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I. INTRODUCTION

¶1 In the fall of 2009, global economic crisis appeared to bring about a major shift in policymaking power by bringing to prominence the G20, an international network of finance ministers and central bankers from eleven developed countries and eight less-developed countries, plus representatives from the European Union, the International Monetary Fund (IMF), and the World Bank.[1] The G20's central role in articulating an internationally agreed upon response to the crisis suggested that the handful of industrialized countries that had long dominated global economic policymaking were now sharing their power, including the power to assert international consensus on tax policy norms, with a more inclusive and representative group of nations.[2] By focusing on the G20 as the appropriate forum for articulating global economic policy, the economic crisis highlighted the importance of inclusion in global tax dialogue for previously marginalized states and peoples.

¶2 Yet despite the specter of the G20 as a "new model of multilateral engagement,"[3] the United States and Europe continue to dominate a virtually impervious institutional architecture of tax policymaking in the form of the Organisation for Economic

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[1] *See, e.g.*, Pascal Lamy, Director-General, World Trade Org., Speech at the Bocconi University in Milan (Nov. 9, 2009) (transcript available at http://www.wto.org/english/news_e/sppl_e/sppl142_e.htm) ("The global economic crisis we are witnessing has accelerated the move towards a new architecture of global governance . . . [in which] the G20, replacing the former G8, [will be] providing political leadership and policy direction."); *Economic Leaders Expand G7 to G20*, VOA NEWS, Sept. 25, 2009, http://www1.voanews.com/english/news/a-13-2009-09-25-voa53-69780602.html ("Group of 20 leaders, including Britain's Prime Minister Gordon Brown, agreed to shift economic issues that have traditionally been handled by the G7, a small group of wealthy nations, to the larger G20. 'The G20 will now be seen as the premier economic organization for dealing with issues of economic management around the world,' Mr. Brown said."); *see also* G20.org, What is the G-20, www.g20.org/about_index.aspx (last visited March 7, 2010) ("The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy.").

[2] *See, e.g.*, Martin Wolf, *The West no longer holds all the cards*, FIN. TIMES, Sept. 24, 2009, at 1; Stephen Leeb, The Developing World Takes Over (Sept. 29, 2009), http://seekingalpha.com/article/163958-the-developing-world-takes-over?source=feed ("The days of U.S. hegemony have ended. Political power is shifting from Europe, Japan and the U.S. to Asia, South America and other developing nations, with economic power going the same way.").

[3] Thabo Mbeki, President S. Afr., Address at the G20 Finance Ministerial Conference, Kleinmond, Western Cape (Nov. 18, 2007) (transcript available at http://www.dfa.gov.za/docs/speeches/2007/mbek1118.htm).

Cooperation and Development (OECD), an international network of thirty of the world's wealthiest countries.[4] The OECD has long enjoyed a position of central importance in formulating and disseminating tax policy norms, labeling itself the "market leader in developing [tax] standards and guidelines."[5] This characterization is widely recognized as accurate and probably impervious to change.[6] The emergence of the G20 as an economic policy leader does not alter this architecture, but provides an opportunity to syndicate OECD policy positions under the new, more inclusive and representative label of G20-endorsed "internationally agreed tax standards."[7] To date, the financial crisis and G20 diplomatic leadership have helped the United States and Europe achieve existing tax policy aims by enlisting new support for an existing process of OECD-led tax policy development.

¶3 As a result, the financial crisis may have elevated developing countries to a more prominent policy leadership position in the G20, but G20 leadership may not provide developing countries with a meaningful voice in global tax policy dialogue. Even so, the rising prominence of the G20 signals that creating opportunities for developing countries to have such a voice is a priority, whether during a time of crisis or beyond. The institutional shift to the G20 thus may have little impact on the current distribution of tax

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[4] By "architecture," I refer to the mechanisms and processes by which individuals make decisions about what policies governments should adopt. *See, e.g.*, Randall D. Germain, *Global Financial Governance and the Problem of Inclusion*, 7 GLOBAL GOV. 411, 411 (2001) (defining the architecture of global financial governance institutions as "the public mechanisms by which authoritative decisions about . . . rules and procedures are made").

[5] OECD, THE OECD'S CURRENT TAX AGENDA 2008, at 74–75 (2008) (on file with author).

[6] *See, e.g.*, Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003) (identifying the OECD as the key source of international coordination); Arthur J. Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges*, 8 YALE J.L. & TECH. 136 (2006) (same). Although not an official member of the G20, the OECD Secretary General has been a participant at G20 meetings from their inception. *See* JAMES POWELL ET AL., THE GROUP OF TWENTY: A HISTORY 13 n.13 (2009), *available at* http://www.g20.org/Documents/history_report_dm1.pdf.

[7] OECD, COUNTERING OFFSHORE TAX EVASION: SOME QUESTIONS AND ANSWERS ON THE PROJECT (2009), *available at* http://www.oecd.org/dataoecd/23/13/42469606.pdf (using the term "the internationally agreed tax standard" nine times, referencing the G20 a total of four times, and stating that the standard was "developed by the OECD and endorsed by the UN and the G20"); OECD, OVERVIEW OF THE OECD'S WORK ON INTERNATIONAL TAX EVASION: A BRIEF FOR JOURNALISTS (2009) (using the term "internationally agreed tax standard" seven times, referencing the G20 a total of seventeen times, and mentioning endorsement from the G20). In contrast, none of the prior periodic reports produced by the OECD to explain their ongoing project used the term "internationally agreed standard," and none expressed a need for, nor a claim to, endorsement from another international institution. *See, e.g.*, OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: 2006 UPDATE ON PROGRESS IN MEMBER COUNTRIES (2006); OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: THE 2004 PROGRESS REPORT (2004), http://www.oecd.org/dataoecd/60/33/30901115.pdf; OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: THE 2001 PROGRESS REPORT (2001), *available at* http://www.oecd.org/dataoecd/60/5/2664450.pdf; OECD, TOWARDS GLOBAL TAX CO-OPERATION: REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS (2000); *see also* Gerry Helleiner, Developing Countries, Global Financial Governance and the Group of Twenty: A Note 2 (2001) (unpublished paper, on file with Global Financial Governance Initiative), *available at* http://www.globaleconomicgovernance.org/wp-content/uploads/Helleiner%20on%20G20.PDF ("G-7 sponsorship and Canadian chairmanship [of the G-20] created marginally greater legitimacy for what was essentially the same U.S.-led effort to involve more countries in discussions, but not decision-making, relating to potential future systemic financial crises."). The G20 itself has suggested that endorsing "internationally accepted standards and codes" was "a significant early achievement." POWELL, *supra* note 6, at 5. However, it has not been explained why G20 endorsement would be necessary or useful, if such standards and codes are in fact internationally accepted.

policymaking power, but it may create an institutional infrastructure from which developing countries may exert more influence in the OECD and other institutions where tax policy norms emerge. Understanding the dynamics of leadership in global tax policy therefore requires an examination of the relative capacities of leadership from the G20 and the OECD, as well as other institutions that play a role in influencing the direction of tax reform efforts. That is the aim of this Article. Part I explores the pressure on tax policy that arose from the financial crisis and examines the respective roles played by the G20 and the OECD in tax policymaking during the crisis. Part II compares the institutional capacities of the G20 and the OECD in developing and disseminating tax policy norms, and analyzes the interplay of leadership between these institutions. Part III asks whether and how developing countries can influence tax policy more effectively through the G20.

II. TAX POLICY IN A TIME OF FINANCIAL CRISIS

¶4 The global economic crisis of 2008–2009 had a dramatic impact on national tax revenues, creating both increasing annual revenue shortfalls (deficits) and increasing public debt.[8] Tax revenues face pressures first because most national tax systems have come to rely increasingly on personal income and consumption taxes, and decreasingly on capital and other taxes.[9] As economic crisis impacts both earnings and consumption levels, tax revenues declined precipitously at the national and sub-national levels during the course of the crisis.[10] Second, the response of governments to the crisis—in the form of stimulus and rescue packages, as well as increased benefits payouts—created additional spending commitments and therefore additional revenue needs that have largely been met by borrowing.[11]

¶5 Governments often respond cooperatively to financial crisis by meeting in various international institutions to compare issues and discuss possible solutions. In past crises, the primary focus was on the G7, or Group of Seven, which has long served as an international network for the finance ministers of Canada, France, Germany, Italy, Japan,

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[8] *See, e.g.*, CONG. BUDGET OFFICE, MONTHLY BUDGET REVIEW: FISCAL YEAR 2009 (2009) [hereinafter MONTHLY BUDGET REVIEW 2009], *available at* http://www.cbo.gov/ftpdocs/106xx/doc10640/10-08-mbr.htm; *see also The Biggest Bill in History*, THE ECONOMIST, Jun. 13, 2009, at 13 ("Across the rich world governments are borrowing vast amounts as the recession reduces tax revenue and spending mounts—on bailouts, unemployment benefits and stimulus plans.").

[9] *See* USGovernmentRevenue.com, Total Budgeted Government Revenue: Revenue GDP–Charts–Deficit Debt, http://www.usgovernmentrevenue.com (last visited Mar. 7, 2010); *see also* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) (documenting shift from capital to labor taxation); Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*, 40 U.B.C. L. REV. (forthcoming 2009–2010) (discussing the revenue productivity implications of this trend), *available at* http://ssrn.com/abstract=1445433.

[10] *See, e.g.*, John Brondolo, Collecting Taxes During an Economic Crisis: Challenges and Policy Options (July 14, 2009) (IMF Fiscal Affairs Dept., Staff Position Note), *available at* http://www.imf.org/external/pubs/ft/spn/2009/spn0917.pdf ("The global economic crisis has led to a substantial decline in government revenue relative to gross domestic product (GDP) in many countries, which seems likely to continue for some time. For many countries, the revenue decline began in 2008 when general government revenue dropped by an average of 0.8 percentage point of GDP worldwide. This decline appears to have accelerated in 2009: the annualized tax yield decline averaged 4 percentage points of GDP across selected emerging and developing economies in the first quarter of 2009.").

