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THE UNRULY WORLD OF TAX: A PROPOSAL FOR AN INTERNATIONAL TAX COOPERATION FORUM

by

*H. David Rosenbloom**

*Noam Noked***

*Mohamed S. Helal****

ABSTRACT

International cooperation in tax policy is deeply fractured. Inconsistencies, loopholes, and ineffective mechanisms—which could be avoided if real collaboration among countries existed—have created significant inefficiency losses for decades. This Article focuses on the institutional infrastructure underlying international cooperation in tax issues and argues that the current forums in which such cooperation is encouraged do not provide an adequate platform in which countries with similar interests can effectively make a collaborative effort. To facilitate cooperation, this Article proposes to create a new institution currently missing from the international tax policy-setting arena: an informal forum for coordination among countries that share similar interests in tax policy, inspired by the model of “Like Minded Groups” in international organizations. This forum will enable countries that share similar interests to cooperate and reach understandings about necessary policy adaptations. We identify two major projects that this forum could promote—efforts to curtail tax evasion and efforts to harmonize various aspects of tax policy. We argue that this model might have significant

*Member, Caplin & Drysdale, Chartered, Washington, D.C.; Director of the International Tax Program, New York University School of Law.

**Terence M. Considine Fellow in Law and Economics; Fellow of the Program on Corporate Governance; Candidate for S.J.D., Harvard Law School.

***Teaching Fellow, John F. Kennedy School of Government; Candidate for S.J.D., Harvard Law School.

advantages in promoting cooperation, reducing the “competitiveness” threat, advocating coordinated policies, and overcoming external and domestic pressures. In light of the current challenges in the field of tax policy, and the difficulties in forming international cooperation within the current institutional framework, the proposed model is worth serious discussion and consideration.

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I. INTRODUCTION

International cooperation in the making of tax policy is inadequate. Inconsistencies, loopholes, and ineffective mechanisms—which could be avoided if real collaboration between countries existed—have created significant inefficiency losses for decades. There are various reforms that might be suggested to improve existing mechanisms of global tax governance, but in this Article we focus on the *institutional* infrastructure underlying international cooperation on tax issues. We argue that the current forums in which international tax cooperation is intended to occur do not provide an adequate platform for countries with similar interests to engage in a true collaborative effort.

We propose a new institution currently missing from the international tax policy-setting arena: an informal forum for coordination between countries sharing similar interests. This forum would enable such countries that share similar interests to cooperate and reach understandings about necessary policy changes. The proposal is inspired by the model of “Like Minded Groups,” widely practiced in international organizations, where states whose interests converge establish a group to coordinate policies and create a negotiating bloc enabling them to achieve greater gains

in negotiations with other parties. This Article emphasizes the maximization of national welfare, but it is possible that the cooperation envisioned would increase worldwide welfare as well.

Current international institutions and forums specializing in the field of international taxation do not provide an effective platform for cooperation. The Organisation for Economic Cooperation and Development [hereinafter “OECD”], which is based on consensual decision-making, consists of countries with divergent and, in some cases, conflicting interests, which limits the ability of the organization to make progress on contentious issues and achieve significant changes to the status quo. The G20, a forum for heads of state with differing interests and no institutional support, cannot permanently play the role of initiator and leader of international tax policy changes. Additionally, the other bodies discussed in this Article do not effectively facilitate cooperation in tax policy matters.

We call our proposed institution the “Tax Cooperation Forum” [hereinafter “TCF”]. Different groups of countries can form different TCFs to promote their shared interests. One group of countries with similar tax interests that might establish such a forum could be the United States, the United Kingdom, Germany, France, Japan, and a few other developed countries that share similar interests. The TCF would be informal in nature and without any legal authority over members. This would allow members to opt in or out of the discussions in accordance with the policies under consideration and create ad hoc coalitions. As we explain further below, the use of an informal body would reduce political pressure and sensitivities regarding the inclusion or exclusion of different countries.

If the changes agreed upon in a TCF only required actions by the member countries, no further international cooperation would be needed, and the countries in the TCF would adopt the changes through domestic laws, or encourage their adoption in bilateral or multilateral agreements. If the changes affected other parties or needed the cooperation of other countries, the TCF could submit the proposed changes to the OECD (and possibly to the G20 or the WTO for issues that affect trade), in order to allow negotiation and the formation of a broader consensus. The TCF may indicate where its core principles are non-negotiable and where there is room for concessions in order to obtain broader acceptance by non-TCF states. If a broad consensus is not achieved, the TCF countries would adopt the proposed changes (though some might opt not to do so) and may set other mechanisms to incentivize cooperation and mitigate problems with lack of cooperation between other parties.

What kind of tax issues could be on the agenda of such a group or could be addressed differently if this forum existed? At least two major projects could be promoted by the TCF—efforts to curtail tax evasion and to

harmonize different aspects of tax policy. There may be measures to fight tax evasion that are not being taken now due to the lack of cooperation among countries.¹ The implementation of automatic information exchange by the United States, which is inconsistent with the adoption of anonymous cross-border tax withholding in the UK-Swiss Confederation Taxation Cooperation Agreement, makes one wonder whether a different outcome would have resulted if these countries had first attempted collaboration on this matter.²

The TCF could also promote multilateral harmonization efforts. Many commentators have suggested ideas for improving international tax policy, but these ideas must be adopted multilaterally: a multilateral tax treaty;³ formulaic apportionment system⁴ and reforms in the current transfer pricing rules;⁵ standardization of anti-avoidance rules, such as the rules regarding CFCs;⁶ uniform minimal tax rate on capital income;⁷ coordinated policy regarding taxation of intellectual property,⁸ and so on. Other, more modest initiatives that would be beneficial include harmonization of reporting rules so as to make compliance less costly for taxpayers;

1. See *infra* note 29.

2. See Itai Grinberg, *Taxing Capital Income in Emerging Countries: Will FATCA Open the Door?* Georgetown Public Law Research Paper No. 13-031, (2013), <http://scholarship.law.georgetown.edu/facpub/1227/> [hereinafter Grinberg, *Capital Income in Emerging Countries*].

3. See Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 BROOK. J. INT'L L. 1641 (2001) [hereinafter Thuronyi, *International Tax Cooperation*].

4. See Kimberly A. Clausing & Reuven S. Avi-Yonah, *Reforming Taxation in a Global Economy: A Proposal to Adopt Formulaic Apportionment*, The Hamilton Project, Policy Brief No. 2007-08 (2007) [hereinafter Clausing & Avi-Yonah, *Reforming Taxation*] (discussing one proposal for a formulaic apportionment), http://www.brookings.edu/~media/research/files/paper/2007/6/corporatetaxes%20clausing/200706clausing_aviyonah_pb.pdf.

5. David Spencer, *Transfer Pricing: Will the OECD Adjust to Reality?*, J. INT'L TAX'N 35 (2012) [hereinafter Spencer, *Transfer Pricing*].

6. See Chloe A. Burnett, *Replacing CFC Regimes with a Collective Attribution System*, 38 TAX NOTES INT'L 1109 (2005) [hereinafter Burnett, *CFC Regimes*].

7. See Peter Birch Sørensen, *The Case for International Tax Coordination Reconsidered*, 15:31 ECONOMIC POLICY 429 (2000) (analyzing the harmonization of tax rates on capital income) [hereinafter Sørensen, *The Case for Coordination*].

8. See Michael J. Graetz & Rachael Doud, *Technological Innovation, International Competition, and the Challenges of International Income Taxation*, 113 COLUM. L. REV. 347 (2013) (discussing coordination of intellectual property taxation and its policy alternatives) [hereinafter Graetz & Doud, *Technological Innovation*].

standardizing source and transfer pricing rules; improving mechanisms for dispute resolution and administrative cooperation, and other initiatives that would improve efficiency.

What would be the advantages of the TCF? First, cooperation among countries that share similar interests is beneficial because it reduces the “competitiveness” threat—a fear that investors will withdraw or that domestic companies will be unable to compete against foreign companies. Second, cooperation among influential countries may be utilized to further tax policies and achieve consensus, and in the event consensus is not possible, to set a coordinated policy that may be preferable to either the status quo or acting unilaterally. Third, this proposed model would permit different groups of states that share similar interests to set their own tax policy agenda and cooperate on issues that may not have broad interest. Fourth, cooperation within a group of countries may help policymakers overcome domestic political pressures and lobbies against policy changes. Fifth, the proposed model is practical, feasible, and within the current framework of international institutions.

