior to and in support of its lending programmes.[115] The STS, as well as the other ESW, are aimed at influencing programmes and policies in client countries. Moreover, the reports concluding these studies contain officially endorsed recommendations by the Bank and express the formal position held by the Bank units that performed the study.[116] On the other hand, the Non-Lending TA is utilised for 'building capacities and strengthening institutions through events and reports'.[117] The Bank funds its stand-alone non-lending operations with either its own financial means or donor-provided trust funds and resources or funds provided by its clients themselves. The research work activities are carried out by the Bank itself or performed on commission by other parties.

All these loans and assistance in the field of knowledge are usually provided within the framework of comprehensive lending programmes laid down in its Country Assistance Strategy paper. This paper is the result of a periodic negotiation between the Bank and the borrowing member state and contains the main points of the Bank's assistance to its clients, reflecting local circumstances and needs.

2.6 Concluding Remarks

The Bank is a multilaterally established financial IGO active in the developmental field. At its creation, it was largely a Western organisation both in its operational field and in membership, but today its operations focus entirely on developing states, and more than the majority of its members belong to these states. Nevertheless,

95. *Id*.
96. *Id. See also* <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last visited 31 October 2017).
97. Art. II (4[vii]) IBRD Articles and Art. V (1[b]) IDA Articles.
98. World Bank, *2015 Development Policy Financing Retrospective* (2014), at 1.
99. On 25 October 2012, Bank's BoDs approved a set of reforms that were aimed at simplifying the project loans. These reforms took effect from 8 April 2013. The new policy replaced many policies and procedures on project-based loans with a single policy called OP/BP 8.60 on Investment Project Financing.
100. These investment loans included Specific Investment Loan, Sector Investment and Maintenance Loan, Adaptable Program Loan Learning and Innovation Loan, Technical Assistance Loan, Financial Intermediary Loan and Emergency Recovery Loans. *See* World Bank – Operations Policy and Country Services, 'Lending Instruments: Resources for Development Impact', (2001), at 5.
101. World Bank (2014), above n. 98, at 1.
102. World Bank Group (2016), above n. 25, at 52.
103. *Id. See also* OP 10.00.
104. DPF is governed by the operational policy approved by the Bank's EDs in August 2004 (OP 8.60).
105. World Bank (2014), above n. 98, at 1.
106. This change took place through OP 8.60. *See* Legal Vice Presidency – World Bank, 'Review of World Bank Conditionality: Legal Aspects of Conditionality in Policy-Based Lending', (2005), at 3.
107. The World Bank (2011), above n. 66, at 76.
108. Section III (4) of OP 8.60 of the Bank.
109. World Bank (2014), above n. 98, at 1.
110. IMF, OECD, UN and WBG, 'Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries', (July 2016), at 44.
111. *Id*.
112. *Id*.
113. *Id*.
114. *Id*.
115. *See* <https://openknowledge.worldbank.org/handle/10986/6> (last visited 9 October 2017).
116. *Id*.
117. IMF *et al*. (July 2016), above n. 110, at 44.

the decision-making power within this IGO remained, owing to its *weighted* voting system, in the hands of its wealthy shareholders located in the West – with the notable exception of some high-income developing states that are politically and economically important.

3 On the Bank's Activities in the Tax Field

3.1 Introductory Remarks

In Section 2.5, I gave an overview of the services that the Bank provides to its client member states. This section aims to elaborate on that matter by focusing on the tax-related activities of the Bank. As these activities derive from two related informal decisions of the Bank to expand its activities into the domestic and international tax fields, I will depict these activities separately in the following two subsections.

3.2 Activities after Expansion into the Domestic Tax Field

Domestic tax issues of its developing members became a concern of the Bank from the 1970s onwards.[118] During that incipient period, the Bank's tax related advice mostly focused ona particular sector in its client's economy.[119] A little attention – if any – was paid to the general tax structure.[120] Whenever it formed a part of the advice it was only about raising the taxes.[121] The tax administration seemed to be an issue that was not worth considering.[122]

In the late 1970s, the Bank's many developing members were hit by severe balance of payments problems.[123] Since the efforts of the formal legal transplantations under the Law and Development movement had not resulted in the desired outcomes,[124] the Bank decided to pursue a new strategy based on a neoliberal economic model.[125] The conviction for this macroeconomic strategy came from the Bank's study conducted in Sub-Saharan Africa that presented *bad* domestic policies to be the cause of failed efforts to yield economic development and advised replacement of these policies with *market-oriented* ones as a strategy that would lead to more economic growth.[126] So from 1980,[127] the Bank began – based on the 'special circumstances' provision in Article I, Section iii of IBRD's Articles and Article I of IDA's Articles – to provide non-project loans.[128] These loans were accompanied by conditions or 'conditionalities' that required the borrower to implement 'a program of reforms and actions'.[129] These reforms and actions had to be in line with the aforementioned neoliberal economic policies,[130] which are usually mistakenly called 'Washington Consensus' policies.[131]

The introduction of this neoliberal strategy was accompanied by the expansion and intensification of tax advisory and analytical activities in the existing tax work field.[132] Nevertheless, the Bank organised and discussed general tax policy issues during its meetings with clients based on the analysis and recommendations given by other IGOs,[133] such as the IMF or the United States Agency for International Development. Moreover, the Bank took part in some tax missions that were organised by the IMF to review the existing conditions and devise new policies. In the mid-1980s, the Bank's working method changed as a result of a significant increase in requests from its clients for TA and policy advice on tax issues.[134] Empowered by the initial activities and requests from its clients, the Bank embarked on its own mission to reform the tax systems of its developing members. For that purpose, it produced 'detailed reports and recommendations' and independently carried out negotiations with its clients to reflect these recommendations in its adjustment lending programmes.[135] However, as a result of several incidents and the Asian financial crisis in 1997, it began to closely coordinate its policy-based loans with the IMF.[136]