[11] MONTHLY BUDGET REVIEW 2009, *supra* note 8.

the United Kingdom, and the United States to collaborate on economic policy matters.[12] In the current crisis, the focus appeared more squarely on the G20, which has been described by some commentators, including national leaders, as an expansion or replacement of the G7.[13] However, as the global economic crisis of 2008–2009 unfolded, both the G7 and the G20 held their respective regularly scheduled meetings. Each institution issued independent statements regarding various economic policy measures they sanctioned, and each institution's statements included assertions regarding tax policy priorities during the crisis.[14] At the same time, other institutions, such as the IMF (as the international lender of last resort) and the OECD (as the think-tank for various matters of economic policy among its thirty developed country members), continued their regular functions as providers of expertise and policy positions.[15] Despite the broad array of institutions offering various forms of expertise towards management of the crisis, it was the G20 that became the center of attention in expressing international consensus.

¶6 The G20's response to the crisis was a series of policy commitments undertaken by the member countries.[16] Most of these commitments centered on banking and monetary policy issues, such as capital and compensation standards, while others focused on trade protectionism and environmentally sustainable development.[17] The G20 made a single commitment to tax policy, stating that its priority was "to maintain the momentum in dealing with tax havens, money laundering," and other "non-cooperative jurisdictions."[18] The leaders declared, "We stand ready to use countermeasures against tax havens from

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[12] *See, e.g.*, Peter I. Hajnal, The G7 Summit and Its Documents (1995) (unpublished manuscript, published in revised form in PETER I. HAJNAL, INTERNATIONAL INFORMATION: DOCUMENTS, PUBLICATIONS AND INFORMATION SYSTEMS OF INTERNATIONAL GOVERNMENTAL ORGANIZATIONS (1997)), http://library2.usask.ca/gic/v1n3/hajnal/hajnal.html#1 (describing the G7 as "a forum in which the leaders of the world's seven major industrialized countries and the European Union (formerly European Community), assisted by their foreign and finance ministers and personal representatives, set the agenda, then debate and make decisions on economic, political, environmental, security, debt-related and other topics, and issue a variety of documents reflecting their deliberations and decisions").

[13] *See Economic Leaders Expand G7 to G20*, *supra* note 1. The G20's primary focus, just like the G7's, is banking and monetary policy. *See* Vanessa Rubio-Marquez, *The G20: A Practitioner's Perspective*, *in* NETWORKS OF INFLUENCE? DEVELOPING COUNTRIES IN A NETWORKED GLOBAL ORDER 19, 21 (Leonardo Martinez-Diaz & Ngaire Woods eds., 2009) [hereinafter NETWORKS OF INFLUENCE?].

[14] For G7 statements during the crisis and otherwise, see G8 Information Centre, Summits, Meetings & Official Documents of G7 & G8, http://www.g7.utoronto.ca/ (last visited Mar. 7, 2010). For G20 statements, see G-20 Homepage, Pittsburgh Summit Leaders' Statement, http://www.g20.org/ (last visited Mar. 7, 2010).

[15] For IMF statements during the crisis and otherwise, see IMF, FACTSHEET: CRISIS LENDING AND THE IMF (Sept. 9, 2009), http://www.imf.org/external/np/exr/facts/crislend.htm. For OECD statements, see Organisation for Economic Co-operation and Development, http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html (last visited Mar. 7, 2010).

[16] PITTSBURGH SUMMIT 2009, LEADERS' STATEMENT: THE PITTSBURGH SUMMIT (Sept. 24–25, 2009), *available at* http://www.pittsburghsummit.gov/mediacenter/129639.htm [hereinafter G20 2009 STATEMENT].

[17] *Id.*

[18] *Id.* The G20's decision to include tax policy within its scope may be an example of strategic issue-area linkage, which may, in the extreme, prevent resolution of underlying structural problems in the international tax regime. *See, e.g.*, Jose E. Alvarez & David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 25 (2002) ("[L]inkage might undermine the ability of nations to reach a consensus on the agenda and the resolution of the issues. In many instances, the degree of consensus regarding the norms in the linked regimes will differ considerably. Linking highly divisive issues on which there is no point of agreement between the parties can potentially inhibit agreement on the entire group of linked issues, including those on which agreement would have been possible in the absence of the linked issues.").

March 2010."[19] While the G20 does not explicitly mention the OECD in connection with this commitment, it is clear that the intent of the statement is to directly affirm a very specific approach to tax policy that has been promoted by the OECD over the past decade.

¶7 The G20 has not stated what countermeasures were contemplated against tax havens or how these countermeasures would respond to the economic crisis. Recent developments suggest that such measures may include economic sanctions, but the details are yet to be disclosed.[20] The prospect of imposing economic sanctions is a serious measure that raises difficult questions, which have not been addressed by the G20 or the OECD, regarding the rights of nations to enforce legal standards upon each other outside of a treaty or similar international agreement.[21] It also raises questions regarding the implications of imposing sanctions on small, impoverished countries.[22]

¶8 Moreover, the G20 leaders did not explicitly state the connection between tax havens, money laundering, and other non-cooperative jurisdictions and the economic crisis, but noted that the purpose of focusing on tax havens is "so that countries can fully enforce their tax laws to protect their tax base."[23] In contrast, prior G20 meetings yielded statements regarding tax evasion (as opposed to tax havens) in order to safeguard the international financial system.[24] For example, the 2000 meeting yielded a statement committing the group to "[s]trengthen our efforts to combat financial abuse, including money laundering, tax evasion, and corruption, given its potential to undermine the credibility and integrity of the international financial system, cause serious

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[19] G20 2009 STATEMENT, *supra* note 16, at ¶ 15.

[20] *See* Philip Aldrick, *G20 summit: Blacklisted Tax Havens Face Sanctions*, THE TELEGRAPH, Apr. 3, 2009, *available at* http://www.telegraph.co.uk/finance/financetopics/g20-summit/5096348/G20-summit-Blacklisted-tax-havens-face-sanctions.html (stating that the six sanctions being considered by the G20 include "[i]ncreased disclosure requirements by companies and individuals using tax havens, [w]ithholding taxes on transactions with tax havens, [a] ban on the use of interest paid in a blacklisted country to offset tax, [r]eviewing tax treaty policy, [p]utting political pressure on global companies to withhold investment to a haven, [and a] reduction in aid"); Nick Mathiason, *Belize Faces Prospect of G20 Sanctions Over Tax Information*, THE OBSERVER, Feb. 7, 2010, *available at* http://www.guardian.co.uk/business/2010/feb/07/belize-g20-sanctions-ashcroft ("Belize could be hit with economic sanctions by G20 nations for failing to abide by international tax information sharing protocols. . . . [D]iscussions at this month's G20 finance ministers meeting in South Korea would include the strong likelihood of the introduction of sanctions on countries which have not abided by an initiative from the [OECD] to force tax havens to sign information-sharing agreements. All countries are required to sign 12 international tax information-sharing agreements. Belize has only agreed one [sic] with Belgium, signed late last year. Other countries that could face sanctions include Panama, Guatemala and the Philippines.").

[21] *See, e.g.*, MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 259–260 (2006) (arguing that absent grave violations of human rights, intervention such as in the form of economic sanctions is almost never justified). I have discussed these difficult questions in a prior work. Allison Christians, *Sovereignty, Taxation and Social Contract*, 81 MINN. J. INT'L L. 99 (2009).

[22] For example, Belize, which faces imminent sanctions for failing to meet OECD criteria, had a gross domestic product of approximately $1.4 billion in 2009, or approximately $8200 on a per capita basis. *See* CIA.gov, The World Factbook Online: Belize, https://www.cia.gov/library/publications/the-world-factbook/geos/bh.html (last visited Mar. 7, 2010). Accordingly, "[i]mposing sanctions would deeply damage the impoverished country, which has a population of just 300,000." Mathiason, *supra* note 20.

[23] G20 2009 STATEMENT, *supra* note 16.

[24] Although they are often related, tax evasion is distinguished from tax havens both conceptually and in terms of administrative response: using the term tax evasion focuses on the activity sought to be discouraged, and may be either domestic or international; likewise, governments have a range of options for responding to tax evasion, including both unilateral (regulatory) and multilateral (treaty). Focusing on the term tax havens both switches the focus to international tax evasion involving foreign nations and their legal systems, and implies that only multilateral approaches are viable in response.

macroeconomic distortions, and jeopardize national financial sectors."[25] A similar message emerged in 2004, when the G20 highlighted harmful tax competition as a threat to the integrity and functioning of the financial system.[26] The G20's 2009 statement, with its focus on protecting the tax base, breaks with this message and suggests instead that the motivation to focus on tax havens arose in light of the pressure on revenues faced by the G20 countries as a result of the crisis.[27]

¶9 However, there is no evidence that even the complete elimination of tax havens—an impossibility in any event[28]—would fill the revenue gap created during (and before) the crisis. Few countries attempt to measure the estimated revenue impact of shutting down tax haven evasion, principally because "there is no agreed methodology to measure the gap."[29] As a result, it is not known how much of the global revenue shortfall problem would be solved if tax havens could be eliminated.[30] Using various U.S. estimates, however, it appears that a complete elimination of tax havens would have a relatively modest impact on global revenue shortfalls. In the United States, federal revenue fell short of outlays in the amount of $1.4 trillion in 2009,[31] while the total annual revenue gap—all forms of tax evasion and underreporting including everything from underpayment of social security taxation to mathematical error—is estimated to equal approximately $290 billion.[32] Of this amount, revenues lost due to tax evasion could be

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[25] *See* Communiqué of Meeting of G-20 Finance Ministers and Central Bank Governors in Montreal, Que., Can. (Oct. 25, 2000). The 2003 meeting raised the issue of information sharing without mentioning tax havens, with a statement entitled "Preventing Abuses of the International Financial System - Promoting Transparency and Information Exchange," in which the group stated that "[d]iscussions were aimed at promoting co-operation among members to improve efforts to combat tax evasion, counterfeiting and money laundering, and in general, to address members' concerns with the use of financial institutions for illicit purposes." *Id*.

