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The EU as a global Robin Hood: Proposal for a multilateral convention on a global financial transaction tax

Bart Van Vooren

CLEER WORKING PAPERS **2011/4**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

THE EU AS A GLOBAL ROBIN HOOD: PROPOSAL FOR A MULTILATERAL CONVENTION ON A GLOBAL FINANCIAL TRANSACTION TAX

BART VAN VOOREN[1]

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ABSTRACT

In the wake of the financial crisis, taxation of the financial sector has forcefully re-emerged on the EU political agenda. Most recently, at the Sarkozy-Merkel meeting of 16 August 2011, both leaders agreed that they would jointly push towards imposing a financial transactions tax (FTT). Asked to look into the feasibility of this proposal, several studies have investigated the political and economic challenges to implementing the FTT. However, the degree of legal and institutional coordination required at global level for a successful implementation of this tax remains unexplored. This paper seeks to fill that lacuna, by proposing that in order to realize a global FTT, the EU must forcefully support further legalization and institutionalization of the global economic governance system. It must do so by proposing a binding multilateral treaty establishing the legal framework within which to levy, manage and disperse the proceeds of a global FTT. The paper then argues that individual Member States will be unable to exert sufficient influence in the G-20 to realize a global financial transaction tax. However, should the Union manage to speak with its proverbial single voice in a sustained lobbying effort at the highest political echelons, success may be within reach. This would have commensurate effects on the EU's standing in the hearts and minds of European citizens: the EU as a global Robin Hood.

TABLE OF CONTENTS

1. Introduction.....7

2. A Global Financial Transaction Tax: Political Context at EU and International Level.....8

3. Realizing Objectives of the FTT: Need for a Global Approach.....10
3.1. Introduction.....10
3.2. Market Correction Function.....11
3.3. Risk of Geographic Relocation.....13
3.4. Funding Global Public Goods.....14
3.5. The EU and an FTT Convention.....16

4. The Legal & Institutional Features of The Multilateral FTT Convention.....16
4.1. The Functions of the FTT Convention.....16
4.2. Function One –Political Decision-making on the FTT.....17
4.2.1. Institutionally: Role for the G-20.....17
4.2.2. Substantively: Initial Chalk Lines for the FTT.....19
4.3. Function Two – Rule-making and Rule Adjustment.....22
4.4. Function Three – Administration & Dissemination of Information.....22
4.5. Function Four – Dispute Resolution.....23
4.6. Function Five – Levying the Tax.....24
4.7. Function Six – Distribution of FTT Proceeds.....25

5. The FTT and the Union as a Global Actor.....27

6. Conclusion.....29

1. INTRODUCTION

In the wake of the financial crisis, taxation of the financial sector has forcefully re-emerged on the European Union political agenda. Several EU Member States (notably France) and the European Parliament have sought to stimulate this idea in the form of a global financial transaction tax (FTT). Asked to look into the feasibility of this proposal, studies by the IMF, the European Commission and academia have now investigated the political and economic challenges of implementing such a proposal. However, the degree of legal and institutional coordination required at global level for a successful implementation of the FTT remains largely unexplored.[2] In this paper I aim to fill this lacuna, by formulating a proposal for a multilateral transaction tax convention in line with EU external objectives. In order to realize a global FTT, the EU must forcefully support further legalization and institutionalization of the global economic governance system. It must do so by proposing a binding multilateral treaty, with as broad as possible a global membership. This FTT Convention would establish the legal framework within which to levy, manage and disperse the proceeds of an international FTT. Institutionally, I propose that this treaty framework would draw on and subsequently incorporate the political legitimacy of the G-20; and that it would draw on, or possibly incorporate the expertise of the IMF, Financial Stability Board, Basel Committee and other bodies. Finally, it would disperse its proceeds through the IMF, specialized UN agencies, or novel instruments towards the provision of global public goods. In terms of changes to global economic governance, this paper thus argues that only two policy options are realistically on the table for the Union. First, the FTT regime could function as part of a reformed IMF with an institutionalized role for the G-20; or second, the tax would be administered by a new international financial institution (IFI) with specific FTT tasks, while cooperating closely with existing bodies. In sum, deep reforms would be required to implement the FTT, and anything less would not be capable of overseeing the complex set of rules and institutions that this initiative would require.