In the beginning, only tax policy issues were reflected in the Bank's adjustment loans with tax-related conditionality. The conditionality in these loans was primarily directed at 'generating revenue to stabilize the economy'.[137] Later on, it began to include 'broader policies of encouraging more efficient allocation in private production and investment' and 'greater attention to equity'.[138] Notwithstanding this shift in its focus, the tax policy conditions were always in line with 'the prevailing best practices' of that period.[139] Gradually, the Bank realised that the implementation of its tax policy reforms also depended on 'the implementation capacity of governments and their commitments to reform' in developing members.[140] As a result, the Bank's conditionality was

118. Z. Shalizi, *Lessons of Tax Reform* (1991), at 8.
119. *Id*., at 7-8.
120. *Id*.
121. *Id*., at 8.
122. *Id*.
123. I.F.I. Shihata, *The World Bank in a Changing World: Selected Essays – Volume I* (1991), at 58.
124. T. Kever, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model', 1 *Harvard International Law Journal* 287, at 296 (2011).
125. S. Park and A. Vetterlein, 'Introduction', in S. Park and A. Vetterlein (eds.), *Owning Development: Creating Policy Norms in the IMF and the World Bank* (2010), at 9.
126. Kever, above n. 124, at 297.
127. Shihata (1991), above n. 123, at 58.
128. *Id*., at 63-4 and Legal Vice Presidency – World Bank (2005), above n. 106, at iv.
129. Legal Vice Presidency – World Bank (2005), above n. 106, at iv.
130. Shihata (1991), above n. 123, 63-4. *Also see* Park and Vetterlein, above n. 125, at 10 (fn. 3).
131. J. Williamson, 'What Should the World Bank Think about the Washington Consensus?', 2 *The World Bank Research Observer* 251, at 251 (2000).
132. Shalizi (1991), above n. 118, at 8.
133. *Id*.
134. *Id*.
135. *Id*.
136. The Secretary of the U.S. Treasury, 'IMF and World Bank collaboration and IMF Accountability', (2009), at 2-3.
137. Shalizi (1991), above n. 118, at 9.
138. *Id*., at 9-10.
139. *Id*., at 8.
140. Shihata (1991), above n. 123, at 59.

expanded to include 'institutional changes in macroeconomic and financial management, sectoral restructuring and policy reforms, enhancement of public sector efficiency and constraints in public sector management'.[141] In the tax field, it meant the implementation of tax administration reforms,[142] which concerned organisational and functional reforms.[143] From 1987, tax administration reforms were increased in volume and with that became a significant part of the Bank's work in the tax field.[144] Nevertheless, as Zmarak Shalizi noted, the overall involvement of the Bank in reforming tax systems of its developing members was always restricted to partial reform programmes and did not include all-embracing major tax policy and tax administration reforms.[145]

3.3 Activities after Expansion into the International Tax Field

The Bank has focused until recently only on domestic tax issues of its developing members. However, the outbreak of the 2008 global financial and economic crisis reduced domestic public revenues even in high-income developed economies. This fact, combined with the subsequent exposure of the extensive aggressive tax planning practices for MNEs and HNWIs, enhanced the G20's attention on public resources. Starting with its high-level meeting in 2010, the G20 has consequently issued several requests to four major IGOs – the Organisation for Economic Co-operation and Development (OECD), IMF, WBG and United Nations (UN) – active *inter alia* in the field of taxation. The first of these requests was made during the G20's Seoul Summit.[146] As a follow-up to this request, the four IGOs brought out a report in 2011 that threw light on ongoing work of all four IGOs that aim at tax capacity building in developing states.[147] The next request from the G20 Development Working Group came in the first half of 2015. In the build-up to the 10th meeting of the G20 heads of government and heads of state, it requested the four IGOs to investigate options for low-income countries' effective and efficient use of tax incentives for investment, which is considered to be one of the main causes of tax competition in developing states.[148] Again, the four IGOs responded to this request with a presentation of their joint report,[149] which was discussed during the G20 Antalya summit.[150] This request was, however, not the last one, and several other requests followed afterwards.

In the meantime, in preparation for the third International Conference on Financing for Development, the six major international and regional development banks, along with the IMF, presented a joint discussion note to the 18 April 2015 Development Committee meeting of the Bank and IMF.[151] This note, called 'From Billions to Trillions: Transforming Development Finance', offered a new approach to financing for development, which emphasised the need for strengthening domestic public resources of developing states and the role that the multilateral development banks, as well as the IMF, should play in this process.[152] This approach was subsequently adopted in the 'Addis Ababa Action Agenda'.[153] Shortly after, during the UN Sustainable Development Summit, held in New York from 25 to 27 September 2015, the international community adopted a declaration with a new set of Sustainable Development Goals,[154] which replaced Millennium Development Goals.[155] In paragraph 41 of this declaration, the UN General Assembly recognised that 'each country has primary responsibility for its own economic and social development' and that 'implementation of the Goals and targets' will need *inter alia* 'the mobilization of financial resources as well as capacity-building'. Furthermore, it stated therein that public finances will play a pivotal role in that process. This and other statements of the declaration show that the Addis Ababa Action Agenda forms an integral part of this declaration. As a result, strengthening tax systems – both tax policy and tax administration – became one of the main global development priorities.[156]

In light of these developments on the international political arena, it became necessary for the Bank to make international tax issues another component of its work. Accordingly, a Global Tax Team was created within the Bank's Governance Global Practice as a departmental unit, which is responsible for coordination of the Bank's international tax-related work, in the first quarter of 2016.[157] Its main mandate, according to the information placed on the Bank's website, is the design of 'struc-