[26] *See* Chair Summary of Meeting of G-20 Finance Ministers and Central Bank Governors Berlin, F.R.G. (Nov. 20–21, 2004), *available at* http://www.g20.utoronto.ca/docs/g20history.pdf.

[27] *See* G20 2009 STATEMENT, *supra* note 16.

[28] *See, e.g.*, *Hearing on Banking Secrecy Practices and Wealthy American Taxpayers Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 111th Cong. 2 (2009) (testimony of Peter H. Blessing, Partner, Shearman & Sterling) [hereinafter *Blessing Statement*], *available at* http://waysandmeans.house.gov/media/pdf/111/pbless.pdf ("It never will be possible to eliminate criminal or fraudulent behavior in respect of financial accounts, even such behavior on a very large scale.").

[29] *Hearing on Offshore Tax Evasion: Stashing Cash Overseas Before S. Finance Comm. on Offshore Tax Evasion,* 110th Cong. 5 (2007) (testimony of Jeffrey Owens, Director, OECD Center for Tax Policy and Administration), *available at* http://www.ceff.univ-cezanne.fr/documents/owen.doc ("Our research reveals that only four OECD countries (Mexico, Sweden, the United Kingdom and the United States) regularly publish estimates of the tax gap. . . . One reason why countries are reluctant to calculate any possible tax gap is that there is no agreed methodology to measure the gap. OECD is currently undertaking work in this area.").

[30] *See, e.g.*, *Hearing on Banking Secrecy Practices and Wealthy American Taxpayers Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 111th Cong. 3–4 (2009) (statement of Stephen N. Shay, Partner, Ropes & Gray) [hereinafter *Shay Statement*] (discussing the various tax gap estimates).

[31] *See* MONTHLY BUDGET REVIEW 2009, *supra* note 8 ("CBO estimates that the federal budget deficit was about $1.4 trillion in fiscal year 2009, $950 billion greater than the shortfall recorded in 2008. . . . The substantial increase in the deficit resulted from both declining revenues and increased spending. Revenues in 2009 were almost $420 billion (or 17 percent) below receipts in 2008 and totaled about 15 percent of GDP, the lowest level in over 50 years. At the same time, outlays increased by over $530 billion (or 18 percent) in 2009, to nearly 25 percent of GDP, the highest level in over 50 years.").

[32] IRS, TAX GAP MAP FOR TAX YEAR 2001, at 1 (2007), http://www.irs.gov/pub/irs-utl/tax_gap_update_070212.pdf; *see also* Press Release, IRS, IR-2006-28, IRS Updates Tax Gap Estimates (Feb. 14, 2006), http://www.irs.ustreas.gov/newsroom/article/0,,id=154496,00.html. The IRS does not

significant: one Treasury estimate suggests that between $40 and $70 billion may be traced to tax haven-related evasion,[33] while a recent Senate staff report puts the number at $100 billion based on the estimates suggested by tax academics, economists, and reporters.[34] These are not small numbers, but it is clear that even if a large portion of this $40 to $100 billion could be collected each year by shutting down tax havens, the amount would far from offset the current revenue shortfall. Relying solely on the elimination of tax havens is a dubious strategy for solving revenue shortfall problems, whether created as a result of crisis or otherwise.[35]

¶10 Nevertheless, the G20's statement carries only one message about tax policy in its response to the crisis: governments have a revenue problem, and tax havens are the focus for reform. Rather than providing a specifically G20-developed approach, however, the group referred the matter to an existing institution, the Global Forum on Transparency and Exchange of Information. National tax officials meet in this Forum to determine various strategies for addressing the problem of tax havens, with their primary focus on eliminating national laws and practices that protect the confidentiality of financial services customers in offshore regimes.[36] Although the G20 leaders' statement does not mention the OECD in connection with this discussion of tax matters, the Global Forum on Transparency and Exchange and Information is an institution of the OECD, created in 2000 to implement the OECD's anti-tax haven policy.[37] The OECD describes this Forum, to which over 100 countries are "invited to meet," as created for the purpose of "establishing a robust peer review mechanism designed to ensure full implementation of

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specify what portion of this amount could be attributable to offshore tax evasion, but even if 100% of the estimated gap was attributed to tax haven-related evasion, this amount is obviously insufficient to meet the challenges posed to revenue as a result of crisis. According to one commentator, the estimate does not include "all unreported income from offshore activity. Indeed, there has been no IRS estimate to date of . . . the 'international tax gap,' defined as 'taxes owed but not collected on time from a U.S. person or foreign person whose cross-border transactions are subject to U.S. taxation.'" *Shay Statement*, *supra* note 30, at 3.

[33] TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2009-IE-R001, A COMBINATION OF LEGISLATIVE ACTIONS AND INCREASED IRS CAPABILITY AND CAPACITY ARE REQUIRED TO REDUCE THE MULTI-BILLION DOLLAR U.S. INTERNATIONAL TAX GAP 4 (2009), *available at* http://www.treas.gov/tigta/iereports/2009reports/2009IER001fr.html.

[34] STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, REPORT ON TAX HAVEN BANKS AND U. S. TAX COMPLIANCE 1 (Comm. Print 2009), *available at* http://levin.senate.gov/newsroom/supporting/2008/071708PSIReport.pdf (deriving $100 billion figure "from studies conducted by a variety of tax experts"). Stephan Shay describes these estimates as "back-of-the-envelope estimates (or educated guesses) by the IRS . . . and [Tax Notes Reporter] Marty Sullivan." *Shay Statement*, *supra* note 30, at 4.

[35] Mounting a campaign against tax havens may have other impacts, such as a signaling effect with regard to the integrity of the tax system. *See, e.g.*, *Shay Statement*, *supra* note 30, at 5 ("There are important reasons to attack offshore evasion and avoidance that are independent of the need for revenue, namely, that confidence in the fairness of our tax system is eroded and support for voluntary compliance is consequently undermined if we let U.S. citizens and residents evade their taxes . . . ."). However, reasons other than revenue needs have not been advanced by the G20 or the OECD in connection with their attention to tax havens in response to the global financial crisis.

[36] *See* OECD.org, Global Forum on Transparency and Exchange of Information for Tax Purposes, http://www.oecd.org/tax/transparency (last visited Mar. 12, 2010).

[37] *Id*. The OECD has several Global Forums on various topics, though the Global Forum on Transparency and Exchange of Information for Tax Purposes appears to be differentiated from these other forums. *See* OECD.org, Global Forums, http://www.oecd.org/pages/0,3417,en_36335986_36339065_1_1_1_1_1,00.html (last visited Mar. 30, 2010) ("The Global Forum on Transparency and Exchange of Information for Tax Purposes is governed by different rules to the OECD's other Global Forums.").

international standards developed at the OECD and now endorsed almost universally."[38] The source of this universal endorsement is not explicitly named, but appears to derive directly from the G20's statements, according to other statements by the OECD.[39]

¶11 The G20 endorsement of the OECD's position on tax havens has elevated this issue to the center of attention in global tax policy matters.[40] The facilitation of tax avoidance by certain countries is of course a problem, as many in the developed world have articulated.[41] But neither the problem of tax havens nor the prescriptions to alleviate it were brought to the forefront by economic crisis.[42] Moreover, the elimination of tax havens will not solve the revenue problems faced by both developed and developing countries,[43] and the contemplated measures may have significant consequences for many developing countries. Finally, alternative policy choices exist: several tax experts in the United States have pointed out that expanding existing domestic institutions and compliance programs would be a more effective method of deterring tax evasion, while focusing on the information-based campaign against tax havens should be viewed, at best, as a "fallback" or "backstop."[44]

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[38] Press Release, OECD, Next steps for OECD Global Forum on Information Exchange for Tax Purposes (Aug. 21, 2009), http://www.oecd.org/document/30/0,3343,fr_2649_37427_43532712_1_1_1_1,00.html.

[39] *See* sources cited *supra* note 7. The attention of the G20 to tax havens may be traced to its 2004 meeting when it first issued a statement of endorsement for the OECD's efforts in this area. Communiqué of the G-20 Meeting of Finance Ministers and Central Bank Governors in Berlin, F.R.G. ¶ 9 (Nov. 21, 2004), *available at* http://www.g20.utoronto.ca/2004/2004communique.html ("[W]e have committed ourselves to the high standards of transparency and exchange of information for tax purposes that have been developed by the OECD's Committee on Fiscal Affairs as set out in the attached statement. We will work to implement the high standards of transparency and effective exchange of information through legal mechanisms such as bilateral information exchange treaties, and we also call on those financial centres and other jurisdictions within and outside the OECD which have not yet adopted these standards to follow our lead and take the necessary steps, in particular in allowing access to bank and entity ownership information.").

[40] *See, e.g.*, Press Release, OECD, Tax Collectors Worldwide to Cooperate in Revenue-Raising to Offset Fiscal Deficits, http://www.oecd.org/document/48/0,3343,en_2649_33749_42889613_1_1_1_1,00.html (last visited Mar. 30, 2010) ("Tax Commissioners also intend to prioritise offshore compliance issues, given the greater willingness of countries to engage in information sharing to counter tax abuses.").

[41] *See, e.g.*, *Shay Statement*, *supra* note 30; *Blessing Statement*, *supra* note 28.

[42] *See, e.g.*, Craig Boise & Andrew Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEX. INT'L L. J. 377, 431 (2009) ("Reasonable people can differ over whether offshore financial centers in the 1970s (or today) primarily produced tax avoidance or tax evasion or led to capital inflows or money laundering. However, regardless of the motive as the offshore world grew in significance, it began to be perceived as a threat by onshore interests that had previously ignored it."); Charles I. Kingson, *The Great American Jobs Act Caper*, 58 TAX L. REV. 327 (2005) (arguing that every government knows that capital is evading taxation, but the situation is quietly ignored unless and until it becomes egregious enough to stir the public consciousness); Vincent P. Belotsky, Jr., *The Prevention of Tax Havens Via Income Tax Treaties*, 17 CAL. W. INT'L L.J. 43, 45 (1987) ("Tax havens have existed for some time but did not begin to present themselves as a major loss of revenue problem for the United States until 1970.").