The structure of this Article is as follows: Part II discusses the current international tax organizations and demonstrates how they fail to foster cooperation efficiently. Part III discusses the proposed model for international tax policy leadership. Part IV offers concluding remarks.

II. CURRENT INTERNATIONAL TAX POLICY ORGANIZATIONS

Assume that a group of countries sharing similar interests seek to collaborate on tax policy matters. What current international forum could facilitate such cooperation? What difficulties would this forum likely encounter?

A. *The OECD*

The OECD claims to have performed a central role in developing and promoting tax policies that are implemented globally,⁹ a contention that is accepted by several commentators.¹⁰ The most successful OECD standard-

9. See, e.g., Organisation for Economic Co-operation and Development, CURRENT TAX AGENDA 9 (2012), <http://www.oecd.org/ctp/OECDCurrentTaxAgenda2012.pdf>, [hereinafter OECD TAX AGENDA].

10. Jan Wouters & Karien Meuwissen, *Global Tax Governance: Work in Progress?*, Leuven Center for Global Governance Studies, Working Paper No. 59, (2011) [hereinafter Wouters & Meuwissen, *Global Tax Governance*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766436; Allison Christians, *Taxation in a*

setting instrument in the field of tax policy is the OECD Model Tax Convention on Income and on Capital, which essentially provided the foundation for over 1,500 current bilateral tax treaties.¹¹ Another similarly successful example of OECD standard-setting are the 1995 Transfer Pricing Guidelines, which have been used as the basis for legislation in participating OECD countries and an increasing number of non-OECD countries. The OECD also took the lead in developing the widely adopted standards regarding e-commerce.¹² The OECD Guidelines for Multinational Enterprises (2008, updated 2011) include a chapter on taxation, in which the OECD outlines the proper standard of behavior in the field of tax.¹³

However, the OECD has faced setbacks in its efforts to achieve greater coordination among its members in the area of tax policy. For example, some observers have noted that by 2006 the OECD's Harmful Tax Competition Agenda, originating from a 1998 OECD report, had largely failed in achieving its objective of combating the role of offshore countries in international tax avoidance and evasion.¹⁴ Other commentators, such as Professor Avi-Yonah of the University of Michigan College of Law, contend the OECD agenda has had limited success.¹⁵ Overall, OECD activities in the field of tax policy are based on the principle of fiscal sovereignty, which favors enhancing cooperation rather than tax harmonization among member states.¹⁶

Time of Crisis: Policy Leadership from the OECD to the G-20, 5 NW. J. L. & SOC. POL'Y 19, 19–40 (2010) [hereinafter Christians, *Taxation in a Time of Crisis*]; Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003) [hereinafter Brauner, *Tax Regime in Crystallization*]; Arthur J. Cockfield, *The Rise of the OECD as Informal "World Taxation Organization" Through National Responses to E-Commerce Tax Challenges*, 8 YALE J.L. & TECH. 136 (2006) [hereinafter Cockfield, *Rise of the OECD*].

11. See Thuronyi, *International Tax Cooperation*, *supra* note 3, at 1641.

12. See Cockfield, *Rise of the OECD*, *supra* note 10, at 136.

13. Organisation for Economic Co-operation and Development, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (May 25, 2011), <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>.

14. Richard Eccleston, Peter Carroll & Aynsley Kellow, *Handmaiden to the G20? The OECD's Evolving Role in Global Economic Governance*, Australian Political Studies Association Conference, Working Paper (2010) [hereinafter Eccleston et al., *Handmaiden to the G20*], http://apsa2010.com.au/full-papers/pdf/APSA2010_0228.pdf; Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10, at 12.

15. Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, 34 BROOK. J. INT'L L. 783 (2009).

16. See OECD TAX AGENDA, *supra* note 9, at 111.

The recent financial crisis increased international interest, particularly among G20 member states, in augmenting government revenues by effectively combating tax havens. Implementing G20 decisions in this regard is largely dependent on the effectiveness of the OECD.¹⁷ Indeed, the relationship between these two bodies is symbiotic: the G20 elevates some of the OECD's tax policies to the top of the international policy-making agenda, while the OECD provides supportive functions for the G20, the latter of which lacks the capacity to develop standards or implement and oversee its decisions.¹⁸

The Global Forum on Transparency and Exchange of Information for Tax Purposes [hereinafter "Global Forum"] provides an interesting example of this relationship between the OECD and the G20. The Global Forum was established in 2001 under the auspices of the OECD to set a multilateral framework within which progress in the areas of transparency and exchange of information might be made by both OECD and non-OECD economies. From its early years, the Global Forum achieved the development of standards of transparency and exchange of information through the publication of the Model Agreement on Exchange of Information for Tax Purposes in 2002 and the publication of a paper setting out the standards for the maintenance of accounting records. Additionally, the Global Forum has, since 2006, produced annually an assessment of the legal and administrative frameworks for transparency and exchange of information in over eighty jurisdictions.¹⁹

In 2009, the Global Forum was restructured and strengthened as a result of the G20's pressure to implement standards of transparency and exchange of information.²⁰ The OECD's tax transparency agenda, adopted

17. See Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10, at 10. See also Christians, *Taxation in a Time of Crisis*, *supra* note 10, at 29.

18. *Id.* See also Eccleston, *Handmaiden to the G20*, *supra* note 14, at 4. The paper contends that there are potential benefits to closer coordination between the OECD and the G20 on international tax issues: the latter's high profile support of the OECD's agenda represents a stronger political commitment, thus making it less likely that OECD member states will veto the G20's agenda in the face of domestic political pressures. Furthermore, this strong commitment would probably result in specific funding to the OECD to support the agenda and fund its implementation and enforcement.

19. See *About the Global Forum*, OECD.ORG (August 10, 2013), http://www.oecd.org/document/33/0,3746,en_2151361_4384757_44200609_1_1_1_1,00.html.

20. See Organisation for Economic Co-operation and Development, *OECD's Current Tax Agenda*, 102–104 (2010), http://www.uscib.org/docs/CTPA_Brochure_June_2010.pdf:

through the Global Forum, had little effect prior to the G20's involvement. As of 2006 only eleven Tax Information Exchange Agreements [hereinafter "TIE Agreements"] were signed, whereas by 2012 more than 800 TIE Agreements were signed.²¹ In order to strengthen the implementation of these standards, in 2010, the Global Forum launched a peer review process including a review of each jurisdiction's legal and regulatory framework for transparency and the exchange of information for tax purposes and a survey concerning the practical implementation of those standards.²² This demonstrates that while the OECD can set the agenda on issues so long as they are not very contentious, it lacks the ability to effectively promote its policy proposals, whereas the G20 has been much more effective in promoting the OECD's agenda. However, the G20 depended on the OECD to ensure implementation of the agenda and monitor each jurisdiction's compliance with it.²³

At its Mexico meeting on 1-2 September 2009, 178 delegates from over 70 jurisdictions and international organizations met to discuss progress made in implementing the international standards of transparency and exchange of information for tax purposes, and how to respond to the G20 call to strengthen the work of the Global Forum. The membership of the Global Forum was expanded to include more than 90 jurisdictions, including all OECD and G20 countries. Its governance and financing were restructured to ensure that all members participate on an equal footing. They agreed to a three-year mandate, which includes: carrying out an in-depth monitoring and peer review of the implementation of the standards of transparency and exchange of information for tax purposes; developing multilateral instruments to speed up negotiations; and ensuring that developing countries benefit from the new environment of transparency.

21. See Organisation for Economic Co-operation and Development, *Global Forum on Transparency and Exchange of Information for Tax Purposes: Tax Transparency 2012 Report on Progress*, 16 (2012), http://www.oecd.org/tax/transparency/Tax%20Transparency%202012_JM%20MB%20corrections%20final.pdf. See also *Tax Information Exchange Agreements (TIEAs)*, OECD.ORG (August 10, 2013), <http://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm> (providing a list of TIE Agreements by date).

22. See *Global Forum on Transparency and Exchange of Information for Tax Purposes, Frequently Asked Questions*, OECD.ORG (August 10, 2013) <http://www.oecd.org/dataoecd/35/16/46615395.pdf>.