141. *Id*.
142. J. Datta-Mitra, *Fiscal Management in Adjustment Lending: A World Bank Operations Evaluation Study* (1997), at 72.
143. Shalizi (1991), above n. 118, at 10.
144. Datta-Mitra (1997), above n. 142, at 72.
145. Shalizi (1991), above n. 118, at 45.
146. IMF, OECD, UN and World Bank, 'Supporting the Development of More Effective Tax Systems: A Report to the G-20 Development Working Group', (2011), at 10.
147. *Id*.
148. IMF, OECD, UN, and World Bank, 'Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment', (2015), at 6.
149. The report has a title 'Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment.' It was presented to the G20 Development Working Group in September 2015. *See id*., at 2.
150. The 10th annual meeting of the G20 heads of government and heads of state, organized in Antalya, Turkey, from 15 to 16 November 2015.
151. Joint Ministerial Committee of the Boards of Governors of the Bank and the IMF on the Transfer of Real Resources.
152. *See* <http://www5.worldbank.org/mdgs/post2015.html> (last visited 9 October 2017).
153. The 'Addis Ababa Action Agenda' of the Third International Conference on Financing for Development, adopted by the General Assembly on 27 July 2015 (resolution 69/313, annex).
154. This declaration is titled 'Transforming our world: the 2030 Agenda for Sustainable Development' and adopted by the General Assembly on 25 September 2015 (resolution A/RES/70/1).
155. These goals are to be found in the 'UN Millennium Declaration', which was adopted by the General Assembly on 8 September 2000 (resolution 55/2).
156. IMF, OECD, UN and World Bank, 'Concept Note: The Platform for Collaboration on Tax', (April 2016), at 3.
157. *See* <www.worldbank.org/en/topic/governance/overview#2> (last visited 9 October 2017).

tured guidance on tax policy and administration reform and to ensure that the global discussion around international tax issues acknowledges the circumstances of developing countries and serves to advance the Bank Group's twin goals'.[158] This meant in practice that the Bank supports its clients with the design and implementation of instruments and administrative procedures to address key sources of base erosion, which includes transfer mispricing, tax treaty application issues, detecting and adjudicating aggressive tax planning structures and other methods of profit shifting, and tax transparency through exchange of information.[159]

In addition to the creation of the Global Tax Team, the Bank decided, together with its partner IGOs, to enhance its cooperation in the tax field. Consequently, they created a Platform for Collaboration on Tax (Platform) in April 2016.[160] This Platform, however, did not create a new formal IGO as its members stay independent from each other in carrying out their own mandated activities.[161] As its founding document 'Concept Note' stated, the Platform was created owing to a rise of common challenges that derive from the 'increased linkages between economies and progress in reform'.[162] Furthermore, it noted that the main purpose of this Platform is to intensify tax-related cooperation between these main IGOs in order to 'better support governments in addressing the tax challenges they face'.[163] To these supporting activities belong the issuance of joint outputs on both domestic and international tax issues, the exchange information on their respective operational and knowledge activities,[164] and the coordination of their activities that should link the standard setting to capacity building and TA.[165] In reality, the last task implied implementation of the results of the OECD/G-20 Base Erosion and Profit Shifting project[166] and effectuation of the Global Standard for Transparency and Effective Exchange of Information[167] in developing members.[168] Within the framework of this informal network, the committed IGOs also aim to continue on a regular basis the already existing discussions on 'the design and implementation of standards for international tax matters'.[169] Moreover, they wish to organise high-level as well as technical-level meetings to discuss tax issues[170] and to support developing states with their participation in the future global standard setting process.[171]

After this second expansion, the Bank's work in the tax field is now mostly aimed at building the capacity of the tax systems of its clients.[172] This capacity building work is focused on both domestic tax related issues (domestic tax policy and administration) and international tax related issues.[173] In relation to domestic tax policy, various tax reform programmes have been devised so far.[174] These reforms range from comprehensive reforms to reforms restricted to a certain part of the tax system, such as tax incentives. The reforms are subsequently implemented and sustained in practice through domestic tax legislation, judicial work and operations of the tax administration. Whereas tax legislation forms a part of the overall tax reform programmes, judicial reforms have been receiving due attention from the Bank as a part of its rule of law programmes.[175] In contrast to them, tax administration reforms have always formed a distinct part of the Bank's overall work in the tax field. In the field of international taxation, the Bank assist developing members with the design and implementation of instruments and administrative procedures for effectuation of international standards.[176]

In order to carry out these tax-related activities, the Bank has been using various lending and non-lending instruments that are available to it. These instruments are combined in such a way that it provides support to client states 'from diagnosis to analysis of causes ad solutions of tax issues, design of a program of capacity building, implementation, and, finally, evaluation.'[177] The most relevant ones among them are now, without doubt, the Bank's lending instruments: the IPF, DPF and PfR.[178] The IPF is used for 'building physical and social infrastructure, such as Information Management Information Systems and business process re-engineering for tax administrations', whereas the DPF is employed 'for a program of policy and institutional actions, such as changes in tax laws and arrangements for providing tax incentives to foreign investors'.[179] Compared with IPF and DPF, the PfR is used to achieve predefined results in taxation.[180] In addition to these main lending instruments, the Bank conducts preparatory studies about a tax system prior to carrying out its tax reforms known as ESW, which are usually funded by the Bank's own budget. Furthermore, it carries out various tax-related researches and assists in drafting of tax legislation. These activities are mostly financed by

158. *Id*.
159. IMF *et al*. (July 2016), n. 110, at 45.
160. IMF *et al*. (April 2016), above n. 156, at 3.
161. *Id*.
162. *Id*.
163. *Id*., at 5.
164. IMF Press Release No. 16/176, 19 April 2016.
165. IMF *et al*. (April 2016), above n. 156, at 5.
166. This project aims to counter tax avoidance strategies of MNEs.
167. The standard was developed within the framework of the Global Forum on Transparency and Exchange of Information for Tax Purposes.
168. IMF *et al*. (April 2016), above n. 156, at 8-9.
169. *Id*., at 3.
170. *Id*., at 6 and 10.
171. *Id*., at 8. Until today, no steps have been undertaken on the international level that give a true participating right to developing states in such process, so the intention of this network to support them in this process is doubtful.
172. IMF *et al*. (July 2016), n. 110, at 44.
173. *Id*., at 44-45.
174. *Id*., at 45.
175. Shihata (1995), above n. 16, at 127-32.
176. IMF *et al*. (July 2016), n. 110, at 45.
177. *Id*., at 44.
178. *See* for these lending instruments in Section 2.5.
179. IMF *et al*. (July 2016), n. 110, at 44.
180. *Id*.

the Bank's Institutional Development Fund and other ad hoc funds.[181]

3.4 Concluding Remarks

As early as the 1970s, the Bank made an informal decision to expand its activities into the domestic tax field of its developing members. Initially, the Bank's work was focused on non-lending tax-related activities, which encompassed analytical and advisory work. But gradually, the scope of the Bank's work expanded to include tax policy and tax administration reforms. These reforms have been carried out first through the Bank's adjustment loans and later through the DPF. After the outbreak of the global economic and financial crisis in 2008, the Bank had to shift its attention to international tax issues owing to enhanced attention of the G20 on public revenue. As a result, the Bank participates nowadays not only in the creation of tax policy norms on the global level, but also in the implementation of these norms in its developing members.