This paper proceeds as follows: First, I briefly sketch the EU and international political context to the global FTT. By doing so, this section flags up the political context and its impact on what is legally and institutionally feasible. In the second part I explore the objectives of the proposed FTT Convention which provides the necessary context to understanding the legal and institutional choices to be made in establishing the FTT legal regime. Here I argue that the purpose of the FTT must be not solely geared towards funding global public goods, but also towards market correction. In the third part I flesh out the core legal-institutional features of the FTT legal regime, tracing the six different functions this new IFI would have to fulfil in order to impose, administer and

[2] A prominent exception is K. Alexander, *'International Financial Regulatory Reform and Financial Taxes',* 13 *Journal of International Economic Law* (2010), 893-910.

distribute the proceeds of the global financial transaction tax. Having outlined the essential characteristics of this regime, I also briefly reflect on the nature of the EU as an international actor in relation to the FTT project: the EU as a global Robin Hood. The paper concludes by outlining the necessary reforms to global economic governance to realize the financial transaction tax.

2. A GLOBAL FINANCIAL TRANSACTION TAX: POLITICAL CONTEXT AT EU AND INTERNATIONAL LEVEL

At their September 2009 meeting in Pittsburgh, political momentum post-financial crisis was such that G-20 leaders agreed to pursue a number of deep changes to global economic governance. They agreed to set up "*a framework for strong, sustainable and balanced growth*", "*an international regulatory system for banks and other financial firms that would reign in the excesses that led to the crisis*", and "*to reform the global economic governance architecture to meet the needs of the 21st century*".[3]Through these transformations, they wished to curb excessive risk-taking and recklessness, which was perceived as the root cause for the financial crisis of 2008. However, the Pittsburgh communiqué did not refer to international financial taxation in any form, and focused on reforming capital requirements,[4] compensation in the financial sector, improved over-the-counter (OTC) derivatives markets,[5] and moral hazard problems related to systemically important financial institutions (SIFIs). It did however request that the IMF prepare a report "*on the range of options (...) as to how the financial sector could make a fair and substantial contribution toward paying for any burdens associated with government interventions to repair the banking system.*"[6] The IMF delivered that report by the June 2010 G-20 summit in Toronto.[7] In the lead-up to that event, the European Council strongly voiced its support for the FTT:

> "*The EU should lead efforts to set a global approach for introducing systems for levies and taxes on financial institutions with a view to maintaining a world-wide level playing field and will strongly defend this position with its G-20 partners. The introduction of a global financial transaction tax should be explored and developed further in that context.*"[8]

Upon delivery of the report the Toronto Summit merely 'thanked' the IMF, and beyond the mentioning of a few generic principles in the final summit communiqué, the EU did not succeed at having the idea discussed more substan-

[3] G-20 Leaders' Statement, The Pittsburgh Summit, 24-25 September 2009, 2.
[4] Ibid, 8.
[5] Ibid, 9.
[6] Ibid, 10.
[7] International Monetary Fund, *A Fair and Substantial Contribution by the Financial Sector*, Final Report for the G-20 (June 2010).
[8] European Council Conclusions, Brussels, 17 June 2010, 6-7.

tively at that meeting.[9] What seemed a tempest in a teapot was no longer even mentioned in the Declaration of the Seoul Summit in November 2010. The communiqué from the February 2011 G-20 meeting of Finance ministers and Central Bank governors only cursorily referred to the financial transaction tax, and we need to await further action from the French G-20 presidency. Indeed, the Union has not abandoned its resolve; mainly under French impetus, supported by other Member States also open to the FTT idea such as Austria, Belgium, the Netherlands, Italy, Spain and Germany. Others, such as the UK, Malta, the Czech Republic and Sweden are much more sceptical. On 20 September 2010, Nicolas Sarkozy addressed the General Assembly of the United Nations, where he stated that

> "(...) *as the future president of the G-20 and the G8 (...) I will strive to promote the idea of innovative financing (...)[W]e must find new sources of financing to fight against poverty (...)We can decide here to implement innovative financing, the taxation of financial transactions. Why wait? Finance has been globalized. Why shouldn't we demand that finance contribute to stabilizing the world through a minuscule tax on each financial transaction?*"