[43] Shutting down tax havens may help solve other problems associated with global instability, such as money laundering.

[44] *See, e.g.*, *Blessing Statement*, *supra* note 28, at 9, 10–11 (discussing the potential for increased compliance in the U.S. "qualified intermediary" program as "an alternative to relying primarily on other countries to provide information"); *Shay Statement*, *supra* note 30, at 5–8 (describing information-based multilateral compliance measures as a "backstop" to the qualified intermediary program, exploring the potential benefits of expanding the qualified intermediary program, and concluding that "compliance is undermined if we pursue the relatively easy targets of noncompliant foreign banks without also taking on 'low hanging fruit' compliance measures at home"). *See also* Steven A. Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 HASTINGS L.J. 911 (2007) (proposing a cash-for-cheaters approach to getting cooperation from tax havens).

¶12 All of these troublesome factors raise difficult questions about the G20's focus on tax havens, especially since there is no indication offered to date that the elimination of tax havens is a top priority for developing countries.[45] Instead, the G20's attention to global tax policy appears to be an effort to both attain a greater international acceptance of tax policy priorities articulated by the OECD and to avoid a more politically difficult conversation about the increasing incapacity of national tax systems to meet revenue demands, especially in times of economic instability.

¶13 In an apparent response to the G20's endorsement, the OECD has also begun to present the effort to shut down tax havens as a novel approach forged in response to fiscal emergency. In a recent statement, the OECD suggested that "with governments facing soaring budget deficits as they seek to combat the global economic slump, tax authorities around the world have agreed on a new cooperation plan to encourage tax compliance and counter tax evasion and abusive tax avoidance, with special focus on banks, wealthy individuals, and offshore activities."[46] But the OECD's campaign against tax havens is not new, and, until this recent statement, the OECD had avoided focusing on the deleterious effect on revenues as a cause for shutting down tax havens. Instead, over the course of more than a decade, the United States and several countries in Europe worked together within the OECD to frame the issue of tax evasion as a significant global problem for reasons of economic efficiency and fairness.

¶14 The revenue explanation for the focus on tax havens is not wholly new, however. In the initial stage of OECD efforts against tax havens in the 1990s, the official progress reports used rhetoric that characterized the need to shut down tax havens as necessary for the purposes of protecting national revenue bases.[47] But as the OECD's work progressed, national delegates appeared to become uneasy with the problem of enforcing tax standards on other countries while espousing the general theme of autonomy and even sovereignty in tax matters. The rhetoric shifted, accordingly, to a focus on "fairness" and

[45] As one commentator noted, "Many of the developing countries do have a real economic interest in curtailing tax evasion and money laundering . . . [but even so, when the OECD efforts diminished in this area], I did not see the developing countries rise up in opposition." E-mail from Michael J. McIntyre, Professor of Law, Wayne State University Law School, to Allison Christians, Assistant Professor, University of Wisconsin Law School (Feb. 18, 2010) (on file with the author). For a discussion of the factors that might cause less developed countries to prioritize different tax policy issues than those prioritized by more developed countries, see Adam Rosenzweig, Why Are There Tax Havens? (Feb. 2010) (unpublished manuscript, on file with the author).

[46] Press Release, OECD, Tax Collectors Worldwide to Cooperate in Revenue-Raising to Offset Fiscal Deficits, http://www.oecd.org/document/48/0,3343,en_2649_33749_42889613_1_1_1_1,00.html (last visited Mar. 30, 2010).

[47] The OECD's work on harmful tax practices began in 1996 when an OECD Ministerial Communiqué called upon the organization to curb the rise of tax havens, which were seen as eroding the revenue-raising ability of capital-exporting countries. *See* Communiqué of the Meeting of the Council at Ministerial Level in Paris, Fr. ¶ 15(xv) (May 21–22, 1996), *available at* http://www.g7utoronto.ca/oecd/oecd96.htm (directing the OECD to "analyse and develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions, and the consequences for national tax bases"). At a meeting in September of the following year, the Heads of State of the G7 countries stated that "tax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases." Statement of G7 Finance Ministers and Central Bank Governors (Sept. 20, 1997), *available at* http://www.g8.utoronto.ca/finance/ fm970920.htm. They "strongly urge[d] the OECD to vigorously pursue its work in this field." Lyon Summit Communiqué: Making a Success of Globalization for the Benefit of All, 7 U.S. Dep't of State Dispatch ¶16 (Supp. 1996). For a discussion of the OECD efforts since that time, see generally Christians, *supra* note 21.

creating a "level playing field."[48] From the earliest stages of this work, the OECD articulated a need for "global endorsement and global participation" with respect to its consensus.[49] The endorsement of the G20 in the current crisis, using the rhetoric of revenue, may be a means of returning to the OECD's initially advanced idea that its members' need for revenues is an appropriate reason for targeting tax haven practices.

¶15 The G20's focus on tax havens may thus be seen, at best, as a modest and inadequate effort to counter declining national tax revenues, and perhaps as an issue around which countries can choose to coalesce in order to create a basis for further cooperation on tax policy matters.[50] But at worst, the prioritizing of tax havens is a means of entrenching an existing focus on a politically safe target while avoiding more difficult conversations about fundamental tax reform, especially in the context of countries with vastly different resources.[51]

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[48] I have documented the rhetorical aspects of the OECD's anti tax-haven campaign in earlier work. *See* Christians, *supra* note 21.

[49] OECD, TOWARDS GLOBAL TAX CO-OPERATION, REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS 22 (2000), *available at* http://www.oecd.org/dataoecd/9/61/2090192.pdf ("Harmful tax competition is by its very nature a global phenomenon and therefore its solution requires global endorsement and global participation. Countries outside the OECD must have a key role in this work since a number of them are either seriously affected by harmful tax practices or have potentially harmful regimes.").

[50] Tax evasion is a convenient target for public scrutiny, especially during a time of financial crisis and the attendant attention to endemic fiscal problems. *See, e.g.*, Daniel Zurbrugg, U.S. War on Tax Havens Is Counterproductive (Oct. 13, 2009), http://seekingalpha.com/article/166195-u-s-war-on-tax-havens-is-counterproductive?source=feed ("Politically, it is relatively easy to get support for such aggressive measures during times of financial distress and economic difficulty. Finding something or somebody to blame for the current trouble gives at least temporary relief and probably more votes for politicians that claim to fight that war on behalf of its people. Today's society and individuals have an almost chronic habit of trying to find somebody or something to blame for its own problems rather than take responsibility for one's own action.").

[51] For example, in simply referring to the possibility of reform of rules applicable to international transactions, the Obama administration appeared to provoke a swift outcry and what appeared to be a speedy retreat. *See, e.g.*, Catherine Snowdon, *Obama Postpones International Changes*, INT'L TAX REV., Oct. 19, 2009, http://www.internationaltaxreview.com/?Page=9&PUBID=210&ISS=25492&SID=722990 ("The White House has been forced to deny that pressure from businesses has forced them to shelve plans to reform international tax rules in the U.S."); Neil King Jr. & Elizabeth Williamson, *Business Fends Off Tax Hit*, WALL ST. J., Oct. 14, 2009, at 1, *available at* http://online.wsj.com/article/SB125539099758581443.html?mod=WSJ_hpp_LEFTWhatsNewsCollection ("The Obama administration has shelved a plan to raise more than $200 billion in new taxes on multinational companies following a blitz of complaints from businesses."); John D. McKinnon, *President's Tax Proposal Riles Business*, WALL ST. J., May 5, 2009, at A3; John D. McKinnon, *Firms Move to Fight Overseas-Profit Tax*, WALL ST. J., Apr. 6, 2009, at A4 ("In recent days, groups including the Business Roundtable, the U.S. Chamber of Commerce, the National Association of Manufacturers and the National Foreign Trade Council have helped form a lobbying coalition called Protect America's Competitive Edge that is devoted specifically to the issue [of international tax reform]. A letter sent to Congress last month opposing the plan was signed by 200 trade associations and companies, including General Electric Co., Intel Corp., International Business Machines Corp., McDonald's Corp., Merck & Co. and Microsoft Corp."); *see also* David Leonhardt, Editorial, *America's Sea of Red Ink Was Years in the Making*, N.Y. TIMES, June 9, 2009 at A1, *available at* http://www.nytimes.com/2009/06/10/business/economy/10leonhardt.html?_r=1 (describing the rising deficit and arguing that "[e]ither a solution will be put off, or foreign lenders, spooked by the rising debt, will send interest rates higher and create a crisis. The solution, though, is no mystery. It will involve some combination of tax increases and spending cuts. And it won't be limited to pay-as-you-go rules, tax increases on somebody else, or a crackdown on waste, fraud and abuse. Your taxes will probably go up, and some government programs you favor will become less generous.").

¶16 Questions remain about how and why the G20 came to embrace tax havens as its policy priority to the exclusion of alternative revenue raising strategies. Perhaps the best explanation is that the G20's primary role is to syndicate, rather than originate, tax policy. As such, it is institutionally designed not to engage in dialogue and build consensus on tax issues among its developed and developing country members, but only to articulate tax policy consensus formed within other institutional structures, namely (with respect to tax matters) the OECD. The following section explores this explanation by comparing the institutional designs, purposes, and capacities of the OECD and the G20.

III. Institutional Leadership in Tax Policy: G20 vs. OECD

¶17 To make statements about the need for tax reform, national leaders typically require input from policy experts regarding which issues are worthy of reform and what possible solutions lie ahead.[52] Leaders look to individuals and institutions with particular expertise to provide both data and analysis in their area of expertise.[53] Thus, in order to develop valuable global tax standards, technical tax experts and tax policymakers must operate in an environment that facilitates communication, dialogue, and consensus building.[54] In the U.S. Congress, for example, members often cite data and analysis provided by the OECD in support of various domestic U.S. tax reform proposals.[55] Internationally, leaders use other international forums, such as summits, to specifically direct the OECD or other institutions to explore identified policy issues and develop coordinated strategies.[56] While this does not mean that the experts "make" policy, it suggests an important relationship between experts and national leaders in the policymaking process.