4 Examinations

4.1 Introductory Remarks

This section aims to give an answer to each of the two questions posed in the introduction of this article. The first question is about the legality of the Bank's informal decisions to expand into the domestic and international tax fields. This issue will be addressed in Section 4.2. The second question concerns the possible implications of these two decisions for the Bank's legitimacy. That issue will be explored in Section 4.3.

4.2 On Legality of the Decisions to Expand

The Bank's mandates are laid down in Article I of both IBRD and IDA's Articles. Neither this long list of mandates nor any other parts of the Bank's founding documents contain any explicit reference to taxation. Yet this lack of black letters cannot immediately be seen as a legal impediment for expansion of the Bank's activities into the tax field. For the Bank's Articles are intentionally defined as broadly and vaguely as possible, similar to the case with any other mandates of any IGOs. Moreover, ambiguity is an inherent quality of every language.[182] As a result of that the meaning of a word or text is rarely clear and always contingent on a context. This nature of a language, therefore, makes interpretation a necessary part of a lawyer's work. The tools or methods of interpretation at the disposal of lawyers are, however, limited in number. Besides that it cannot be applied in an arbitrary way. For that purpose, Articles 31 and 32 of the Vienna Convention on the Law of Treaties[183] contain a set of rules that determine how these interpretation methods should be applied in relation to treaties or agreements between states.

According to Article 31(1) of this convention, 'A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* (emphasis added) to be given to the terms of the treaty in their context and in the light of its object and purpose.' Under the context mentioned in this provision, the convention subsumes not only preamble, text and annexes of that particular treaty, but also other related agreements and instruments to that treaty.[184] In addition to the context, the convention implors to pay attention to: '(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (c) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; or (c) any relevant rules of international law application in the relations between the parties'.[185] Furthermore, an interpreter should respect a 'special meaning' of a certain term provided that it is demonstrated by the intention of the parties concerned.[186] These general rules of interpretation could be, nonetheless, supplemented by other methods of interpretation in order: (1) to validate the meaning determined through the application of the general rules of interpretation; or (2) to determine a different meaning in case the meaning already found through the application of the general rules of interpretation is 'ambiguous' or 'absurd', or leads to a result 'manifestly absurd' or 'unreasonable'.[187]

These rules of interpretation of a treaty lead to many uncertainties in practice.[188] The only clear rule that follows from them is the rule of hierarchy that says that a 'textual' or linguistic interpretation method[189] should be preferred over other interpretation methods.[190] For the textual interpretation, however, we need to pay due attention to the context of the terms used ('contextual' or linguistic interpretation in the context involved)[191] and also take into account the object and purpose of the treaty or organisation ('teleological' or purposive interpretation).[192] Moreover, the subsequent practice – in the case of an organisation it means especially the exercise of 'implied powers'[193] – should play a role during this endeavour. The 'subjective' or intentionist interpretation method[194] could also be applied – but only as a last 'resort'[195] – when the foregoing methods do not lead to reasonable results or when a special meaning of the

181. Shihata (1995), above n. 16, at 134-35.
182. J.E. Alvarez, 'Constitutional Interpretation in international organizations', in J. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (2001) 104, at 116.
183. UN DOC.A/CONF. 39/11/Add.2.
184. Art. 31(2) of Vienna Convention on the Law of Treaties.
185. Art. 31(3) of Vienna Convention on the Law of Treaties.
186. Art. 31(4) of Vienna Convention on the Law of Treaties.
187. Art. 32 of the Vienna Convention on the Law of Treaties.
188. Alvarez (2001), above n. 182, at 116.
189. I.F.I. Shihata, *The World Bank in a Changing World – Volume III* (2000), at 6.
190. Alvarez (2001), above n. 182, at 116.
191. Shihata (2000), above n. 189, at 6.
192. *Id*.
193. *Id*., at 15. For implied powers *see* n. 238.
194. *Id*., 6.
195. Alvarez (2001), above n. 182, at 116 and Shihata (2000), above n. 189, at 15.

words was intended. As Jose E. Alvarez noted, the wording of the provisions contains further vague terms such as 'in good faith' and 'ordinary meaning', which ask in their turn for the application of 'canons of interpretation' that leave substantial discretionary space to the interpreter.[196] This leads to the conclusion that any endeavours of interpretation will depend much on the interpreter who is authorised to do that work.[197] But who is the authoritative interpreter in the case of the Bank's articles?