As regards support from the EU institutions, the European Parliament is most supportive of the FTT, most recently in a Resolution of 8 March 2011.[10] In this resolution, the EP stated that, in its opinion, the EU should promote the introduction of an FTT at global level, failing which the EU should implement an FTT at European level as a first step.[11] Given the cold reception at G-20 level, during 2011 the idea of an EU-level financial transaction tax has slowly begun to gain traction: in June 2011 Commission President Barroso spoke favourably of that option, and he indicated that during the autumn of 2011 the Commission would publish a proposal to that effect.[12] Similarly, at the joint Sarkozy-Merkel meeting of 16 August 2011,[13] both leaders stated that they would push towards taxing 'corporate' transactions.[14] The idea(l) underlying the European implementation of the financial transaction tax is that the Union would 'lead by example', and that other nations would follow suit once the EU has proven that the FTT does not have the feared relocation effects on financial markets. However, at the technocratic level that enthusiasm is not uniformly shared with political leadership. Politically the tax Commissioner may support the FTT,[15] but in reality the Commission services clearly take a more sceptical stance.

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[9] K. Lannoo, *'The EU's Response to the Financial Crisis: A mid-term review'*, *CEPS Policy Brief* No. 241 (April 2011), 6.

[10] European Parliament, Resolution on innovative financing at global and European Level, (8 March 2011).

[11] See note 10, para 16.

[12] 'Barroso to push for financial transaction tax', European Voice, 21 June 2011.

[13] A transcript of the press conference is available at: <http://www.businessinsider.com/live-coverage-the-big-merkel-sarkozy-meeting-youve-been-waiting-for-2011-8>.

[14] 'Merkel and Sarkozy plan "true economic government"', EU Observer, 18 August 2011.

[15] Algirdas Šemeta EU Commissioner for Taxation and Customs Union, Audit and Anti-Fraud, 'Taxing the Financial Sector' Press Conference Brussels, 7 October 2010, SPEECH/10/530, 07/10/2010.

During the second half of 2010, the Commission published two thoroughly researched Communications which clearly disfavour the FTT idea (both at EU or global level) on the basis of technical, legal and institutional hurdles.[16] Nonetheless, it is expected that the proposal in September 2011 for an EU-wide FTT will be used by the Union to garner support for a global FTT to be discussed at the Cannes G-20 Meeting on 3 – 4 November 2011.[17] This paper is concerned with the latter option, where I argue that legal and political arguments favour the global implementation of the Financial Transaction Tax as the central option. In the following section, I focus on three key arguments which support that assertion: first, the market correction function of this tax; second, the risk of geographic relocation posed by this tax; and third, the disbursement of proceeds of the tax.

3. REALIZING OBJECTIVES OF THE FTT: NEED FOR A GLOBAL APPROACH

3.1. Introduction

Options for taxation of the financial sector exist in a number of forms. The most famous such tax is the Tobin tax proposed in the 1970s, which would levy a small percentage on all spot conversions of one currency into another, proportional to the size of the transaction. The objective of this tax would be to deter short-term speculative currency transactions, and thus to 'throw sand in the wheels of the excessively efficient international money markets.'[18] The idea of deterring high-volume, high-speed trading is integral to the idea of the financial transaction tax, but additional rationales do exist. The goal of the financial transaction tax is to achieve a triple dividend, namely to 1) make the financial sector contribute more equally to society; 2) to stabilize markets; and 3) to raise extra funds for global public goods where funds are currently lacking due to significant public deficits.

In the following paragraphs I argue that the global political context is such that when designing the FTT, emphasis should lie on providing funds for global public goods as well as the market corrective function. As a consequence, (EU Member) States should not view this as an opportunity to replenish public coffers of those nations which have bailed out financial institutions. Clearly, widely different responses across the globe – especially in Asia – would hinder consensus and render the FTT stillborn at G-20 level. What is more, the political context is such that the tax should only be implemented at global level, and not at EU-27 or Eurozone-17 level. This is because of the political percep-

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Taxation of the Financial Sector, Brussels COM(2010) 549/5; European Commission Staff Working Document, Taxation of the Financial Sector, Brussels COM(2010) 549.

[17] 'EU to push financial transactions tax at G20 summit', EurActiv, 1 September 2011.

[18] J. Tobin, 'A Proposal for International Monetary Reform', 4 Eastern Economic Journal (1978), 153-159.

tion that geographical relocation poses grave risks to the major financial centres and the economies of the countries that host them. As a consequence, this section concludes that the *global option* in function of *market stabilization* and the provision of *global public goods* is the only politically and legally feasible avenue towards implementing a global financial transaction tax.

3.2. **Market Correction Function**

There is deep disagreement on the economic merits of the FTT, essentially reflecting different economic schools' ideologies on the desirability of regulatory intervention in markets. Because the possible impact on the market must be taken into account in devising the legal-institutional set-up for the FTT, I briefly outline the pro's and contra's raised in various fora.