23. It may be argued that the G20 and the OECD could be tougher in their current efforts, as they do not require imposing automatic information exchange or closing down tax havens, but only seek "information exchange upon request,"

The OECD recently presented to the G20 an Action Plan on Base Erosion and Profit Shifting [hereinafter “Action Plan”]—a plan to reformulate international tax standards in order to reduce tax avoidance opportunities for multinational corporations.²⁴ The Action Plan identifies weaknesses in the current framework and sets a timeline for the development of new standards for each recommended plan of action. This is an ambitious plan, both with regard to its scope and its goal of achieving consensus on many sensitive issues. The OECD notes that “[i]naction in this area would likely result in some governments losing corporate tax revenue, the emergence of competing sets of international standards, and the replacement of the current consensus-based framework by unilateral measures, which could lead to global tax chaos marked by the massive re-emergence of double taxation. “In fact, if the Action Plan fails to develop effective solutions in a timely manner, some countries may be persuaded to take unilateral action for protecting their tax base, resulting in avoidable uncertainty and unrelieved double taxation. It is therefore critical that governments achieve consensus on actions that would deal with the above weaknesses.”²⁵

Although it remains the most significant international forum in the field of tax policy coordination, the OECD suffers from substantial limitations in its efforts to lead international reforms in this field. First, OECD decision-making is based on *consensus* among thirty-four member states. Naturally, these countries have different interests, different economic characteristics, and different tax systems. As is the case in other multilateral forums, OECD decisions and policies tend to reflect the lowest common denominator that its members can agree upon. Although it is desirable to achieve policy goals by broad acceptance, partial cooperation among some members may be better than a stalemate. However, OECD rules of procedure do not provide for partial cooperation among these members that share similar interests. It is possible that in order to resolve the weaknesses identified in the Action Plan through broad consensus, the OECD will have to dilute the suggested reforms, thus undermining the goal of this ambitious project.

allowing tax havens to be taken from the OECD’s blacklist by nominally complying with information exchange requirements. *Exchange of Information*, OECD.ORG (October 14, 2013), <http://www.oecd.org/ctp/exchange-of-tax-information/>.

24. Organisation for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Shifting*, (August 10, 2013), <http://www.oecd.org/ctp/BEPSActionPlan.pdf>.

25. *See id.* at 10–11.

Second, the OECD lacks the political and diplomatic influence to advance the policies it endorses, as evident from the OECD's efforts on tax transparency and harmful tax competition. Therefore, although the OECD remains the forum best suited for forging a broad consensus on proposed international tax policies, there may be a need for an additional mechanism to achieve coordination among a group of countries that share similar interests. Sustained high-level political support provided by the G20 to the reforms suggested by the OECD may resolve this problem. However, the G20's interest in tax issues became significant only after the financial crisis of 2008, and it is undetermined if and for how long the political support of the G20 to the OECD will continue.

Finally, as a forum aiming to address global tax issues, the OECD is probably not the most suitable body to discuss issues of interest to only a portion of its membership. For example, some countries may have a keen interest in collaborating to suppress tax competition harmful to them. This form of coordination would not be feasible through the OECD, which is not a forum that is conducive to cooperation among only some of its members.

B. G20

From its inception in 1999 until the financial crisis that arose in late 2008, the Group of Twenty Finance Ministers and Central Bank Governors [hereinafter "G20"] played a limited role in setting tax policy.²⁶ The G20 is

26. The G20 was established in 1999 as a forum for both industrialized and developing nations to discuss key issues relating to the global economy, economic growth, and economic stability. The G7 created the G20 as a response both to the financial crises of the late 1990s and to a growing recognition that key emerging economies were not being adequately integrated in debates on global economic governance. The body of the G20 is composed of the finance ministers and central bank governors of nineteen countries and the European Union. There are no formal criteria for membership in the G20 and the composition of the group has remained unchanged since it was established. The original members of the G7 are Canada, France, Germany, Italy, Japan, the United Kingdom and the United States, who were later joined by Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea and Turkey. In light of the objectives of the G20, it was seen as important that the G20 include countries wielding considerable influence within the international financial system. Aspects such as geographical balance and population representation also played a major part in determining membership.

The G20 usually meets annually at the level of the G20 finance ministers and central bank governors. This meeting is usually preceded by two meetings between deputies of the G20, as well as technical work to provide the financial

an informal forum with no founding legal instrument or voting mechanisms. Its decisions are reached by consensus and are not legally binding. Moreover, the G20 does not have a permanent secretariat to assist it. The member state holding the rotating position of President hosts the annual meeting of the G20 and provides secretarial and logistical support.²⁷ In 2004, the G20 released a “Statement on Transparency and Exchange of Information for Tax Purposes,” in which it made a commitment “to the high standards of transparency and exchange of information for tax purposes that have been reflected in the Model Agreement on Exchange of Information on Tax Matters as released by the OECD in April 2002” and a call to “all countries to adopt these standards.”²⁸ However, as noted above, the 2004 statement had little effect on the signing of TIE Agreements.

In the aftermath of the emerging financial crisis in 2008, the role of the G20 in the field of international tax policy became more significant. The primary indication of the G20’s interest in this field came from its fight against tax havens through the improvement of transparency and exchange of information.²⁹ These statements were backed with political and diplomatic

ministers and bank governors with a foundation to better inform their consideration of policy options. *See What is the G20*, G20.ORG (August 10, 2013), http://www.g20.org/docs/about/about_G20.html.

27. *See id.*

28. The G20 stated that it “strongly support[s] the efforts of the OECD Global Forum on Taxation to promote high standards of transparency and exchange of information for tax purposes and to provide a cooperative forum in which all countries can work towards the establishment of a level playing field based on these standards.” *See G20, Statement on Transparency and Exchange of Information for Tax Purposes* (November 21, 2004), http://www.g20.utoronto.ca/2004/2004_transparency.html.

29. In a statement issued after the G20 London Summit in 2009, the G20 expressed the need to “take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information.” *See G20, London Summit – Leaders’ Statement*, 4 (April 2, 2009), http://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf. Later, during the Pittsburgh Summit in 2009, a statement by the G20 was issued: “We welcome the expansion of the Global Forum on Transparency and Exchange of Information, including the participation of developing countries, and welcome the agreement to deliver an effective program of peer review. The main focus of the [Global] Forum’s work will be to improve tax transparency and exchange of information so that countries can fully enforce their tax laws to protect their tax base. We stand ready to use countermeasures against tax havens from March 2010.” *See G20, Pittsburgh Summit – Leaders’ Statement*, 10

commitments. Thereafter, the number of signed TIE agreements by key countries substantially increased. Furthermore, the Global Forum was granted additional funding.

Nonetheless, the G20's ability to affect international tax policy is limited because of several impediments. First, the G20 depends on the OECD in a way that limits its ability to originate tax policy. As described above, the relationship between the G20 and the OECD is symbiotic: the G20 provides high-level political backing, while the OECD develops technical standards and monitors implementation.³⁰ Therefore, as one commentator has noted, the primary role of the G20 is to "syndicate, rather than originate, tax policy."³¹ Moreover, since the G20 depends on the OECD for implementation, if tax policies adopted by the G20 are not in accord with OECD standards, the latter organization is not likely to implement them.

(September 24–25, 2009). The G20 has not yet stated what countermeasures are being considered against tax havens. See Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10 at 5–7.

30. See Wouters & Meuwissen, *Global Tax Governance*, *supra* note 17. See also Christians, *Taxation in a Time of Crisis*, *supra* note 10; Eccleston, *Handmaiden to the G20*, *supra* note 14.

31. See Christians, *Taxation in a Time of Crisis*, *supra* note 10 at 29. For example, see the G20 statement from February 2013, noting that:

[W]e welcome the OECD report on addressing base erosion and profit shifting and acknowledge that an important part of fiscal sustainability is securing our revenue bases. We are determined to develop measures to address base erosion and profit shifting, take necessary collective actions[,] and look forward to the comprehensive action plan the OECD will present to us in July [2013]. We strongly encourage all jurisdictions to sign the Multilateral Convention on Mutual Administrative Assistance. We encourage the Global Forum on Transparency and Exchange of Information to continue to make rapid progress in assessing and monitoring on a continuous basis the implementation of the international standard on information exchange and look forward to the progress report by April 2013. We reiterate our commitment to extending the practice of automatic exchange of information, as appropriate, and commend the progress made recently in this area. We support the OECD analysis for multilateral implementation in that domain.

G20, *Final Communiqué of Finance Ministers and Central Bank Governors 5* (February 15–16, 2013). This statement demonstrates how the OECD originates the action plans and norms while the G20 provides high-level political support in order to effectuate those plans.

Second, since the G20 is an executive-level forum based on consensual decision-making, it tends to avoid taking stances on issues that are politically sensitive. This could explain why the G20 refrained from taking a tougher stance in the fight against tax havens. Conflicting interests among G20 members who accommodate tax havens within their borders, such as Hong Kong and Macau in the case of China and the Isle of Man, Guernsey, and Jersey in the case of the United Kingdom may also explain the G20's choice not to endorse harsher measures in combating tax havens.³² The G8, which is less active in tax policy issues in the last few years, suffers from similar problems.