According to the Bank's founding documents, the Bank's EDs are authorised to decide on issues concerning disagreements with regard to interpretation of the Bank's articles.[198] This decision can be appealed before the BoGs, which is designated as a competent authority to review the decisions of the EDs.[199] As is clear from these provisions of the Bank's Articles, these organs appear on stage only in exceptional situations when disagreements arise regarding the interpretation of the articles. This suggests that someone other than these two organs takes the initial decision for interpretation in the day-to-day practice of the Bank. According to the San Francisco decision given with regard to the interpretation of the UN Charter, issues of interpretation are left to each institutional organ of the United Nations.[200] This decision has attained widespread acceptance and is considered to be applicable to other IGOs.[201] Consequently, each element of an organisation, including its members, is eligible for that task.[202] Since the question of expansion of the Bank's activities belongs to the operational field of the Bank, the Bank's internal organs that decide on or approve its policies and operations would likely be the designated instances to make such interpretations. And in the case of the Bank, these organs that decide on or approve the Bank's policies and operations are the BoDs and ultimately the BoGs.[203] These are one and the same bodies entitled to interpret the Bank's Articles or review the Bank's policies and operations. In light of these rules, it is understandable that the Bank's EDs nowadays incorporate their interpretations in their policy papers.[204] Although a member state has, in principle, the right to contest initial interpretation, the conflation of two roles – determination of policies and operations in line with the Articles and interpretation of those articles – makes in advance the possibility to contest such an initial interpretation needless. Even if we can imagine that such a possibility exists, then, as Alvarez noted, 'members may not contest institutional practices' owing to 'lack of transparency, absence of financial or other resources to mount a challenge, or simply fear of giving offence to powerful members or organs'.[205] Moreover, the resistance of some members might be seen in practice as invalid since there is no agreement as to what should be reckoned as 'opposition' and whether or not it was or should be seen as timely filed.[206] But we know that as long as the initial interpretations are not contested by a member state, they are presumed to be 'legal'. For an 'unchallenged institutional practice' resembles tacit consent[207] and *even* constitutes 'precedents' for future reference.[208] In these circumstances, the only comfort could be, therefore, found in the involvement of the legal opinion issued by the Bank's General Counsel in this BoDs' interpretation process, which became a practice since the establishment of the IBRD.[209] Thanks to this informal process, the BoDs' interpretations reflected in their policy papers contain to a certain extent the legal rationale that confines totally arbitrary interpretations.[210]

As was mentioned earlier in this article, the IBRD's main mandate is to assist in reconstruction and development of its members by facilitating and financing investment for productive purposes. In addition to this, the IBRD pursues other goals such as promotion of long-range balanced growth of international trade and maintenance of equilibrium in the balance of payments by encouraging international investment for the development of productive resources of members. According to the Bank's former Senior Vice President and General Counselor, Ibrahim Shihata, these 'purposes' of the IBRD define two 'statutory roles' of the Bank: 'that of a facilitator and promoter of investment of capital, especially private foreign investment, for reconstruction and productive purposes in member states'; and (b) 'that of a financier, *i.e.* a guarantor of/or a participant in "loans and other investments" made by *private foreign* investors and a direct lender of funds to finance or facilitate productive purposes on suitable conditions "when private capital is not available on reasonable terms."'[211] As Shihata further noted, the first of these two roles has been empowering the Bank 'to address the conditions that attract investment and the enabling environment needed for economic growth and development'.[212] This role was the fertile ground for many expansions of the Bank's activities.[213] It therefore seems to me plausible to conclude from it that the two successive expansions into the tax field were also rooted in this role. Even more notably, tax measures are related to increase in private for-

196. Alvarez (2001), above n. 182, at 116.
197. *Id*.
198. Art. IX (a) of Articles IBRD and Art. X (a) of Articles IDA.
199. Art. IX (b) of Articles IBRD and Art. X (b) of Articles IDA. Up to the present moment, none of the Bank's members has done such a request for review. *See* Shihata (2000), above n. 189, at 16.
200. During the drafting process of the UN Charter, the drafters of this instrument assigned a subcommittee to decide on the issue of interpretation. This subcommittee produced a report that was adopted by both the Committee on Legal Problems and Conference. *See* Alvarez (2001), above n. 182, at 111-2.
201. *Id*., at 112.
202. *Id*.
203. Art. V (4[a]) IBRD Articles and art. VI (4[a]) IDA Articles.
204. Shihata (2000), above n. 189, at 6 and Shihata (1991), above n. 123, at 68.
205. Alvarez (2001), above n. 182, at 120.
206. *Id*.
207. *Id*.
208. *Id*., at 112.
209. Shihata (2000), above n. 189, at 16-7.
210. Shihata (1991), above n. 123, at 68.
211. Shihata (2000), above n. 189, at 75.
212. *Id*.
213. *Id*., at 76.

eign investment owing to their ability to affect investment decisions by creating an enabling environment that promotes investments. Moreover, taxes are needed for financing public expenditures. Under these public expenditures, one might also include public investments for productive purposes. Although the Bank aims primarily at promotion of private investments, its mandate does not prevent it from promoting public investments for productive purposes as well. So paying attention to taxation can lead to an increase in both private and public investments for productive purposes. In this way, tax issues fall clearly under the mandate of the Bank. The same is true with regard to the IDA's mandates, as taxation is one of the possible measures that indirectly or directly could promote economic development, increase productivity and thus raise standards of living in the less developed areas of the world.

Nonetheless, the Bank's founding documents contain three other provisions, which make the above conclusion doubtful. These provisions preclude the Bank undertaking any activities that fall within the prohibited political intervention. They are applicable to all decisions of the Bank[214] and could be found in Article III, Section 5 (b); Article IV, Section 10; and Article V, Section 5 (c) of the IBRD Articles and Article V, Section 1 (g); Article V, Section 6; and Article VI, Section 5 (c) of the IDA Articles. The prohibitions define – according to Shihata – the six distinct yet intertwined conditions for the Bank's operations.[215] The two rules out of these requirements are of particular importance in our case. The first one refers to prohibition of interference in the political affairs of a member, whereas the second one prohibits taking non-economic considerations into account during decision-making.[216] Tax issues are highly political in nature because they require, first of all, answering questions, such as who and to what extent should contribute to that particular country's public finance, that affect the distribution of wealth within a society. Any activities undertaken in the field of taxation could therefore be an activity prohibited by the Bank's own Articles owing to this general nature of tax issues. And since the Bank has the duty to act in conformity with its Articles, neglecting these prohibitions would imply 'for the Bank acting 'ultra vires' or beyond its legal powers.[217] The Bank's former General Counsel and his successive colleagues of the Legal Vice Presidency seem to have always been conscious of such consequence and advised to approach such issues with due caution.[218] However, they did not completely deny the possibility of involvement of the Bank in activities that are related to political issues.[219] Although I agree with their latter opinion, I think that it is possible to make a clear distinction between the allowed and not allowed involvements of the Bank in a tax-related activity. In my opinion, such a distinction could be made not on the basis of the nature of the issues concerned, but on that of the degree and nature of the involvement. For example, a tax-related conditionality in a lending instrument will be problematic if it concerns a pre-selected choice that should be implemented by the client, while an advisory activity that discusses technical issues of taxation should not be seen as a prohibited activity. Anyway, since the constituent organs of the Bank carrying out its mandates are allowed to interpret the mandates themselves, it is possible that they have concluded based on this flawed provision in the Articles that these kinds of activities do not fall under the prohibited political activity. And since no cases of objection by members – notwithstanding the question whether or not they had an opportunity to do so – are known, the Bank could, oddly enough, rightfully assume that its decisions to expand were legal – all the more notably as other decisions to expand into the non-tax fields that were taken earlier within the Bank could also act as 'precedents' for the Bank's expansions into the tax field. This leads, therefore, to the conclusion that both the decisions of the Bank to expand were legal. In the following section, I provide an answer to the second question that was posed in the introduction of this article.