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[52] Nevertheless, some scholars of global governance suggest that for leaders to get the "right" answers, they need to be able to talk in informal, protected settings, without their "retinues of ministers and other assistants." *See, e.g.*, Johannes F. Linn & Colin I. Bradford Jr., *Summit Reform: Toward an L-20*, *in* Global Governance Reform: Breaking the Stalemate 77, 84 (Colin I. Bradford Jr. & Johannes F. Linn eds., 2007).

[53] *See, e.g.*, John D. McKinnon, *White House to Search for New Tax Revenues*, Wall St. J., Mar. 24, 2009, at A4 (outlining President Obama's plan to set up a "task force to consider elimination of corporate loopholes and subsidies, tougher enforcement against tax avoidance and tax simplification"); *Bush Set to Introduce Bipartisan Tax Panel*, Wall St. J., Jan. 7, 2005, at A6 (describing President Bush's plan to create "a nine-member bipartisan panel to study overhauling and simplifying the federal tax code"); Martin Vaughan, White House Tax Panel Stays Out of Public Eye, http://www.nasdaq.com/aspx/stock-market-news-story.aspx?storyid=200909081456dowjonesdjonline000380 (last visited Mar. 30, 2010); *see generally* Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (1998) (discussing the role of international networks in influencing international agendas by using information to mobilize political actors and by linking political and nonpolitical actors in shared interest areas).

[54] The rhetoric of technicality appears to be especially effective in giving experts a prominent role in tax policy development. *See, e.g.*, Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 Harv. Int'l L.J. 139 (2003) (addressing the work of significant tax reformers, especially Vito Tanzi, Malcom Gillis, and Richard Bird).

[55] *See* Allison Christians, *Networks, Norms, and National Tax Policy*, 9 Wash. U. Global Studies L. Rev. 1, 29–30 (2010).

[56] *See, e.g.*, Statement of the G7 Finance Ministers and Central Bank Governors Meeting (Apr. 24, 2009), *available at* http://www.treas.gov/press/releases/tg101.htm ("[W]e urge the OECD, FSB, and FATF to intensify their work in conducting objective peer reviews of countries' efforts to strengthen international standards in taxation.").

¶18 As a result, a new G20 paradigm of tax policy leadership would require a structural modification in the interaction between tax experts and tax policy decision-makers on the international stage. With this kind of structural modification, the G20 could act as a competitor to the existing tax policymaking institution of the OECD, aggregating the expertise and perspectives generated by policymakers from a different group of countries. However, the global market for tax policy, as defined by its self-proclaimed leader,[57] is not necessarily one open to competition. The OECD features the most advanced institutional infrastructure capable of assembling and mobilizing experts, government officials, and private sector interest groups around issues of tax law and policy.[58] Its leadership in tax policy is fostered principally by means of a permanent secretariat whose fulltime task is to assemble groups of individuals from the member countries to study specific issue areas and devise consensus-based reports and guidance.[59] Other international institutions, especially the United Nations, also concentrate efforts on tax policy development.[60] The United Nations' more inclusive membership might make it the more ideal space for developing inclusive tax policy consensus.[61] But the United Nations has traditionally lacked institutional support for tax policy development, and it

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[57] *See supra* text accompanying note 5.

[58] *See, e.g.*, JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 486 (2000) ("Across the spectrum of regulatory activity, the OECD plays a distinctively important role."); *see also* Brauner, *supra* note 6, at 310–16 (describing the OECD's ability to take the lead in international tax policymaking); Cockfield, *supra* note 6, at 89–94 (same).

[59] These "working parties" are the typical venue for carrying out any international agenda, including in the area of tax policy. Formally, the OECD Secretariat assembles representatives from each member country to collaborate with each other and with tax experts on particular topics. OECD, THE OECD'S CURRENT TAX AGENDA 6 (2009), *available at* http://www.oecd.org/dataoecd/38/17/1909369.pdf ("The [OECD's] Committee on Fiscal Affairs' work programme is carried out by groups of experts drawn from member and observer countries as well as other non-member economies in certain cases."). Informally, individuals who are able to assert control in preliminary discussions dominate meetings. Interview with U.S. Tax Official (Aug. 31, 2008) (stating that in preliminary meetings, all of the representatives present will discuss the issue to be explored and solicit volunteers for the committee, but if "too many people" volunteer, the group continues the discussion in hopes that some will "drop out").

[60] The U.N.'s membership is, of course, much more representative than that of the OECD or the G20. *See* UN.org, United Nations Member States, www.un.org/en/members/index.shtml (last visited Mar. 30, 2010). The IMF also has the requisite infrastructure for formulating tax policy, and it has played an important role in driving specific tax reform policies, especially with respect to consumption (specifically value-added) taxation; however, it has largely exerted this influence in the context of developing countries and in connection with its lending facilities. The IMF is not known for coordinating tax policy amongst its members. In addition, the IMF is closely aligned with the OECD both in terms of dominant membership and ideology, so it would not function as an alternative policy space despite its broader membership. For example, the OECD states that "[t]he principles and values that the OECD promotes—commitments to market-based economies and open, rule-based and non-discriminatory trading and financial systems, supported by good governance—are essential to achieving the ultimate goal of the economic and social well-being of all people, in a way that respects diversity and cultural identity." OECD, THE OECD'S GLOBAL RELATIONS PROGRAM 2007–2008, at 5 [hereinafter OECD 2007–2008 GLOBAL RELATIONS PROGRAM]. Similarly, the IMF states that among its goals are to "facilitate the expansion and balanced growth of international trade," and "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." Articles of Agreement of the International Monetary Fund art. I, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, *available at* http://www.imf.org/external/pubs/ft/aa/index.htm.

[61] *See, e.g.,* Steven A. Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime*, 84 TUL. L. REV. 125, 154 n.128 ("In the international tax context, the broader membership of the United Nations may give it a stronger claim to legitimacy than an organization like the OECD, but the OECD has consistently been a leader on international tax issues.").

has therefore assumed a more peripheral role in developing international tax policy standards.[62]

¶19 In contrast to the OECD's strong institutional structure and historic roles, the G20 is a relatively young institution, featuring new players, no permanent secretariat, and just a few, newly established working groups.[63] Moreover, access to the negotiating table either before or at the summit meetings does not automatically ensure an effective voice for new players; as in other areas of law, repeat players have an advantage based on relationships and shared experiences.[64] Thus, most of the national tax officials and tax practitioners who participate in OECD working groups know each other personally and may often know each other's positions on specific technical tax issues, even without necessarily consulting before meetings.[65] In contrast, the G20 has typically used the "Sherpa" system to coordinate policy positions, draft discussion documents, and organize their agendas for the periodic summits.[66] The Sherpas are advisors who communicate and coordinate the positions of their national leaders horizontally among themselves, and vertically with their heads of state.[67] The source of tax policy expertise to summit Sherpas thus appears to be an important link in the progression of ideas to articulation of policy by summit-based networks like the G20.[68]

¶20 Finally, the G20 membership may appear broad and inclusive relative to the OECD, but its membership appears to be both over-representative of and tightly controlled by the "old" powers that created it.[69] The G20 was brought into being in 1999

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[62] *See, e.g.*, Dries Lesage, *Taxation and the 2008 UN Follow-Up Conference on Financing for Development: Policy Recommendations*, 61 STUDIA DIPLOMATICA 2, 4 (2008), *available at* http://www.taxjustice.net/cms/upload/pdf/Doha_and_tax_0806_Dries_Lesage.pdf ("The OECD and the UN are the most relevant players. The OECD has the actual lead. The OECD's tax department has the most resources and is assisted by the ministries of finance of the industrialized countries. It is also important to note that the OECD in general and for tax matters in particular attempts to exert global influence."); The U.N. is Failing on International Tax—So the OECD Calls the Shots, http://taxjustice.blogspot.com/2008/06/un-is-failing-on-international-tax-so.html (June 20, 2008, 04:02 EST).

[63] The G20 lacks a permanent secretariat. Instead, it is lead by a "Troika" of three member countries comprised of the prior two leaders and the current leader. The G20 currently has five working groups. G20.org, G-20 Working Groups, http://www.g20.org/about_working_groups.aspx (last visited July 1, 2010).

[64] *See* Marc Galanter, *Why the Haves Come Out Ahead*, 9 L. & SOC'Y REV. 95 (1974).

[65] Interview with Norway Tax Official (Aug. 31, 2008) (notes on file with the author) ("Often I will know that the U.K. guy has some of the same priorities and I will align with him—not before the meeting necessarily but we each know the other one has similar views and we contribute based on that knowledge.").

[66] *See, e.g.*, The Sherpa About Page, http://www.sherpatimes.com/about (last visited Mar. 4, 2010) ("The word Sherpa was borrowed [to describe government negotiators at global summits] from the hard-working and famous Nepalese porters by the global community sometime during the 1960s - to describe the civil servants who prepared the head of state for the Summit (G8, European Union etc) and the name stuck."); Victoria McGrane, *Obama sends reps to G-20*, POLITICO, Nov. 14, 2008, http://www.politico.com/news/stories/1108/15631.html (describing how then President-elect Obama used the Sherpa system to "participate in a meeting that is crucial to his future economic agenda without appearing to participate at all").

[67] *See, e.g.*, CSIS.org, CSIS Sherpa Summit 2009: Pittsburgh and the Future of International Leadership through the G8/G20/G-?, http://csis.org/event/csis-sherpa-summit-2009 ("'Sherpas' are the personal representatives of world leaders at the G8/G20 summits, and lead and perform the heavy lifting for governments in shaping the global agenda."). As such, the Sherpa system operates as a knowledge and organization network. *See* Linn & Bradford, *supra* note 52, at 85–86.

[68] The presence of the OECD Secretary General at G20 meetings is important in this respect as well.