A commonly quoted statistic is that in 2007, the volume of financial transactions stood at a level 73,5 times higher than nominal world GDP, owing largely to the growth in derivatives trading.[19] In particular, trading in derivatives markets expanded significantly stronger than trading in spot markets: in 2008, the volume of derivatives trading was 66 times higher than world GDP, whereas spot trading amounted to only 8 times world GDP. The argument goes that this indicates the skewed relationship between needs of the real economy and the international financial markets. Intervention is then necessary because only a small share of transactions stem from 'useful' hedging activities and the greatest part of transactions is purely speculative.[20] The broad-based FTT would correct market behaviour through rendering speculative trades more costly, in particular high frequency intra-day technical trading. This is what Tobin called 'throwing sand into the wheels', thereby avoiding extreme systemic risks as observed in 2008-2009.[21] For this reason, the European Parliament[22] as well as a number of academics and prominent politicians[23] are most favourable to a broad FTT. They argue that it would curb speculation and improve market efficiency, increase transparency, reduce excessive price volatility, and create incentives for longer-term investments with added-value for the real economy by freeing up resources for more productive uses.[24]

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[19] S. Schulmeister, Short-term Asset Trading, long-term Price Swings and the Stabilizing Potential of a Transactions Tax, WIFO – Austrian Institute of Economic Research (October 2010), 19.

[20] Ibid, 20.

[21] A. Narain and L. Kodres, 'Redesigning the Contours of the Future Financial System', SPN/10/10 IMF Staff Position Note (August 2010), 4.

[22] See note 10, para 13.

[23] See for example: Centre for Economic and Policy Research, Support for a Financial Transactions Tax, quoting among others Nancy Pelosi, Nicolas Sarkozy, Angela Merkel, Warren Buffet, Paul Krugman, George Soros, and others. See also in academic literature: Summers & Summers, 'When Financial Markets Work Too Well: A Cautious Case for a Securities Transaction Tax', 3 Journal of Financial Services Research (1989), 261.; J. E. Stiglitz, 'Using Tax Policy to Curb Short-Term Trading', 3 Journal of Financial Services Research (1989), 101. More recently also Schulmeister, 2010, supra n. 19; Alexander, supra n. 2.

[24] D. Baker, 'The Benefits of a Financial Transactions Tax', Centre for Economic and Policy Research (December 2008), 3.

Counterarguments to the FTT consider that it would limit parties' ability to hedge risk,[25] thereby reducing liquidity and increasing short-term volatility of asset prices. Indeed, not all speculation is necessarily negative, and certain forms of risk-taking enhance efficiency of the market.[26] A prominent voice quite sceptical of the FTT is the IMF in its June 2010 Report prepared for the G-20 entitled '*A Fair and Substantial Contribution by the Financial Sector'*. In the IMF report, this institution rather favours a combination of a financial activities tax (FAT) and a financial stability contribution (FSC). According to the IMF, first, a FAT should be levied on the sum of the profits and remuneration of financial institutions, and paid to general revenue; which according to the IMF would curb excessive risk-taking. Second, an FSC would be a levy to pay for the fiscal cost of any future government support to the sector.[27] On the FTT, this institution then argues that "*an FTT does not appear well suited to the specific purposes set out in the mandate from G-20 leaders*",[28] namely to: *"reign in excesses that led to the crisis, and reduce the development gap to accelerate convergence of living standards and productivity in developing and emerging economies to the levels of advanced economies."*[29] I list here three key arguments against the FTT voiced by the IMF, together with their counterarguments:

First, the IMF report argues that it is not the best way to finance a resolution mechanism since the volume of transactions is not a good proxy for the benefits it conveys to particular institutions or the costs they are likely to impose on it.[30] For the IMF, an FTT does not focus on core sources of financial instability which give rise to systemic risk. Notably, the fact that the financial sector has become too large is no indicator of it being socially unproductive, and a tax focusing on the sum of profits and remuneration might be easier to implement and better achieve the fair contribution of the financial sector to society.[31] The IMF also indicates that economists disagree as to whether market price volatility is reduced by an FTT and it states that "*it is now generally recognized that this is not always true either in theory (...) or practice (...).*"[32] However, the counterarguments are equally strong: on the one hand, Alexander argues that the example of the September 2008 collapse of Lehman Brothers demonstrates that the risk to the economy is not merely a function of the complexity of transactions, but also of the size of the transactions relative to the underlying assets

[25] K. Alexander, 'International Financial Regulatory Reform and Financial Taxes', 13 Journal of International Economic Law (2010), 900. (Himself a proponent of the FTT, but quoting a number of counter-arguments).