4.3 Implications for the Bank's Legitimacy

According to Martti Koskenniemi, legitimacy is a notion of recent vintage that was developed by liberal political theory in order 'to enable criticism of social institutions without relying on earlier routes of critical thought which had been traveled to the end and in the process had lost much of their respectability'.[220] Whatever purpose the creators of this notion had for it, it has now become one of the most widely used concepts with an application and utility beyond the realm of this theory. However, the meaning of this concept is vague, and consequently it is normatively defined in several different ways. In legal or political literature, the most widely accepted meaning is the *reason* why someone follows a rule. This meaning is, however, too broad without further clarifications as there are other factors that can yield rule-following or compliance with a rule.[221] In addition to legitimacy, one comes across in the literature three other factors of compliance with a rule, which are self-interest, coercion and rational persuasion. From all these means of compliance, the legitimacy appears to have a quality that creates voluntary compliance with a rule in the absence of these three alternative sources of compliance. But the question could be raised as to why anyone without being obliged to *or* being rationally persuaded *or* **even** having a self-interest in the outcome would simply follow a rule. Whereas it is clear to every-

214. Shihata (1991), above n. 123, at 65-6.
215. *Id*., at 66-7.
216. Art. III (5[b]) *and Art. IV* (10) of IBRD Articles. Also Art. V (1[g]) and Art. V (6) of IDA Articles.
217. Shihata (1991), above n. 123, at 66-7.
218. Legal Vice Presidency – World Bank (2005), above n. 106, at 17.
219. *Id*., 16-7.
220. M. Koskenniemi, 'Book Reviews and Notes', *American Journal of International Law* 86, at 175 (1992).
221. D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *American Journal of International Law* 596, at 602-3 (1999). Franck does not say that with much wording. Buchanan and Keohane do the same.

one that other three bases of compliance can induce compliant behaviour, more is needed to understand what legitimacy is.

Daniel Bodansky and Rudiger Wolfrum observed in this regard that legitimacy is not exclusively a 'reason' for compliance, but also a 'justification' of the exercise of (any kind of) authority.[222] Yet this observation does not seem to convey that legitimacy and justification are coextensive. Such an observation would be, otherwise, narrow as it, on the one hand, would neglect the difference between the meanings of these two concepts and, on the other hand, would suppose one-sided action from the 'governor' to the 'governed'[223] to substantiate its claim for authority. Monica Hlavac warned, therefore, rightfully of this kind of 'Kantian tendency' based on the A. John Simmons's conclusion that legitimacy judgment differs from the justification judgment.[224] Simmons mentioned two reasons for it. First, a person would require more than a justification before he accepts restrictions on his natural freedom. Second, a justification does not in itself impose obligations on people. Consequently, Hlavac notes that legitimacy derives from a two-way significant relationship between the one that make decisions and the ones that are affected by its decision.[225] However, this proposition of Hlavac is not completely new as any normative theory on legitimacy assumes some kind of relationship between the agent and its principal. The agent is in this case always the one who has the right to govern or rule, whereas the principal differs in each theory – being the god, sovereign states, constituencies or affected people.

We are, however, not readily equipped with the above to assess the legitimacy of any international institution or its output as they only draw the outer lines of the notion of legitimacy. Consequently, it is imperative to do more exploration to find out when exactly we can speak of legitimacy or what the possible yardstick – sometimes called 'sources',[226] 'variables',[227] 'elements'[228] or 'standards'[229] – of legitimacy is. Many different yardsticks for legitimacy are mentioned by various scholars belonging to many different traditions of international legal and international relations scholarships. They are usually categorised as source-, procedure- and outcome-based ones.[230] In what follows, I explore some of the most authoritative theories forwarded within international law and international relations scholarships.

Pursuant to the dominant theoretical tradition of international legal scholarship, states legitimise activities of IIs by giving their consent to their activities. In relation to multilaterally established IGOs, this consent is given by the states either, at the onset, through signing of a treaty establishing an IGO or, later, through accessing to the membership of that IGO.[231] The state consent has such a legitimising effect as, on the one hand, states have a 'thick' legitimacy on the national level[232] and, on the other hand, they are the only – for the most part[233] – players in the international arena. This arena is horizontal in nature[234] and distinct from the national playfield owing to its lack of Austinian power.[235] Consequently, state consent is the only standard of legitimacy at the international level. All the traditional sources of international law[236] – (internationally recognised) general principles of law, treaties and international customary law – can therefore be led directly or indirectly to state consent.[237] Even the extensive decision-making power of IGOs also finds its origin in the consent of states.[238] This consent not only has a legitimising effect for the rules of international law, but also legally binds states to these rules of international law.[239] So, as long as IGOs stay within the limits of their mandate defined in their

222. D. Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum & V. Roben (eds.), *Legitimacy in International Law* (2008) 309, at 312; Bodanksy (1999), above n. 221, at 603; and R. Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in R. Wolfrum and V. Roben (eds.), *Legitimacy in International Law* (2008) 1, at 6.

223. I borrow these terms from Brunnée and Toope. *See* J. Brunnée and S.J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Columbia Journal of Transnational Law* 19 (2000).

224. M. Hlavac, 'A Developmental Approach to the Legitimacy of Global Governance Institutions', in D.A. Reidy and W.J. Riker (eds.), *Coercion and the State* (2008) 203, at 212-3.