Nevertheless, the advantage of the G20 is that it enables cooperation in regard to fiscal issues within a relatively small group of influential countries. This cooperation may lead to significant advances in proposed tax standards, which could not be achieved by the OECD alone.

C. *Other Forums*

Other bodies and international organizations do not provide an effective platform for countries to collaborate on tax policy matters. Some of these organizations—the United Nations, the European Union, the World Trade Organization, the International Monetary Fund, the World Bank, and regional and administrative forums—are discussed below.

The United Nations [hereinafter “UN”] has not been a leading forum for international tax policy setting,³³ although it has made contributions by advancing some proposals that affect the tax policy of developing countries.³⁴ There are a few reasons for the surprising lack of involvement of

32. See Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10, at 7.

33. The lack of UN leadership in tax issues became apparent at the international conferences on financing for development in Monterrey during 2002 and Doha during 2008, where tax-related issues received limited attention.

34. Overall, UN activity in this area sought to support developing countries' tax policy, due to the universal membership of the organization. See Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10 at 16. One major development relevant to tax policy that took place at the UN was the adoption of the Model Double Taxation Convention Between Developed and Developing Countries (hereinafter “UN Model”). Work on this instrument began in 1967 as a response by developing countries to the success of the draft of the OECD Model Treaty from 1963, and its main goal was to eliminate the double taxation impeding the flow of investments to developing countries. The UN Model was published in 1980, and revised in 2001. See Michael J. McIntyre, DEVELOPING COUNTRIES AND INTERNATIONAL COOPERATION ON INCOME TAX MATTERS: AN HISTORICAL REVIEW

the UN in tax policy issues. One is that the respective ministries of finance in developed countries are ambivalent toward the prospect of the UN becoming a major player in fiscal policy, whereas the respective ministries of foreign affairs, which are the departments most involved in UN affairs, are usually unqualified to deal with tax issues. These institutional and bureaucratic realities have in part prevented the UN from being at the forefront of international tax policy.³⁵

Similarly, as an inclusive forum, the UN usually adopts the lowest common denominator acceptable to all participating states. This effectively means that no real change in the status quo is achieved by the UN. Dries Lesage, David McNair, and Mattias Vermeiren argue that the negotiating blocs, such as the G7, the RIO Group, and the EU that are divided internally, come to negotiations with only their respective group's lowest common denominator, prejudicing discussions before a conference is convened.³⁶

Some commentators argue that the UN is inferior to the OECD with regard to the UN's institutional capacity to develop and implement tax policy standards.³⁷ Although the UN has a permanent committee on International Cooperation in Tax Matters, consisting of twenty five experts with a mandate to discuss all relevant global tax issues,³⁸ most of the committee's work is focused mainly on updating the UN Model Income Tax Convention.³⁹

4–7 (Tax Policy for Developing and Transitional Countries in the Global Economy, Working Paper, 2005) www.michielse.com/files/mcintyre_intl_cooperation.pdf.

While the UN Model mirrored many aspects of the OECD Model, it departed from the latter on some major issues in a manner more favorable to developing countries. Specifically, it modified the definition of a 'permanent establishment' to allow additional taxation of business income by the source country and provided that any reduction in a country's statutory withholding rates would be done through bilateral negotiations. Additionally, no specific target withholding rates were established in the UN Model, and the expectation was that treaties based on the UN Model would have higher withholding tax rates on royalties, dividends, and interest than those recommended in the OECD Model. The UN Model has been effective in influencing tax treaties between developed and developing countries—virtually all of which have a positive withholding rate on royalty income, and the proposed "permanent establishment" article was widely adopted.

35. See Dries Lesage, David McNair & Mattias Vermeiren, *From Monterrey to Doha: Taxation and Financing for Development*, 28:2 DEV. POL'Y REV. 155, 162–64 (2010).

36. See *id.*

37. See *id.* See also Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10, at 17.

38. The mandate of the UN Committee on International Cooperation in Tax Matters, is:

Although the European Union [hereinafter “EU”] has the legal authority to coordinate indirect tax issues among its member states, it remains limited in its ability to promote other kinds of cooperation. The EU has legislative authority over indirect taxes, since these taxes affect the free movement of goods and the freedom to provide services. Therefore, the EU has set common rules for the operation of value added tax [hereinafter “VAT”], and has lowered the limit on VAT rates that can be charged, yet has allowed considerable leeway for national differences in VAT rates. Excise taxes are also subject to some common rules, but the EU leaves a great deal of room for national differences.⁴⁰ In the case of direct taxes, unanimous consent of the member states is needed for EU legislation.⁴¹ This policy is based on respect for the principle of fiscal sovereignty.

However, the European Court of Justice [hereinafter “ECJ”] can strike down domestic legislation dealing with direct taxation of a member

1. Keep under review and update as necessary the *United Nations Model Double Taxation Convention between Developed and Developing Countries* and the *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries*; 2. Provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities; 3. Consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries[,] and appropriate recommendations; 4. Make recommendations on capacity-building and the provision of technical assistance to developing countries and countries with economies in transition; 5. Give special attention to developing countries and countries with economies in transition in dealing with all the above issues.

See United Nations Economic and Social Council, Res. 2004/69 on Committee of Experts on International Cooperation in Tax Matters, E/2004/INF/2/Add.3, at 14, (November 11, 2004), <http://www.un.org/esa/ffd/tax/overview.htm>.

39. Dries Lesage, *Taxation and the 2008 UN Follow-Up Conference on Financing for Development: Policy Recommendations*, 5 (2008), www.taxjustice.net/cms/upload/pdf/Doha_and_tax_0806_Dries_Lesage.pdf. See also Tax Justice Network, *The UN is failing on international tax — so the OECD calls the shots* (June 20, 2008), <http://taxjustice.blogspot.com/2008/06/un-is-failing-on-international-tax-so.html>.

40. See European Union, Taxation (August 10, 2013), http://europa.eu/legislation_summaries/taxation/index_en.htm (detailing the relevant EU legislation).

41. Lilian V. Faulhaber, *Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance*, 48 COLUM. J. TRANSNAT’L. L. 177, 181 (2010) [hereinafter Faulhaber, *Tax Avoidance in the EU*].

state if it violates “community law,”⁴² that is, the legislation creates an unjustified and disproportionate obstacle to the free movement of goods, services, and capital throughout the EU’s single market.⁴³ The ECJ, in a series of cases, struck down anti-avoidance legislation of various member states as inconsistent with the “wholly artificial arrangement” doctrine endorsed by the Court.⁴⁴ Still, the lack of legislative authority in the EU and the legislative vacuum induced by the ECJ are problematic.⁴⁵ Initiatives to harmonize the direct tax treatment of EU tax on corporations have been unsuccessful so far, mainly because legislation requires a consensus among all EU members while some have conflicting interests. It is, in fact, debatable whether any harmonization agreement would be accepted by all EU members.⁴⁶ Moreover, EU rules apply only (or at least mainly) to relations among EU member states. Therefore, this body in its current form is not well structured to facilitate cooperation among other countries sharing similar interests in regard to tax policy issues.

The World Trade Organization [hereinafter “WTO”] has an indirect effect on its members’ tax policies, as the Agreement on Subsidies and Countervailing Measures forbids distortive measures, including government revenue foregone or not collected (for example, fiscal incentives such as tax credits).⁴⁷ Some possible tax reforms (such as implementing subtraction-method VAT with border adjustments) might contradict and be barred under the WTO rules.⁴⁸ Although some commentators have called for further

42. *See id.* at 188.

43. *See id.* at 189–92.

44. *See id.* at 193–200 (providing a detailed description and analysis of the Court’s decision). These judicial decisions are limited to the relations between EU members—the legislation is valid with regard to relations between an EU member and a non-EU member.

45. *See id.*

46. *See id.* at 226–28.

47. *See* Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10, at 25–26. *See also* World Trade Organization, *Subsidies and Countervailing Measures: Overview*, (August 10, 2013), http://www.wto.org/english/tratop_e/scm_e/subs_e.htm. The case law of the WTO on this issue, banning the use of some fiscal policies, has an influence on current and potential domestic tax law of the member countries. Some exemptions were banned as “subsidies” by the WTO’s adjudicating bodies. *See* Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10, at 25–29.