[69] *See* G20.org, About G-20: FAQ, http://www.g20.org/about_faq.aspx (last visited Mar. 4, 2010) ("What

by the G7, all of which are OECD members. Since 1975, the finance ministers from the G7 have met at least once a year in summits to collaborate and coordinate international policy positions.[70] At their September 1999 meeting, the United States led the G7 to create the G20 for the purpose of involving more countries in discussions about the financial crisis of the late 1990s.[71] The G7 constituted the G20 with its own members and a short list of other nations it deemed "systemically important."[72] In doing so, the G7 has been criticized for ignoring the efforts of a distinct group of developing countries, the G24, which was then attempting to independently engage with the G7 on matters of global public policy.[73] One study compared G7, G24, and G20 policies on a series of

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are the criteria for G-20 membership? In a forum such as the G-20, it is particularly important for the number of countries involved to be restricted and fixed to ensure the effectiveness and continuity of its activity. There are no formal criteria for G-20 membership and the composition of the group has remained unchanged since it was established. In view of the objectives of the G-20, it was considered important that countries and regions of systemic significance for the international financial system be included. Aspects such as geographical balance and population representation also played a major part."); *see also* Gideon Rachman, Editorial, *Europe's Plot To Take Over the World*, FIN. TIMES., Oct. 5, 2009, http://www.ft.com/cms/s/0/a47079b2-b1e6-11de-a271-00144feab49a.html?nclick_check=1 ("The Europeans did not just set the tone at the G20 – they also dominate proceedings, since they are grossly over-represented. Huge countries such as Brazil, China, India and the US are represented by one leader each. The Europeans managed to secure eight slots around the conference table for Britain, France, Germany, Italy, Spain, the Netherlands, the president of the European Commission and the president of the European Council. Most of the key international civil servants present were also Europeans: Dominique Strauss-Kahn, head of the International Monetary Fund; Pascal Lamy of the World Trade Organisation; Mario Draghi of the Financial Stability Board.").

[70] *See generally* ROBERT D. PUTNAM AND NICHOLAS BAYNE, HANGING TOGETHER: THE SEVEN-POWER SUMMITS (1984).

[71] *See, e.g.*, Helleiner, *supra* note 7, at 1. The G7 was also seeking to procure more financial commitments for IMF lending. *See* POWELL, *supra* note 6, at 11 ("The inclusion of important emerging and other economies . . . was a deliberate initiative by the G-7, particularly the United States, to encourage economies that had substantial financial capability to assume greater responsibility for the effective operation of the international financial system, and to extend international economic and financial co-operation beyond the G-7 or G-10 groups of industrialized countries."). This suggests that the eight "developing" countries invited to join the G20 were chosen not for their representativeness with respect to the developing world, but paradoxically for their wealth.

[72] *See* G20.org, About G-20: What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Mar. 10, 2010) ("The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy."). The use of the term "systemically important" to determine which countries would be granted G20 membership is also a term used in crisis to explain which banks should be saved. *See, e.g.*, DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC 24–6 (2009); Neil Irwin, *Bernanke Endorses Expanded Authority: New Tools Needed To Avert Crises, Fed Chairman Says*, WASH. POST, July 9, 2008, at D1. The term is troubling in the context of the G20 because in constituting this institution, the G7 assumed the responsibility for determining which countries "matter" and therefore would be allowed to have a voice in international discourse. Since the constitutive effort was not open for discussion or observation, the ensuing decisions may be at best puzzling. For example, while the collapse of the financial system in Thailand in 1997 was the impetus for formation of the G20 in 1999, Thailand itself is not a member of the group. *See* POWELL, *supra* note 6, at 20 ("[T]here was no codified list of criteria to determine which countries would be invited to join," but "countries had to be systemically important to the global economy and have the ability to contribute to global economic and financial stability."). Powell offers no details regarding who decided these matters, but noted that "drawing up a membership list was challenging for G-7 deputies," *id.* at 20, and in the end although the G20 included only nineteen countries, the decision to refer to the group as the G20 was motivated by a concern that calling it the G19 "might lead to pressure for additional members. 'G-20' was adopted on the basis that it was a round number, suggested finality, and was consistent with the number of countries represented plus the European Union." *Id.* at 21–22.

[73] POWELL, *supra* note 6, at 26; *see also* Leonardo Martinez-Diaz, *The G20 After Eight Years: How Effective a Vehicle for Developing-country Influence?*, *in* NETWORKS OF INFLUENCE?, *supra* note 13, at 44.

issues and concluded that the G20 "endorsed without qualification" many of the G7 positions while remaining "silent or neutral" on conflicting G24 policies.[74] The study did not specifically address tax policy, but such a study would be welcome.[75]

¶21 The relative diversity of G20 membership thus does not necessarily change the interaction between experts and decision-makers in a way that fosters a new paradigm of tax policy decision-making. The critical work of framing issues and solutions continues to be dominated within the existing infrastructure of experts and officials from the world's wealthiest countries.[76] Perhaps paradoxically, a significant part of the work of facilitating international tax policy discussion lies in the ability of these countries to minimize the number of collaborators to a "manageable number" so as to reduce the possible universe of debatable issues.[77] As global economic crisis has demonstrated, limiting participants and issues may facilitate (expedient) consensus. However, global economic crisis also raises issues about who decides which parties have a voice in the global policymaking process.

¶22 In 2008, as financial panic seized the United States and spread across the globe, the leadership status quo ensured that the United States and Europe would dominate tax policy discussions via the OECD, even as many of the countries targeted for change were not OECD members and were not represented in the decision to focus on tax havens as a primary policy goal.[78] As Paul Martin, the G20's inaugural chair, asserted, "[Development policies] will work only if the developing countries and emerging markets help shape them, because inclusiveness lies at the heart of legitimacy and effectiveness."[79] The question is what constitutes inclusiveness.

¶23 In the past, inclusiveness has been conceived and measured in terms of economic representativeness. Thus, OECD members and observers have questioned the ongoing legitimacy of the OECD as a "global" policy leader when OECD member countries

[74] Martinez-Diaz, *supra* note 73, at 39–61.
[75] The study did examine positions on financial sector transparency standards, and found that the G20 position mirrored that of the G7. *Id.* at 47–48, 57. A comparison of positions on tax policy would be especially useful since the G7 plays a direct role in setting the agenda of the OECD, including with respect to its tax haven work. For example, the G7 stated that "[t]ax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases," and they "strongly urge[d] the OECD to vigorously pursue its work in this field." Statement of G7 Finance Ministers and Central Bank Governors in Hong Kong (Sept. 20, 1997), http://www.g8.utoronto.ca/finance/fm970920.htm.
[76] *See, e.g.*, POWELL, *supra* note 6, at 41 ("Some concern was expressed by certain [G-20] members regarding a lack of consultation in the development of the annual work programme."); *see also* John Mason, The G20: Time for a U.S. Attitude Adjustment (Oct. 6, 2009), http://seekingalpha.com/article/165088-the-g20-time-for-a-u-s-attitude-adjustment ("[I]t has always seemed to me that the one who writes the agenda for a meeting is the one that most often ends up controlling the results that come out of that meeting.").
[77] Interview with U.S. Tax Official (Aug. 31, 2008) (noting that it is "necessary to get collaborative groups down to manageable number—if there are too many people working on issues, more and more issues will be raised").
[78] *See, e.g.*, OECD 2007–2008 GLOBAL RELATIONS PROGRAM, *supra* note 60, at 4 ("Many countries outside the OECD have become major players in the global economy to the extent that excluding them from our work would seriously hamper the effectiveness of policy initiatives agreed within the OECD framework.").
[79] Paul Martin, Notes for an Address to the Royal Institute of International Affairs (Jan. 24, 2001), *available at* http://www.collectionscanada.gc.ca/webarchives/20071122090216/http://www.fin.gc.ca/news01/01-009e.html.

represent a declining share of global gross domestic product.[80] The OECD cited this criterion as both a reason for embarking on an expansion project and for targeting specific countries for greater participation in OECD efforts.[81] Consequently, in the late 1990s, and corresponding to the timing of the creation of the G20, the OECD began to take several steps to expand the scope of countries involved—however peripherally—in their tax policy efforts.[82] First, the OECD reached out to a short list of countries for possible accession to OECD membership, including most of the developing countries included in the G20.[83] Second, the OECD began to invite certain countries to participate in various capacities, including as invitees at Global Forums and as "observers" in particular working groups.[84] In the case of enlargement, talks have been ongoing for several years, but OECD membership has remained steady at thirty countries since the accession of the Slovak Republic in 2000.[85] In terms of other forms of outreach, the OECD appears to be creating a two-tiered structure of policy leadership in which the existing OECD member countries will continue to enjoy privileged participation.[86]

¶24 But expanding inclusion in OECD policymaking by way of membership or participation is complicated by political and historical factors. For example, some countries may be reluctant to join the OECD because they will be required to sign onto,

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[80] Jeffrey Owens, Enlargement of the OECD: Challenges and Opportunities, Presentation at The OECD's Evolving Role in Shaping International Tax Policy Conference (June 2, 2009) (notes on file with the author) (noting that the combined GDP of OECD members currently represents approximately 60% of world GDP, down from an estimated high of 75% in the 1960s).

[81] *See* OECD.org, Enhanced Engagement, http://www.oecd.org/document/36/0,3343,en_2649_201185_41668772_1_1_1_1,00.html (last visited Apr. 10, 2010).

[82] *See* OECD 2007–2008 GLOBAL RELATIONS PROGRAM, *supra* note 60, at 4 ("[T]he OECD has progressively evolved from a traditional concept of 'outreach' in its relations with the rest of the world to a two-way flow where giving access to and participation in core OECD work and processes is as important as disseminating OECD best practices.").