225. *Id*., at 212-4.

226. *Id*., at 204.

227. Brunnée and Toope (2000), above n. 223, at 53.

228. Wolfrum (2008), above n. 222, at 6.

229. A. Buchanan and R.O. Keohane, 'The Legitimacy of Global Governance Institutions', in R. Wolfrum and V. Roben (eds.), *Legitimacy in International Law* (2008) 25, at 28.

230. Wolfrum (2008), above n. 222, at 6; Bodansky (1999), above n. 221, at 612; T.M. Franck, *Fairness in International Law and Institutions* (1995), at 7-8; and Hlavac (2008), above n. 224, at 204.

231. E. Hey, 'Sustainable Development, Normative Development and the Legitimacy of Decision-Making', 12 *Netherlands Yearbook of International Law* 3, at 16 (2003); J. Klabbers, 'The changing image of IOs', in J. Coicaud and V. Heiskanen (eds.), *The Legitimacy of IOs* (2001) 221, at 224-36; and Bodansky (1999), above n. 221, at 604.

232. N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, (2010), at 297.

233. Exceptions concern humanitarian law and international criminal law, which directly address individuals.

234. All members are considered to be equal to each other.

235. Austin noted in his book *The Province of Jurisprudence Determined* (1832) that law is a command of a sovereign to its subjects. *See* T.M. Franck, 'Legitimacy in the International System', 4 *Americal Journal of International Law* 705 (1988), at 706, fn. 3.

236. As mentioned in the statute of International Court of Justice.

237. The state gives its explicit consent to treaties by concluding them, whereas in the case of customary international law and internationally recognized principles the implicit consent is conceived to be given by state practice. *See* Wolfrum (2008), above n. 222, at 7-9 and E. Hey, *Teaching International Law: State-Consent as Consent to a Process of Normative Development and Ensuing Problems*, (2003).

238. Scholars identify two types of state consent: general and specific. The authority of sources of international law is based on a specific state consent, while the authority of IOs is based on the general consent. Bodansky (1999), above n. 221, at 604-5. This general state consent thus forms the basis of the law of IOs, which is reflected in two opposing doctrines: the implied powers doctrine and the principle of attribution. Klabbers (2001), above n. 231, at 224-36. The 'implied powers' doctrine is developed by the International Court of Justice in its 11 April 1949 case *Reparation for Injuries Suffered in the Service of the United Nations* (ICJ Reat 1949, at 180). This doctrine is based on the principle of effectiveness. In short, it dictates that every IO has implied powers, which are needed for reaching its purposes and exercising its explicit powers. Alvarez (2001), above n. 182, at 116-7 and 121.

239. Hey (2003), above n. 231, at 15.

founding documents, their activities are legal and at the same time legitimate.

For a long time, this theoretically pre-supposed conflation of the notions of legitimacy with the notion of legality through state consent corresponded not only with the reality of that time, but appeared to be highly practical and efficacious in international legal practice. In the recent decades, however, the rise of global problems in conjunction with the legal empowerment of international institutions based on considerations of the 'principle of (institutional) effectiveness'[240] has led to a shift of (a large part of) the national decision-making authority to the international level.[241] Since the consensual-decision making on the international level is, at the same time, being replaced by flexible law-making approaches,[242] it results eventually in the break or prolongation of the legitimacy chain towards the people who are affected by the decisions taken on the international level.[243] Consequently, a growing group of people within and beyond legal academia began to discern discrepancies between the fundamental assumptions of this dominant paradigm and the reality. This discrepancy raised the question of adequacy of the state consent as the source of legitimacy of international law. Accordingly, they proposed many different solutions for the lack of legitimacy that ensues from this discrepancy. Although these people are a heterogeneous mixture of people, they could, broadly speaking, be divided into two main distinct groups: 'nationalists,' or those who propose to contain and reverse the international developments, and 'internationalists,' or those who propose to accommodate these developments. Both groups, however, agree with each other that the state consent would have sufficed as long as the two distinctive layers of the global legal order – *international* and *domestic* – had remained in two separate operational spheres.[244] As to the second group, it could be further divided into three subgroups. The first subgroup emphasises the emergence of a truly global political and legal order and, therefore, denies the suitability of the dominant paradigm in its entirety by proposing to replace it with a completely different one.[245] In contrast to it, the second subgroup discerns only a partial convergence of the international and domestic layers of the global order owing to the rise of global problems.[246] Consequently, they propose to repair legitimacy deficits that resulted from it in certain parts of international law development by either adapting the process of international norm development[247] or improving the governance structure of international institutions that create these norms.[248] The last subgroup tries to amend the legitimacy gap by improving the domestic 'legitimacy chain' by 'strengthening the national parliamentarian influence on the conduct of international relations which is traditionally thought to be domain of governments'.[249]

The number of theories and their differences between them, however, do not allow a discussion of all details and merits of these theories here. Nonetheless, this classification enables me to make a rough judgment on possible implications of the two informal decisions for the Bank's legitimacy. Whereas I think that we could be sure that the two decisions have no implications if we apply the dominant paradigm of international legal scholarship, such a judgment cannot be made on the basis of other theoretical traditions that are gaining more and more influence within and beyond academia. Of course, the Bank may feel itself safe with the dogma of the dominant theory and think that it does not need to take any actions to improve this legitimacy chain. But it is better to play safe and take provisionary measures since the tendency inclines to the direction of bringing the ones that have the 'right to rule' closer to the people that are 'being ruled'. This direction of movement seems to be visible not only in the aforementioned new theories proposed by the scholars, but also on the demands of non-governmental organizations and the will of the political leaders belonging to the G20 with their frequent calls addressed to the four major IGOs. Although the G20 comprise non-elected officials of some twenty economies in the world, it is, nonetheless, aimed at shortening the chain of legitimacy at least with regard to their constituencies.