48. *See* Itai Grinberg, *Where Credit is Due: Advantages of the Credit-Invoice Method for a Partial Replacement VAT*, 63 TAX L. REV. 309, 347–349 (2010).

intervention of the WTO in tax policy matters,⁴⁹ the WTO currently does not foster collaboration—it only sets constraints on tax policies adopted by member states. Political conditions make it unlikely that countries would agree to allow the WTO to assume some of their sovereignty in tax matters.⁵⁰

Both the World Bank and the International Monetary Fund [hereinafter “IMF”] operate as economic advisors, presenting policy options and recommendations, as opposed to forums for negotiation and cooperation. The IMF provides technical advice as well as policy advice to member states.⁵¹ The G20 occasionally assigns tasks to the IMF, as it is one of the “organizational instruments” of the G7/8 and the G20.⁵² Similarly, the World Bank occasionally makes specific recommendations for particular

49. Reuven Avi-Yonah and Joel Slemrod, (*How*) *Should Trade Agreements Deal with Income Tax Issues?* 55 TAX L. REV. 533–54 (2002). Avi-Yonah and Slemrod argue that trade agreements should cover more income tax issues that are relevant to enabling free trade with no “predatory tax protectionism.” *Id.* at 544. They also note that the multilateral nature of the trade agreement is more effective than the bilateral nature of the tax treaties in addressing some problems, such as trade-distorting and “investment-distorting tax competition.” *Id.* at 534.

50. See Brauner, *Tax Regime in Crystallization*, *supra* note 10.

51. See Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10, at 20. For example, tax expenditures and the need to eliminate them are discussed in the 2011 edition of the IMF Fiscal Monitor. See International Monetary Fund, Fiscal Monitor 99-106 (April 2011), www.imf.org/external/pubs/ft/fm/2011/01/pdf/fm1101.pdf. “Ideally, revenue increases would be achieved by widening tax bases and removing distortions, rather than by raising tax rates. In many countries, the elimination of tax expenditures can contribute to this objective.” *Id.* at 62. In the 2010 edition, the IMF recommended increasing revenues efficiently by strengthening broad-based taxes on relatively immobile bases, increasing externality-reducing taxes, and strengthening tax compliance, including through better international cooperation. See IMF, Fiscal Monitor 45-47, 4 (May 2011), www.imf.org/external/pubs/ft/fm/2010/fm1001.pdf. See also IMF Fiscal Affairs Department, *The Fiscal Implications of Climate Change* 12 (March 2008), www.imf.org/external/np/pp/eng/2008/022208.pdf (providing recommendations on carbon tax issues).

52. See Wouters & Meuwissen, *Global Tax Governance*, *supra* note 10 at 20. For example, the statement issued by the Pittsburgh Summit called on the IMF to prepare a report regarding the “options countries have adopted or are considering as to how the financial sector could make a fair and substantial contribution toward paying for any burdens as associated with government interventions to repair the banking system.” See *supra* note 29, at ¶ 16. The IMF report responsive to this statement presented and discussed several tax options. See International Monetary Fund, A FAIR AND SUBSTANTIAL CONTRIBUTION BY THE FINANCIAL SECTOR 6 (June 2010), www.imf.org/external/np/g20/pdf/062710b.pdf.

developing countries,⁵³ and it can condition loans or grants on the adoption of its recommendations. Additionally, the World Bank publishes tax policy recommendations in different fields, such as carbon taxes,⁵⁴ improving tax compliance and administration, and other global or developing-countries-related issues.⁵⁵ Neither body is a forum dedicated to achieving cooperation among countries. The International Tax Dialogue, which was initiated in 2002 by the IMF, the OECD, and the World Bank, serves as a platform for comparative data and analysis of tax issues, but not as a forum for negotiation and cooperation.⁵⁶

Regional tax organizations—such as CIAT,⁵⁷ CATA,⁵⁸ PATA,⁵⁹ IOTA,⁶⁰ CREDAF,⁶¹ and ATAF⁶²—also have limited capacity to promote

53. See Fred Ojambo, *World Bank Calls on Uganda to Widen Tax Base, Reduce Dependency*, BLOOMBERG (April 7, 2011), <http://www.bloomberg.com/news/2011-04-07/world-bank-calls-on-uganda-to-widen-tax-base-reduce-dependency.html>. See also Judith Balea, *World Bank: No-new-taxes plan won't cut deficit*, ABS-CBNNEWS.com (December 8, 2010), <http://www.abs-cbnnews.com/business/11/06/10/world-bank-no-new-taxes-plan-wont-cut-deficit>.

54. Gerard Wynn, *World Bank To Suggest Global Carbon Tax on Airline, Shipping Fuel (Paid by You)*, REUTERS (June 5, 2011), <http://www.prisonplanet.com/world-bank-to-suggest-global-carbon-tax-on-airline-shipping-fuel-paid-by-you.html>.

55. See generally Search for World Bank Group, INTERNATIONAL TAX DIALOGUE (August 10, 2013), <http://www.itdweb.org/Pages/Search.aspx?st=6&sort=2&c=246>.

56. The International Tax Dialogue, or ITD, was initiated in April 2002 by the IMF, the OECD, and the World Bank, partly in response to the call issued by the Monterrey Conference for enhancing international dialogue on tax matters. It is a joint initiative intended to encourage and facilitate the discussion of tax matters among national tax officials, regional tax organizations, and international organizations. The ITD's goal is to provide reliable information on all international tax matters at the global level, with an emphasis on the publication of professional, comparative, or research studies in the field. The ITD's website is a platform for countries to share documents, knowledge, and experience, in order to improve the sharing of useful information and avoid duplication of effort. All countries can use this website and make contributions. See *About Us*, INTERNATIONAL TAX DIALOGUE (August 10, 2013), <http://www.itdweb.org/Pages/AboutUs.aspx>.

57. The Inter-American Center of Tax Administrations, or CIAT, was founded in 1967. The CIAT is based in Panama City and has forty member and associate countries: thirty-one countries of the Americas, six European countries, two African countries, and one Asian country. The organization supports the efforts of national governments by promoting the evolution, social acceptance, and institutional strengthening of tax administrations, encouraging international cooperation, and exchanging of experiences and best practices.

58. The Commonwealth Association of Tax Administrators, or CATA, was founded in 1977-1978 and has forty-eight member countries, most of which are developing countries. CATA's mission is to promote the improvement of tax administration of its members in all aspects. To this end, its activities include: "holding meetings of technical and administrative personnel in tax administration for the exchange of ideas and experiences; organi[z]ing seminars, workshops[,] and training courses on aspects of tax administration; collecting, analy[z]ing[,] and disseminating information on tax administration; providing directly or, collaborating with, and generally facilitating, the work of bilateral and multilateral agencies providing technical assistance and research facilities in the field of tax administration; generally carrying out functions related to the overall improvement of the capabilities of tax administrations through functional co-operation between and among Commonwealth countries." See COMMONWEALTH ASSOCIATION OF TAX ADMINISTRATORS CONST. of 1978, Art. II (2004), <http://www.catatax.org/resources/our-mission>.

59. The Pacific Association of Tax Administrators, or PATA, was established in 1980. The countries comprising this intergovernmental tax group consist of Australia, Canada, Japan, and the United States, respectively represented by tax officials from their tax authorities. PATA was formed in response to the increased use of certain strategies and techniques by transnational corporations to evade taxes, including transfer pricing and tax havens. Its members meet at least annually to exchange information and identify specific deterrents to tax evasion activities. The main products of PATA were exchange of information mechanisms, transfer pricing policies, and mutual agreement procedures between PATA members. See Susan C. Borkowski, *The History of PATA and its Effect on Advance Pricing Arrangements and Mutual Agreement Procedures*, 17 J. INT'L ACC., AUDITING & TAX'N 31-60 (2008). For example, PATA provides principles under which taxpayers can create uniform transfer pricing documentation called a "PATA Documentation Package" so that one set of documentation can meet each PATA members' transfer pricing documentation provisions. Use of this PATA Documentation Package by taxpayers is voluntary and does not impose any legal requirements greater than those imposed under the local laws of a PATA member. This way a taxpayer can reduce compliance costs of duplicative administrative requirements in order to meet the transfer pricing documentation standards of the different jurisdictions. *Id.*

60. The Intra-European Organization of Tax Administrations, or IOTA, is a non-profit organization, founded in 1996-1997, which provides a forum to assist member European countries in improving their tax administration. See *What is Iota*, INTRA-EUROPEAN ORGANIZATION OF TAX ADMINISTRATIONS (August 10, 2013), <http://www.iota-tax.org/about-iota/what-is-iota.html>. IOTA's mission is "to provide a forum for discussion of practical tax administration issues, to promote co-operation between tax administrations in the European region and to support their development according to their individual needs." *Id.*

61. The General Assembly of the Meeting and Studies Center of Tax Administration Directors, or CREDAF, first met in 1972 and currently includes

collaboration among countries that share similar interests. The major focus of these organizations is on tax administration and not broader tax policy issues. Moreover, the membership of most of these organizations is generally based on geography and not on shared interests in tax policy.