[83] Press Release, OECD, OECD Invites Five Countries To Membership Talks, Offers Enhanced Engagement To Other Big Players (May 16, 2007), http://www.oecd.org/document/33/0,2340,en_2649_201185_38603809_1_1_1_1,00.html ("OECD countries agreed to invite Chile, Estonia, Israel, Russia and Slovenia to open discussions for membership of the Organisation and offered enhanced engagement, with a view to possible membership, to Brazil, China, India, Indonesia and South Africa."). Each of the latter countries is also a member of the G20, as is Russia. Thus, the only G20 developing country members not included in the OECD list for enlargement or enhanced engagement are Argentina and Saudi Arabia. Argentina participates as an observer on multiple committees and working parties, including in the area of tax policy. OECD 2007–2008 GLOBAL RELATIONS PROGRAM, *supra* note 60, at 18–22, 52, 109, 131, 138, 155. Saudi Arabia also appears to have some history of interaction with the OECD. *See, e.g.*, MENA-OECD Investment Programme, Working Group 4 Meeting, Hosted by Saudi Arabian General Investment Authority (SAGIA) (Feb. 7–8, 2005), *available at* http://www.oecd.org/dataoecd/48/16/34472285.pdf. The proposed enlargement would potentially restore the OECD's representation of global GDP to past levels. Owens, *supra* note 79.

[84] OECD 2007–2008 GLOBAL RELATIONS PROGRAM, *supra* note 60, at 2, 9 (stating that Global Forums are "aimed at providing the platforms for peer learning and policy dialogue on issues for which the relevance of OECD work is dependent on interaction with relevant non-Members world-wide," while observer status is an apparently ad hoc designation that implies a varying degree of participation in OECD programs).

[85] OECD.org, Ratification of the Convention on the OECD, http://www.oecd.org/document/58/0,3343,en_2649_201185_1889402_1_1_1_1,00.html (last visited Mar. 10, 2010).

[86] *See, e.g.*, Cockfield, *supra* note 6, at 185–86 (discussing what he termed the emerging "first tier" (existing OECD member countries) and "second tier" (countries invited to participate by means of observer or similar status) structure of the OECD, and noting that "[t]ier two status would be likely problematic for non-member countries but, given current political realities, it may be the best that they can hope for").

or otherwise express their position with respect to existing OECD policies.[87] In the case of Brazil, the OECD's invitation was likened to an offer of marriage, with attendant commitments that are not necessarily viewed favorably.[88] Additionally, some current OECD members may be reluctant to enlarge the membership due to this sense that greater numbers of countries will tend to reduce the ability of the institution to forge consensus, as more members means that potentially more issues and more barriers to agreement may be raised.[89]

¶25 As a result, perhaps the biggest effect on tax policy from the emergence of the G20 in the global economic crisis is a new policy space to lend the OECD its needed legitimacy, without disrupting the foundations of consensus carefully built over many decades.[90] Global economic crises may heighten the awareness of what it means for an international institution to involve itself in law and policy development. The viral nature of a crisis reminds us that societies are indelibly linked and global coordination is critical.[91] But the fact that crisis is global in nature does not explain whether or how to coordinate a global solution. Rather, the relative authority of particular institutions and individuals to define issues and determine solutions is highly contested, and the relative capacity of various institutions is broad.[92] The story of the 2008–2009 global economic crisis is not yet over, and emerging issues may continue to shape the relationship between tax experts and tax policymakers on the international stage.[93] But significant institutional shifts will be required if developing countries are to gain a greater voice in

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[87] *See* OECD 2007–2008 GLOBAL RELATIONS PROGRAM, *supra* note 60, at 13 ("[T]he concept of the OECD 'acquis', which must be accepted by all potential member countries, has two principal elements. First, it implies the acceptance of all of the internal rules of the Organisation. Second, it requires a positioning of the candidate country with respect to all existing OECD instruments.").

[88] On July 14, 2009, OECD Secretary-General Angel Gurria stated in a press conference that "[t]he possibility of Brazil becoming a formal partner of the OECD, depends only on the country. Our doors are open." Brazil's Finance Minister, Guido Mantega stated, "We have doubts about entering the OECD. We have an almost perfect relationship. We've been 'dating' for a long time. But we need to discuss the conveniences of a 'marriage.' We must analyze the obligations and responsibilities that this 'marriage' would require." Press Release, Minister of Finance of Brazil, Mantega Descarta Fazer Parte do Bloco (July 15, 2009), *available at* http://www.fazenda.gov.br/resenhaeletronica/MostraMateria.asp?page=&cod=566770.

[89] Owens, *supra* note 79 (the OECD has "no ambition to rival the U.N. in terms of membership"). The inability of the United Nations to come to decisions has been linked to an unwieldy institutional structure. *See, e.g.*, Linn & Bradford, *supra* note 52, at 78 ("The UN decision-making processes are cumbersome, mostly ineffective, and hard to change.").

[90] *See, e.g.*, POWELL, *supra* note 6, at 27 ("The formation of the G-20 in 1999 represented the first step on the creation of a legitimate and important new element in the international governance structure. . . . [I]ts membership was composed of systematically important economies and was broadly representative . . ."). Even so, legitimacy may rest "equally on inclusion and performance." Linn & Bradford, *supra* note 52, at 10.

[91] History demonstrates that most crises are global, most crises require internationally coordinated solutions, and, therefore, most crises raise major questions about the authority to lead. CHARLES P. KINDLEBERGER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES 161-206 (4th ed. 2000) (discussing the search for national and international leadership during financial crisis).

[92] *See, e.g.*, WOLFGANG H. REINICKE & FRANCIS DENG, CRITICAL CHOICES: THE UNITED NATIONS, NETWORKS, AND THE FUTURE OF GLOBAL GOVERNANCE 2 (2000) ("It is almost self-evident that deeper social and economic integration . . . requires that a growing number of 'public goods' be provided at the global level. Less clear is whether the right structures and institutions now exist at the global level to facilitate such a process. After all, what is or is not in the public interest is not something that can be determined a priori. Rather, it is the outcome of the public policymaking process.").

[93] *See, e.g.*, *id.* at 4 ("[I]ndividuals and groups, not bureaucracies or formal institutions, drive innovation and learning. Change is a bottom-up process, not a top-down steering committee.").

setting the global tax policy agenda, in identifying issues, and in forging consensus on best practices.

IV. (HOW) CAN DEVELOPING COUNTRIES INFLUENCE TAX POLICY THROUGH THE G20?

¶26 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.[94] This Article argues that 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.[95] Moreover, while only invited countries may send representatives to G20 meetings, "representatives of private sector groups are routinely invited to share their expertise with G20 officials in seminars and workshops."[96] This imbalance in participation may further impede the ability of the G20 to influence tax policy from the perspective of priorities faced by the developing world.

¶27 An implicit assumption of this discussion is that developing countries might not share the same policymaking priorities as those articulated by the OECD and currently endorsed by the G20. As discussed above, there is little evidence to either support or deny the suggestion that eliminating tax havens is a policy priority for developing countries, whether members of the G20 or otherwise.[97] If tax havens are not a top policy priority for these countries, the question remains whether the G20 does or can serve to promote alternative tax policy positions.[98]

¶28 The question of producing alternative policy priorities in response to the interests of developing countries is complicated not least because the concept of what constitutes a "developing country" is itself highly contestable and may suggest similarities of

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[94] *See, e.g.*, POWELL, *supra* note 6, at 28 (stating that the G20 was not formed for the purpose of being "a decision-making body," but instead "to help shape the international agenda, to discuss economic and financial issues in areas where consensus had not yet been achieved, and to 'lead by example,' by adopting measures developed in other forums but not yet in wide use"); *see also* John Kirton, From G7 to G20: Capacity, Leadership and Normative Diffusion in Global Financial Governance (Feb. 2005) (unpublished paper, presented at International Studies Association Annual Convention on Mar. 2, 2005), *available at* http://www.g8.utoronto.ca/scholar/kirton2005/kirton_isa2005.pdf (noting that the G20 has done relatively little to "reach out beyond the international institutions in which it was nested to involve other increasingly consequential countries in its expanding governance tasks").

[95] For a similar view that the G20 represents "the 'G7-isation' of international decision-making, rather than a genuine broadening," see John Kirton, The G7 and China in the Management of the International Financial System § 4.b (Nov. 1999) (unpublished paper, on file with University of Tornto G8 Information Centre), *available at* http://www.g7.utoronto.ca/scholar/kirton199903/china5.htm ("In this view, the G20 was born to legitimate G7 initiatives to the wider world, by securing a broader consensus for G7-generated ideas. The G20's eleven non-G7 members are thus destined to affect issues merely on the margin, to be informed of G7 initiatives, and to be given some semblance of participation. The G20 underscores the fact that the G7 does not want to leave the reform of the international financial system to the IMF or World Bank, where developing countries have an institutionalized role.").

[96] POWELL, *supra* note 6, at 45.

[97] *See supra* note 45 and accompanying text.

[98] One commentator has suggested, contrary to the discussion presented in this Article, that "[i]n 2003 and 2004 [the G20] started to instruct the 'rich country club' of the OECD what to do." Kirton, *supra* note 94, at 16. As discussed above, it seems more likely that the direction of policy flow has been from the OECD to the G20. Nevertheless, the commentator's statement suggests the possibility that an alternative policy agenda could emerge from the G20 and be exported to other institutions.

development that do not exist. There is no uniform convention for the designation of a country as "developing" or "developed," but the term is generally used to reflect a country's economic status or growth potential; the United States uses a per capita GDP of $10,000 as a rough guide for distinguishing developed from developing countries, though its categories are not consistent.[99] The United States thus distinguishes countries according to a development hierarchy that consists of 34 "developed countries," 27 "former USSR/Eastern Europe," and 172 "less developed countries."[100] The category of less developed countries includes such economically (as well as socially and politically) diverse countries as China, Cuba, the Comoros, and Chad.[101] In addition, the IMF produces a similar, but not identical, development hierarchy, which divides the world into "advanced economies" (34 countries) and "emerging and developing countries" (149 countries).[102] Other institutions, such as the World Bank, produce similar categorizations. According to both the IMF and U.S. categories, the G20 includes eight "developing countries": Argentina, Brazil, China, India, Indonesia, and Saudi Arabia. Of these, three—Argentina, Brazil, and Saudi Arabia—exceed the $10,000 per capita GDP threshold.[103] These three also exceed the global average per capita GDP, which is currently estimated at $10,500.[104]

¶29 These statistics about relative per capita GDP may convey less about the countries themselves than about the desire of bureaucrats to sort and categorize, yet the inquiry raises questions about whether the G20 adequately represents the developing world. G20 proponents have pointed out that G20 membership accounts "for almost 65% of the world's population, around 70% of the world's poor, and over 75% of the world's economy."[105] But there is no discourse within the G20 regarding what these factors and

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[99] Argentina's per capita GDP is $13,800, Brazil's per capita GDP is $10,200, and Saudi Arabia has a per capita GDP of over $20,000. Among the remaining G20 developing countries, China's per capita GDP is $6500, India's is $3100, and Indonesia's is $4000. Mexico, which is both a member of the OECD and the G20, is considered to be developed by the United States and has a per capita GDP of $13,200, while South Africa, also categorized as developed, has a per capita GDP of $10,000. *See* CIA.gov, The World Factbook Online, https://www.cia.gov/library/publications/the-world-factbook/index.html (last visited Mar. 30, 2010) (navigate to each country's "Economy" page to see GDP information).