It seems that the Bank is also aware of this general movement as it has undergone owing to these new calls for legitimacy some institutional facelift in recent decades. The most recent and important of these adjustments concern the revision of the previously mentioned distribution of voting power in 2010. Moreover, one can mention the establishment of the Bank's 'Inspection Panel' in 1993. This internal, yet independent, accountability mechanism investigates, on the basis of a request from project-affected people, whether or not the Bank, as a result of a failure to follow its operational policies and procedures, adversely affects or is likely to affect by its action or omission the rights and interests of the people that have submitted complaints.[250] Furthermore, a big step into the direction of transparency was made with the introduction of the Policy on Access to Infor-

240. This principle forms the basis of the implied powers doctrine. *See* above n. 238.
241. All scholars seem to observe this process.
242. Bodansky (1999), above n. 221, at 606.
243. Wolfrum (2008), above n. 222, at 20.
244. Krisch (2010), above n. 232, at 297.
245. To this group of scholars belong constitutionalists and pluralists. The seminal book written by the former group is: J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009). For the vision of pluralists, *see* Krisch (2010), above n. 232.
246. Hey (2003), above n. 237; E. Hey, 'International Institutions', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2008) 749, at 751; and Wolfrum (2008), above n. 222, at 5. Ellen Hey calls these global problems 'common interest' problems, which concern everyone in the world.
247. Wolfrum (2008), above n. 222, at 4. The representatives of this group are analytical positivists as Franck and constructivists as Brunneé and Toope.
248. Representatives are, among others, Buchanan, Keohane and Hlavac.
249. Wolfrum (2008), above n. 222, at 5.
250. Section 12 of Resolution No. IBRD 93 and Resolution No. IDA 93 establishing the World Bank Inspection Panel, 22 September 1993.

mation on 1 July 2010.[251] This information policy replaced the Bank's old Information Disclosure policy of more limited scope.[252] As a result of two subsequent modifications of this policy, respectively in 2013 and 2015, the public has now access to information about projects under preparation, projects under implementation, analytic and advisory activities, and Board proceedings.[253] Although these developments are to be cheered, the changes largely focus on improvements of the Bank's governance structure, which depends on the willingness of the large shareholders of this IGO. Furthermore, the impact of these changes was of limited scope since these developments did not aim to bring a radical reform of the governance structure. For example, the 2010 reform resulted only in a substantial increase in the voting power of a few economies such as China, India and Brazil, while it led to a negligible increase – and *even* decrease in some cases – in the voting powers of some other developing members.[254]

It is not clear whether or not the Bank's policy dialogues and recommendations in its policy-based loans have involved and still involve a pre-selected choice containing an ultimate tax policy norm that should be implemented by the borrowing member. It looks like this was the case in the past if we consider the Bank's adjustment loans with tax conditionality.[255] However, the Bank's recently adjusted Bank Policy (BP) and Operational Policy (OP) 8.60 suggest otherwise.[256] According to Paragraph 9 of the BP 8.60: 'In carrying out dialogue with a Member Country, the Bank advises it to consult with and engage the participation of *key stakeholders* [emphasis added] in the country in the process of formulating its development strategies. Key stakeholders include social groups directly affected by the operations, as well as public sector, private sector and donor organizations relevant to the operation. For a development policy operation, the Member Country draws on this process of strategy formulation to determine, in the context of its constitutional and legislative framework, the form and extent of consultations and participation in preparing, implementing, and monitoring and valuating the operation.' However, such a consultation does not exclude the imposition of tax-related conditions from the Bank, because the borrowing member state will need to negotiate with the Bank on the loan conditions or conditionality after its consultation with the so-called key stakeholders. And it is even more the case since the donor organisations relevant to the operation are also mentioned as such stakeholders. If in practice such an imposition takes place then it implies shift of the decision-making authority from developing members to the international level. Although such a shift might be necessary for tackling the international tax problems, a top-down approach is not the only way of reaching that shift and will even render the shift illegitimate. And since having a legitimate authority means in part having lower costs of implementation, this lack of legitimacy vis-à-vis its client members will eventually lead to increased costs of implementation for the Bank, its main shareholders and eventually to the international community.

5 Conclusion

The Bank has now become one of the prominent players in the field of taxation. Two informal decisions to expand that were taken in the past have contributed to the Bank's current position. The first one was taken as early as the late 1970s. As a result of this decision, the Bank expanded its activities into the domestic tax field of its clients and has subsequently evolved as their co-legislator or legislative partner. It performed its co-legislative role by attaching conditionality to its adjustment loans at times when its clients were desperately in need of financial resources. In other cases, it appeared as a legislative partner for its clients through its frequently held policy dialogues and on-demand advisory activities. After the outbreak of the 2008 financial and economic crisis, owing partly to the enhanced attention of the G20, the Bank took its second decision to expand. This time the Bank expanded into the international tax field. As a result, international tax issues became another component of the Bank's tax-related work. Yet questions could be raised whether these informal decisions – which in some cases result in significant constraint of parliamentary authority in the Bank's client member states – were legal, and if so, what implications, if any, they have for the Bank's legitimacy. Based on the Bank's Articles and the current doctrines of international law, it could be concluded that these informal decisions were legal, even though the Bank's Articles contain a serious deficiency with regard to the provision of competent authority for interpretations. The answer to the other question, however, is not straightforward as much will depend on the normative theory that is chosen to assess the Bank's legitimacy. Nevertheless, the tendency inclines to the direction of bringing the ones that have the 'right to rule' closer to the people that are being ruled. This direction of movement seems to be visible not only in the aforementioned new theories proposed by the scholars, but also on the demands of non-governmental organizations, the will of the political leaders belonging to the G20, and the Bank's own and its main shareholders' reform efforts. However, there is a need for more reforms in order to make the Bank more legitimate. For that purpose, not the top-down but the bottom-up approach should be followed if the Bank wishes to be legitimate vis-à-vis its client members and with that reduce the costs of implementation for the Bank, its main shareholders and eventually to the international community.

251. <www.worldbank.org/en/access-to-information/overview#1> (last visited 9 October 2017).
252. *Id.*
253. *Id.*
254. *See* above n. 64 and 65.
255. More research is needed on this matter.
256. Bank Policy, 'Development Policy Financing', *OPS5.02-POL.105*, 2 August 2017 (Effective from 13 July 2017).