One current forum that might serve as an example for cooperation in tax matters among a small number of countries sharing similar interests is the Joint International Tax Shelter Information Centre [hereinafter “JITSIC”]. JITSIC was established in 2004 by the tax administrations of the United States, the United Kingdom, Australia, Canada, and later Japan, South Korea, and China to supplement the ongoing work of tax authorities in these countries in identifying and curbing tax avoidance, tax shelters, and those who promote them and invest in them.⁶³ According to the JITSIC Memorandum of Understanding, the member countries each appoint tax experts as officials to the JITSIC. The member countries create an Executive Steering Group to coordinate, oversee, and evaluate the work of the JITSIC, with meetings held periodically in different locations.⁶⁴ Although the JITSIC is an interesting example of cooperation among a small number of countries, it has a narrow focus and does not deal significantly with policy issues.

thirty French speaking countries, with a secretariat located in Paris. *See* General Assembly of the Meeting and Studies Center of Tax Administration Directors, CREDAF (August 10, 2013), <http://www.credaf.org>.

62. The African Tax Administration Forum, or ATAF, was founded in 2009 and has thirty-nine member countries. It is a platform to promote and facilitate mutual cooperation among African Tax Administrations (and other relevant and interested stakeholders) with the aim of improving the efficacy of their tax legislation and administrations. *See* African Tax Administration Forum, ATAF (August 10, 2013), <http://www.ataftax.net/>. Its goals are similar to the aforementioned organizations.

63. *See* Joint International Tax Shelter Information Centre, *Memorandum of Understanding* (August 10, 2013), www.irs.gov/pub/irs-utl/jitsic-finalmou.pdf [hereinafter *JITSIC Memorandum*]. JITSIC’s purposes are to:

Provide support to the parties through the identification and understanding of abusive tax schemes and those who promote them[;] Share expertise, best practices[,] and experience in tax administration to combat abusive tax schemes[;] Exchange information on abusive tax schemes, in general, and on specific schemes, their promoters, and investors consistent with the provisions of bilateral tax conventions[;] Enable the parties to better address abusive tax schemes promoted by firms and individuals who operate without regard to national borders. *Id.*

64. *See id.*

III. PROPOSAL: TAX COOPERATION FORUM

A. *Applying the “Like-Minded Group” Model to Tax Policy Setting*

The most salient feature of international affairs is the absence of a global government capable of regulating activity on the international plane. This is why scholars of international relations describe the world order as anarchic.⁶⁵ However, this does not mean that the world is chaotic—far from it. As the world became increasingly globalized, it also became necessary to regulate the multitude of global activities of every type and form absent the intervention of a centralized authority.⁶⁶ This has led various actors, including states, businesses, international organizations, and civil society institutions to engage in a dynamic process involving many of the functions of governance that traditionally fall to governments. This process, called global governance, includes norm creation, standard-setting, and even the enforcement of laws and regulations.⁶⁷ It is by nature a decentralized, and at times fragmented, process that takes various forms in various fields of international affairs.

The lack of international cooperation and coordination in the field of tax policy is, in many respects, a global governance problem. A large group of actors, primarily states, have a stake in harmonizing, or at least coordinating, tax policies as the actions and decisions taken by any particular state might affect the interests of other states. This means that ensuring the full effectiveness of national tax policies requires a degree of international cooperation to ensure that the measures adopted externally do not undermine national policy. Moreover, tax policy affects many other areas of public policy, such as monetary and general economic policy. Tax policies adopted in foreign countries impact the flow of international investments and affect

65. See generally KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (McGraw-Hill, Inc., 1st. ed. 1979) (presenting an authoritative statement of this claim).

66. See DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION/ANTI-GLOBALIZATION*, 1–12 (Polity Press, 2d ed. 2003).

67. According to one scholar, “Global governance is governing, without sovereign authority, relationships that transcend national frontiers. Global governance is doing internationally what governments do at home.” Lawrence Finkelstein, *What is Global Governance?* 1 *GLOBAL GOVERNANCE* 367, 369 (1995). See also James Rosenau, *Governance in the Twenty-first Century*, 1 *GLOBAL GOVERNANCE* 1 (1995); Klaus Dingwerth & Philipp Pattberg, *Global Governance as a Perspective on World Politics*, 12 *GLOBAL GOVERNANCE* 185–203 (2006); Thomas Weiss, *Governance, Good Governance, and Global Governance: Conceptual and Actual Challenges* 21:5 *THIRD WORLD QUARTERLY* 795–814 (2000).

business transitional decisions. The multiplicity of actors of varying types and disparate interests and the absence of a central body to determine and enforce policy necessitate the creation of global governance forums that bring various stakeholders together to coordinate policies.⁶⁸

This is the essence of the proposal advanced by this paper. The creation of the TCF would fill a gap in the scheme of international tax policy-making by providing a setting in which similarly minded stakeholders could coordinate their policies.⁶⁹ This proposed TCF would be modeled around, but not identical to, what is known as a ‘Like Minded Group’ [hereinafter “LMG”] of states, which is a common practice in many international organizations, especially the UN. An LMG is a non-institutionalized, informal gathering of states sharing similar interests regarding a specific matter.⁷⁰ The practice in many international organizations is that delegations of the member countries meet to agree on common positions that satisfy their interests in order to create a negotiating bloc in international meetings or conferences. The UN has established such LMGs in numerous settings, including the six main committees of the UN General Assembly in New York,⁷¹ the UN Human Rights Council in Geneva,⁷² UN specialized agencies, the WTO,⁷³ international environmental law and policy forums,⁷⁴ and even within the OSCE.⁷⁵

68. See John G. Ruggie, *Reconstituting the Global Public Domain—Issues, Actors, and Practices*, 10:4 EURO. J. INT’L REL. 499–531 (2004).

69. See H. David Rosenbloom, *International Tax Policy: A Current View From the United States*, 41:3 AUSTRALIAN TAX REV. 133–35 (2012).

70. See generally Antony J. Dolman, *The Like-Minded Countries and the New International Order: Past, Present and Future Prospects*, 14 COOPERATION AND CONFLICT 57 (1979).

71. The six main committees are First Committee: Disarmament and International Security Committee; Second Committee: Economic and Financial Committee; Third Committee: Social, Humanitarian, and Cultural Committee; Fourth Committee: Special Political and Decolonization Committee; Fifth Committee: Administrative and Budgetary Committee; Sixth Committee: Legal Committee. See generally M. J. Peterson, *THE UN GENERAL ASSEMBLY 80* (Thomas G. Weiss & Rorden Wilkinson eds., 1st ed. 2006).

72. See Philip Alston, *Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council*, Center for Human Rights and Global Justice, Working Paper No. 4, (2006), http://www.chrgj.org/publications/docs/wp/WPS_NYU%20_CHRGJ_Alston_Final.pdf.

73. See John S. Odell, *Introduction*, in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 1*, 17 (John S. Odell ed., Cambridge University Press, 1st ed. 2006) [hereinafter *NEGOTIATING TRADE*].

An LMG has no permanent premises, no secretariat or staff, and is not established pursuant to a treaty or a legally binding instrument. In most cases, the presidency of an LMG rotates among member states. In cases where the LMG does not fall within the framework of an international organization such as the UN, the presiding state would provide secretarial services and background papers for the group's meetings, lead discussions, facilitate debates, and speak and negotiate on behalf of the group in other forums.

The principal advantage of an LMG lies in its flexibility. It allows states with different views on policy areas generally to cooperate on specific matters on which their interests converge. This means that an LMG offers countries the opportunity to achieve policy objectives without having to overcome the hurdles created by their differences in views on distinct policy areas. For example, India and Pakistan, hardly political allies, were members of an influential LMG during the Uruguay Round of negotiations that led to the establishment of the WTO.⁷⁶

Furthermore, the LMG model does not require permanent membership.⁷⁷ Whenever a state concludes that its interests are no longer served by membership in the LMG, it may simply terminate its participation. This presents a much lower political cost than formally withdrawing from an international organization. Membership in LMGs is usually open to states that believe their interests are identical to those of other participating

74. See Fen Osler Hampson, *Climate Change: Building International Coalitions of the Like-Minded*, 45 INT'L J. 36 (1989). See also John S. Odell & Amrita Narlikar, *The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade Organization, 1998-2001* in NEGOTIATING TRADE, *supra* note 73, at 115–144 (prepared for the Conference on Developing Countries and the Trade Negotiation Process, UNCTAD, Geneva).