[100] CIA.gov, The World Factbook Online: Appendix B: International Organizations and Groups, https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html#D (last visited Mar. 30, 2010) (defining "developed" and "developing" countries). The distinction between developing and developed for purposes of both categorization and inclusion in international institutions may have at least as much to do with politics as it does with dollars. For example, Botswana's per capita GDP of $13,900 is higher than that of South Africa, and Botswana is a democracy that has enjoyed peaceful rule since it obtained independence in 1966. *See* CIA.gov, The World Factbook Online: Africa: Botswana, https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html (last visited Mar. 30, 2010). Yet Botswana is not a member of the G20, nor has it been identified for OECD expansion or observer status.

[101] CIA.gov, The World Factbook Online: Appendix B: International Organizations and Groups, https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html#D (last visited Mar. 30, 2010) (listing less developed countries).

[102] IMF.org, World Economic Outlook Database: WEO Groups and Aggregates Information (Oct. 2009), http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/groups.htm#ae. The IMF also uses the term "countries in transition" to denote an intermediate between developing and developed. *See, e.g.*, IMF, TRANSITION ECONOMIES: AN IMF PERSPECTIVE ON PROGRESS AND PROSPECTS (Nov. 3, 2000), *available at* http://www.imf.org/external/np/exr/ib/2000/110300.htm.

[103] *See supra* note 99.

[104] CIA.gov, The World Factbook Online: World, https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html (last visited Mar. 30, 2010).

[105] Ken Henry, Sec'y of the Treasury, Dinner Address to the Sydney G-20 Workshop on Globalisation, Living Standards and Inequality: Recent Progress and Continuing Challenges, Spreading the Benefits of

the associated percentages convey in terms of inclusion and representativeness of developing countries in matters of global policymaking.[106]

¶30 Even if developing countries could be considered a consolidated group in terms of economic measurements such as per capita GDP, it is not clear whether the eight countries chosen to represent this group in the G20 adequately represent the range of tax policy issues that are of critical importance to other developing countries. While each of the eight countries may (or may not) have distinct tax policy goals, the over one hundred developing countries that have not been invited to participate in the G20 likely have distinct and divergent goals. As one G20 leader put it, the challenge for "international economic governance . . . can be pictured in part as a quest for balance between representativeness, and workable size."[107] For this reason, the more inclusive United Nations has been rejected as a viable alternative policymaking space.[108] Even the temporary G33 was deemed too large to be effective.[109] Other transnational institutions and networks, such as the self-constituted G24, have received relatively little attention in these discussions.[110]

¶31 As a result, the G20 emerges as the single institution where developing countries currently have a voice in tax policymaking on a global scale.[111] To the extent that the

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Globalisation: 'Selling' the Compounding Benefits of Reforms (May 27, 2002) (transcript available at http://www.columbia.edu/~xs23/papers/worldistribution/G20.htm).

[106] Still, those tasked with writing the history of the institution concluded confidently that "[i]nvited countries were pleased that a new, more inclusive, international forum ha [sic] been established to better recogni[z]e their importance in the global economy: one that treated them as equals in the debate on international economic and financial issues," and that some of the invited developing countries "saw their role as representing other, smaller countries in the international debate." POWELL, *supra* note 6, at 25. The South African Minister of Finance echoed this sentiment in a statement before the G20 meeting in 2000:

> Next week, we go to the G-20 meeting in Canada – a group that includes 'systemically significant' countries. Countries like ourselves, influential, although not powerful; countries with a voice; with potential. The G-20 provides us with an opportunity to make new allies among the middle powers to engage with the G-7; to push for structural change in a world where the inequalities are often reinforced by what, in the post Cold War era, has been a completely lopsided balance of power. We do this for ourselves, but we also need to engage on behalf of our neighbours.

Trevor Manuel, Minister of Fin., S. Afr., Notes for a Speech to the Seminar on South Africa's Foreign Relations and the Creation of National Wealth and Social Welfare, Centre for European Study in Africa, Rand Afrikaans University (Oct. 20, 2000) (transcript available at http://www.treasury.gov.za/comm_media/speeches/2000/2000102001.pdf). Nevertheless, there was "disappointment from many who were not invited to participate," including smaller European countries that "had demonstrated their ability to support the international financial system." POWELL, *supra* note 6, at 25–26.

[107] Henry, *supra* note 105, at 2. *See also* Steven A. Dean, *supra* note 61, at 154 n.128 ("Often, there is tension between the two goals of creating a legitimate cross-border framework and building one that is robust . . . [t]he OECD's success is arguably the result of its more limited membership and the greater focus that limited membership permits.").

[108] *See, e.g.*, Henry, *supra* note 105, at 2 ("Since the United Nations was founded in 1945, its membership has expanded from 51 to 189 countries. It and all other universal organisations grapple with a total membership far too large for informal discussion or prompt responses to rapid change. But on the other hand, smaller groupings generally lose the representation of the range of global experience as they gain the practicality of smaller size.").

[109] *See* POWELL, *supra* note 6, at 16; *see also* IMF, FACTSHEET: A GUIDE TO COMMITTEES, GROUPS, AND CLUBS (Mar. 23, 2010), http://www.imf.org/external/np/exr/facts/groups.htm#G33 (describing the G33).

[110] *See supra* text accompanying note 73.

[111] *See, e.g.*, POWELL, *supra* note 6, at 42–43 ("No other forum has brought together a regionally representative group of systemically important developed and emerging economies for informal discussion and dialogue. The G-20 filled an important gap in the governance structure of the international economic

G20 continues to accomplish its founders' goals as an effective institution for disseminating consensus positions on international economic matters,[112] its developing country members may have an opportunity to shape future tax policy decisions.[113] In the long term, whether the institution is currently sufficiently representative or inclusive of developing countries or sufficiently independent from the established international architecture of the OECD[114] may matter less than whether its members can use the institutional structure to advance their own policies and, in so doing, potentially create additional opportunities for developing countries to have a meaningful say in the future development of tax policy.[115] Institutions are not static but develop dynamically according to both internal and external factors, and they may develop in ways that the original founders did not contemplate or expect.[116] Even so, it seems clear that fundamental restructuring of the current tax policymaking paradigm would have to undergo significant changes in order to accord developing countries meaningful input in the crucial idea and agenda stages of tax policy development.

V. CONCLUSION

¶32 The G20 does not and probably cannot create the promised "new paradigm for international engagements"[117] in tax policy, foremost because it lacks the infrastructure necessary to activate tax policy development on an international scale. The G20 is neither well-suited nor likely intended to provide an alternative policymaking space. Instead, the G20's role in the context of tax policy appears mainly to be one of syndicating, and thereby compelling consensus to, norms formulated, debated, and implemented by the OECD.[118] The G20's more inclusive membership for the developing

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and financial system. . . . [T]he importance and breadth of its membership in the international community make its views influential.").

[112] *See, e.g.*, POWELL, *supra* note 6, at 46 ("Groups will be sustained as long as their members view them to be useful and continue to support them.").

[113] *See, e.g.*, Roy Culpepper, Systemic Reform at a Standstill: A Flock Of "Gs" In Search Of Global Financial Stability (May 2000) (unpublished paper), *available at* https://tspace.library.utoronto.ca/retrieve/1095/ ("[T]he G-20 is as yet in its infancy, and the possibility exists of its non-G7 members of taking initiatives and broadening its agenda.").

[114] Or from other institutions, most notably the IMF. *See, e.g.*, POWELL, *supra* note 6, at 43 ("[T]he fact that the G-20 is not itself an organ of the IMF may strengthen its ability to reflect on the international financial system. Good governance requires independence and a degree of detachment."). The meaning of such independence and detachment may be contested since the IMF has two seats at the G20 table, as does the World Bank. *See supra* note 1 and accompanying text. The OECD has no permanent seat, but the Secretary General participates in G20 meetings. *See* POWELL, *supra* note 6.

[115] Such as has arguably occurred in other contexts, for example within the WTO. *See, e.g.*, Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The rise of judicial liberalization at the WTO*, *in* THE POLITICS OF GLOBAL REGULATION 211, 220 (Walter Mattli and Ngaire Woods eds., 2009) (discussing the "bundling" effect various institutions, including the G20, have enabled for developing countries, and suggesting that, at a minimum, institutional participation presents developing countries with a veto power they previously lacked).

[116] *See generally* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

[117] Mbeki, *supra* note 3.

[118] *See, e.g.*, Leonardo Martinez-Diaz & Ngaire Woods, *Introduction*, *in* NETWORKS OF INFLUENCE?, *supra* note 13, at 7–8 ("[N]etworks can be used as vehicles for the cooption or subtle coercion of relatively weak states. Indeed, networks are sometimes preferred by powerful states precisely because there are no constraints imposed by formal rights of representation or mechanisms to protect minorities or small shareholders.").

world—to the extent it is in fact inclusive—is therefore insufficient to ensure that developing countries have anything more than a peripheral role in tax policymaking. While crisis may have demonstrated the need for developing countries to play a greater role in global economic decision-making, it seems clear that at least in the area of tax policy, inclusiveness for developing countries will be elusive so long as the framing, discussion, and consensus building takes place within an established order that continues to be dominated by the world's wealthiest countries.