75. See generally Maria-Pia Kothbauer-Liechtenstein & Mette Kongshem, *The Group of Like-Minded Countries within the OSCE*, OSCE YEARBOOK 2005 at 89 (2005), <http://www.core-hamburg.de/documents/yearbook/english/05/KothbauerKongshem-en.pdf>.

76. See Amrita Narlikar & Diana Tussie, *The G20 at the Cancun Ministerial: Developing Countries and their Evolving Coalitions in the WTO*, 27:7 THE WORLD ECONOMY 947 (2004).

77. For example, during the 2001 Doha Round of WTO negotiations a like-minded group of countries was created that included twelve countries and two observers. The members included India and Cuba. The fact that the former is the world's largest democracy, while the latter is a communist state, demonstrates the flexibility a like-minded group offers. See Amrita Narlikar, *Bargaining over the Doha Development Agenda: Coalitions in the World Trade Organization*, Series Latin American Trade Network Papers No. 34 (2005).

countries. The latter may invite a new member to attend meetings. Thus, participation is a low-key matter and very flexible. Additionally, LMGs do not have formal procedures and protocols similar to those in institutionalized forums, meaning that meetings can be more efficient and focus sharply on matters of interest to participants.

Meetings of the LMG can be periodic, can be convened whenever the need arises, or can be held on the margins of other events. The fact that these are informal forums means there is no obligation for any particular member country to meet. This is distinguishable from other institutions that require members to meet regularly, even if there is no urgent need.

Finally, LMGs are essentially a negotiating bloc. Members of these groups may agree on a joint position that reflects their common interests and present a common policy during meetings of international organizations. As numbers bring influence, an LMG provides a useful mechanism to increase the bargaining power of all members.

Meetings of LMGs are usually preceded by informal consultations between member countries about the agenda and any desired outcomes. In many global governance settings, these preparatory consultations are undertaken by technical experts and government functionaries. Once the LMG concludes these meetings and reaches agreement on what items will be discussed and proposed outcomes, the LMG reviews the matters and makes the necessary decisions at the policy executive level.

Most LMGs have been established within the framework of a broader international organization, such as the UN or the WTO. The members of these LMGs coordinate positions and participate in meetings of international organizations as a bloc. The proposal advanced in this Article is to create a body that is similar, but not identical, to an LMG. As indicated from the above survey of global tax policy forums, there is no central or leading international organization that oversees matters relating to taxation. Therefore, the proposed TCF would not be established as a negotiating bloc within any particular forum.

Rather, the TCF would act independently as a coordinating forum for states whose interests within the field of taxation are similar in at least some matters. Those countries would meet in the same manner as an LMG, agree on common positions and policies, and then jointly promote those common positions in the various organizations that are active in the field of international taxation, such as the OECD. In other words, the TCF could become a vehicle through which some, but not necessarily all, countries could cooperate and agree on positions regarding global tax policy.

A model that might serve as a guide to the establishment of the proposed TCF is the Basel Committee on Banking Supervision [hereinafter "BCBS"], which deals with a global governance problem similar to the

regulation of international taxation.⁷⁸ This committee was established in 1974 to provide a forum for cooperation and coordination between central bank governors of the main world economies.⁷⁹ Similar to the TCF that we propose, the presidency of the BCBS rotates among central bank governors of the participating states. In addition, the BCBS does not “possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force.”⁸⁰

Rather, the BCBS has been described as “one of the central organs of global economic governance, being both the locus of financial decision-making and a facilitator for coordinating the actions of other international financial institutions.”⁸¹ This is similar to the functions that the proposed TCF could perform, namely to act as a coordinating mechanism among players in the field of international taxation who have similar interests, and to enable these countries to reach common understandings and agree on joint positions that could be adopted in each participating country and advanced through other international organizations.

One group of like-minded countries that could establish a TCF would include major developed economies having comparable tax systems and interests, such as the United States, the United Kingdom, Germany, France, and Japan. Other groups of countries that share similar interests could form a TCF as well. Like other LMGs, the TCF would be informal and

78. Like tax policies, fiscal and monetary policies are decided by national agencies. However, in an increasingly interconnected world, it is no longer tenable for states to set fiscal and monetary policies without considering the international ramifications of their domestic decisions. This change created the need for forums and mechanisms designed for the global governance of fiscal and monetary affairs. It was for this purpose the BCBS was established. Indeed, as one scholar notes, “questions concerning the interface between the international nature of banking and the domestic character of financial regulation/supervision otherwise faced a political/economic/legal vacuum at this time. It was this vacuum that the BCBS filled. . . .” Charles Goodhart, *THE BASEL COMMITTEE ON BANKING SUPERVISION* 6 (2011).

79. The membership of the BCBS currently includes the following states: Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

80. Avijit Chatterjee & Cameron Mills, *Risk Management*, in *FIFTH GLOBAL CONFERENCE OF ACTUARIES*, 161 (August 10, 2013), http://www.actuaries.org/EVENTS/Seminars/New_Delhi/Chapters/page-161to179.pdf.

81. Duncan Wood, *GOVERNING GLOBAL BANKING: THE BASEL COMMITTEE AND THE POLITICS OF FINANCIAL GLOBALISATION* (Ashgate Publishing Limited 2005).

would not exercise legal authority over its members. Its decisions and recommendations would not be binding, and it would not require an international legal instrument for its establishment. Comparatively, a joint statement or communiqué by representatives of the participating states would suffice to announce that the TCF would hold regular meetings to coordinate tax policies.

One design question would be whether the TCF should have a permanent staff. As noted, LMGs generally do not have a permanent secretariat or staff. If the TCF follows that model, a staff would not be costly to create. In addition, the agenda of its meetings would not be predetermined, but would be agreed upon by members depending on international developments currently requiring attention and consideration. However, the utilization of a lean staff to facilitate regular communication, prepare meetings, and shape the agenda might be beneficial. Costs would still be quite low, as demonstrated by the JITSIC experience. Members of the JITSIC each appoint tax experts as representatives; there is an Executive Steering Group who coordinates, oversees, and evaluates the work of the tax experts. Meetings of the JITSIC are held periodically in different locations.⁸²

The implementation of decisions made by a TCF would depend on the nature of the issues considered and the understandings amongst its members. For example, if participating states decided to adopt certain measures that affected only their interests, then each respective state would oversee the implementation of those measures domestically. However, if the TCF reached an agreement that required further consultation with other states, the matter could be brought before the pertinent international forum, such as the OECD. The members of the TCF would then submit their proposals on the specific matter to these forums. Like any negotiating party, the members of the TCF could agree on what they will consider to be their non-negotiable bottom lines, in which they might compromise to garner greater international agreement.

In addition, the TCF could invite leading tax scholars and experts to attend meetings and express their views on the matters being discussed. Representatives from participating governments would benefit from the knowledge and expertise of tax scholars who could give their opinions either as written submissions or during informal meetings, such as roundtable discussions or interactive dialogues. The TCF could also extend invitations to its meetings to representatives of international organizations that are relevant to the matter being considered by the TCF.

82. See *JITSIC Memorandum*, *supra* note 63.

B. *Where Can the TCF Make a Difference?*

TCFs could deal with a wide range of topics. For example, a TCF could undertake to promote measures to curtail tax evasion and avoidance. As noted in Part II.A, the OECD's efforts to fight tax evasion have only had limited success. Despite the G20's decisive 2010 statement that it is "ready to use countermeasures against tax havens," no countermeasures were further discussed among countries that might benefit from putting pressure on tax havens.⁸³ The JITSIC focuses on cooperation among tax administrators from the United States, the United Kingdom, Australia, Canada, and Japan in combating tax avoidance and shelters and focuses less on policy issues. A TCF could deal with broader policy issues that the JITSIC does not address and could also set goals for tax administrations, instruct them on priorities, and promote other collaborative efforts to reduce tax evasion.

A current example of the lack of cooperation in combating tax evasion concerns the choice between automatic information exchange (adopted unilaterally by the United States in the Foreign Account Tax Compliance Act (FATCA)) or anonymous cross-border tax withholding (adopted by the United Kingdom in a treaty signed with Switzerland in 2011⁸⁴). It is unclear whether the different policies are beneficial to these countries, and one may wonder whether a different result would have been achieved if the aforementioned countries tried to collaborate on those issues in advance.

A TCF could also promote multilateral harmonization efforts. Many commentators have suggested ideas that could improve international tax policy, but adoption of those ideas must be multilateral: promoting a multilateral tax treaty to address inconsistencies among other treaties and multilateral issues that cannot be addressed through a bilateral treaty system;⁸⁵ implementing formulaic apportionment of multinational companies' income in a manner that would reduce incentives for income shifting through the use of transfer pricing and other planning tools⁸⁶ or other alternatives to the current transfer pricing system;⁸⁷ standardizing anti-

83. G20, *Toronto Summit Declaration*, (June 26-27, 2010), <http://www.whitehouse.gov/the-press-office/g-20-toronto-summit-declaration>.

84. See Grinberg, *Capital Income in Emerging Countries*, *supra* note 2.

85. See Thuronyi, *International Tax Cooperation*, *supra* note 3.

86. See Clausing & Avi-Yonah, *Reforming Taxation*, *supra* note 4 (proposing a formulaic apportionment approach).

87. See Spencer, *Transfer Pricing*, *supra* note 5 (discussing the flaws of the current transfer pricing system).

avoidance rules, such as the rules regarding CFCs;⁸⁸ addressing situations in which an entity is not taxed in any jurisdiction because of differences in tax laws; adopting a minimal corporate and capital income tax rate to reduce tax competition between countries that have similar economies and tax structures;⁸⁹ changing the taxation of intellectual property to limit companies' ability to lower tax liability by use of planning tools, and reducing incentives to change location of research and development because of differences in tax systems.⁹⁰ Other initiatives that might be beneficial include harmonization of reporting rules so as to make compliance less costly for taxpayers, standardizing source and transfer pricing rules, improving mechanisms for dispute resolution and administrative cooperation, and other means of making cooperation in tax administration more efficient.

The lack of cooperation today can likely be explained in several ways. Powerful lobbies, influential multinational companies, and other countries can put significant pressure on countries that share similar interests to prevent them from cooperating to improve their ability to tax income that is currently being evaded or avoided. These forces might limit the ability to attain effective cooperation even if the proposed TCF existed.

However, while there may be inherent reasons why countries do not cooperate, the lack of a forum to facilitate collaboration between countries definitely does not help the situation. As noted earlier, the lack of coordination in the international setting is not unique to tax policy—other international institutions face similar difficulties and pressures. Learning from other institutional frameworks that are used for cooperation-building can be useful for the tax policy setting as well. To the extent institutional factors have influence on policy decisions—and we believe they do—establishing a forum or a process in which countries with similar interests will better cooperate can make an actual difference in regard to tax policy issues.

C. *Rationale and Advantages*

The rationale for this proposal is clear: to enhance cooperation among countries that have similar interests in matters of taxation in order to

88. See Burnett, *CFC Regimes*, *supra* note 6.

89. See Sørensen, *Case for Coordination*, *supra* note 7 (analyzing the harmonization of tax rates on capital income).

90. See Graetz & Doud, *Technological Innovation*, *supra* note 8 (discussing this topic and its policy alternatives).

maximize the *national welfare* of those countries.⁹¹ Greater cooperation in tax matters may, in turn, reduce current inefficiencies stemming from a lack of cooperation so as to increase global welfare as well. Thus, although the reduction in sheltering opportunities may hurt some countries that benefit from providing tax shelters, it may increase worldwide welfare due to efficiency gains.⁹²

The potential cooperation gains are clear. First, countries today face a “competitiveness” threat: if a country adopts a strict tax policy that is not adopted by competitors, investors may shift their capital and, even if that does not occur, local businesses may be placed in an inferior competitive position. Thus, even if current tax policy is inefficient and causes social waste, a lack of coordination leads countries to stick with it. Cooperation among countries having similar policy interests may enable them to suppress undesired competition in an effective way.

Second, cooperation may provide a countermeasure to domestic political pressures and lobbies. For example, assume that TCF members reach an agreement on a particular anti-tax abuse policy. This policy could be undermined by domestic lobbies within individual member countries. However, the dynamics of the domestic legislative process may change when the policy is a result of collaboration among comparable countries—no one country may wish to stand out as rejecting the anti-abuse measures adopted by other countries. This may boost local pressure to adopt the proposal.

Third, cooperation among countries with similar interests increases their ability to advance their agenda and reach a broader consensus (such as within the G20). Even if broad consensus is not feasible, cooperation in adopting a policy change may effectively mitigate the problem of less than full cooperation by incentivizing other countries to comply with the policy change.⁹³ Thus, it may be advantageous for countries to cooperate even if

91. See Michael J. Graetz & Itai Grinberg, *Taxing International Portfolio Income*, 56 TAX L. REV. 537 (2003) (discussing alternative implementations of the National Welfare approach). See also Mihir A. Desai & Dhammika Dharmapala, *Investor Taxation in Open Economics* International Tax Policy Forum Working Paper No. 3, (2009), <http://www.law.northwestern.edu/colloquium/tax/documents/Dharmapala.pdf>.

92. In terms of distribution, very rich countries such as Switzerland and Luxemburg are some of the states that will suffer the most from reduction of sheltering opportunities. While some impoverished countries who rely on tax shelters will suffer as well, it is unclear if the inefficiency they cause justifies the distributive gain and whether there are other ways to improve distributive goals and simultaneously stimulate economic growth in these countries.

93. One example of efficiency gains from a collaboration between several states is the Streamlined Sales and Use Tax Agreement, which is a multilateral

there is no global or OECD consensus. Since the forum is informal, flexible, and does not infringe on members' sovereignty, a potential member may achieve cooperation benefits with no significant risk, except in the unlikely event that a TCF forms a consensus that is contrary to the policy preference of that member.

Fourth, as reflected in the survey of international organizations active in the field of tax policy, negotiations in these bodies are burdened by the need to achieve consensus. This inevitably leads to the lowest common denominator, which in many cases is not the most efficient and effective policy choice. Cooperation within a smaller group would provide an alternative to the lowest-common-denominator result. The existence of this alternative may increase the leverage of TCF members trying to achieve a broader consensus.

Fifth, when tax issues are discussed within a broader international organization, such as the OECD or G20, they naturally must compete for the attention of policy makers with other non-tax matters and issues. For example, the Ministers of Finance at the G20 have a long list of topics that need to be discussed and agreed upon, meaning that international tax policy may not receive the requisite attention and consideration. Having a forum focused on tax policy would be desirable. Moreover, establishing the forum would be practical, inexpensive, and politically feasible. The forum should complement the current international institutions and thus should not give rise to strong opposition in its formation.

The proposed model does not impugn the role of the OECD in negotiating for a broad consensus, developing standards regarding global issues, and providing data and analysis for policy-making. The proposed model may even increase the importance of the OECD as a negotiator and consensus achiever. In addition, since this forum is informal, flexible, and resembles other forums in the international sphere, it would probably be readily accepted without opposition. An informal body should not offend sensitivities regarding the inclusion or exclusion of different countries.

IV. CONCLUSION

This Article proposes the implementation of Tax Cooperation Forums, informal forums for coordination among countries that share similar

agreement between several states in the United States to harmonize their sales tax systems (after attempts by states to prevent buyers from avoiding sales tax were struck down by the Supreme Court of the United States as a violation of the Commerce Clause of the U.S. Constitution). See Faulhaber, *Tax Avoidance in the EU*, *supra* note 41, at 228–29.

interests in tax policy, an institution that is currently missing in international tax policy-setting. The ability of existing institutions and forums that affect tax policy today to achieve effective cooperation in international tax matters is both limited and problematic. The proposed model would maximize national welfare for cooperating countries, and possibly promote global welfare by reducing current inefficiencies. Any group of countries that share similar interests in tax policy could establish such a forum. All that would be needed for creating the forum is a joint or parallel statement or communiqué by the Ministers of Finance of participating states announcing that they would hold regular meetings to coordinate their tax policies.

We mention two major projects this forum could promote—efforts to curtail tax evasion and efforts to harmonize different aspects of tax policy. The advantages of this model are significant. Cooperation among countries sharing similar interests would benefit them by reducing the “competitiveness” threat. Such cooperation might be utilized to advance policies and achieve consensus in tax matters and, if consensus is not in reach, to set a coordinated policy which may be preferable to the status quo or acting unilaterally. This model would allow different groups of states sharing similar interests to set their own tax policy agendas and cooperate on issues that are not of broad interest, which appears practical and feasible. For all of these reasons, we believe the proposed model deserves serious consideration.