[26] See note 10, para 18.

[27] IMF, A Fair and Substantial Contribution by the Financial Sector, Final Report for the G-20 (June 2010).

[28] Ibid, 19.

[29] Ibid, 2-3.

[30] Ibid, 19.

[31] Ibid, 19 and 22.

[32] Ibid, 20. For a brief explanation of a number of pro – and contra – studies see: D. Baker, 'Responses to Criticisms of Taxes on Financial Speculation', Centre for Economic and Policy Research (January 2010).

on which they were written.[33] High volume trading is also potentially destabilizing, especially in the case of algorithmic trading which is based on the trades of others, thereby amplifying fluctuations away from equilibrium based on real economic indicators.[34] On the other hand, the proposition of the IMF to target excessive risk-taking through a balance sheet tax is equally contested, since financial institutions would simply shift risky assets and liabilities off their balance sheets outside the taxing jurisdiction.[35]

Second, it is uncertain where the burden of the tax would fall. According to the IMF, the real burden may fall largely on final consumers rather than earnings in the financial sector in the form of reduced returns to saving, higher costs of borrowing, and/or increases in final commodity prices.[36] Conversely, according an expert report commissioned by the Leading Group, there would be a trickle-down effect whereby proportional to their involvement, economic market participants who benefit from globalisation would pay a small contribution equal to their involvement.[37]

Finally, the IMF states that financial transactions are particularly vulnerable to avoidance by engineering. Notably, there would be the incentive to avoid taxes through integration (conducting transactions within businesses rather than between them), resulting into larger financial institutions. However, that argument does not militate against the FTT, since it equally applies to the FAT and is a problem that needs to be resolved whatever form the financial tax would take.

Whichever side of these arguments one finds oneself, it is clear that in order to mitigate the concerns on the FTT for the global economy, the FTT should be organized internationally: tackling global systemic risk, sharing the impact of the tax, or avoiding engineering, are all best tackled at global level. This argument is the subject of the following subsection.

3.3. **Risk of Geographic Relocation**

Now more than ever, financial markets operate at global level. Implementing the financial transaction tax in a regionally or nationally fragmented way exponentially increases the risk of financial engineering to avoid the tax; with financial institutions fleeing the area where it has been implemented. One oft-quoted example is Sweden, having unsuccessfully adopted such a tax from the mid-1980s. The tax was progressively widened in scope and heightened in rate, and by 1990 more than 50% of its securities trading activity moved to

[33] Alexander illustrates this with Lehman's OTC credit default swap book which had a notional value of 72 billion USD in 2008, as compared to its net exposure to OTC credit default contracts which was only 5.2 billion USD. See Alexander, note 25, 898.

[34] Ibid.

[35] Ibid, 897.

[36] See note 27, 21.

[37] Leading Group, 'Globalizing Solidarity: The Case for Financial Levies', Report of the Committee of Experts to the Taskforce on International Financial Transactions and Development (June 2010), 6, available at: <www.leadinggroup.org>.

London and other financial centres.[38] Because of this real risk of geographical relocation, Sweden is urging other G-20 countries not to adopt the FTT, but rather to opt for the balance sheet tax.[39] Whether or not the Swedish example is due to design flaws in the tax, in political minds there is an undeniable apprehension towards any risk of geographical relocation with commensurate effects on financial centres and national economies. For example, the UK is highly sceptical towards the FTT idea, though Germany less so. The latter EU Member State indeed defends the FTT in principle – with its Finance Minister in September 2010 stating that the technical problems are not insurmountable. He stated that the FTT provides an answer to a fair share to financing public coffers, but he stated explicitly that his country would not introduce such a tax unilaterally.[40] The UK was much more sceptical: the Chancellor of the Exchequer stated that he could not see in practice how the FTT would work, and that 'while it has been discussed for many decades, it would be discussed for many more decades to come.'[41] Hence, no country wants to go at it alone: the unknowns for national financial centres are too great, and evidence of the risk of relocation does exist. Arguments that relocation would only concern harmful and speculative trading and would therefore actually be beneficial,[42] will undoubtedly not suffice to convince the more sceptical states. It matters little whether the risk of geographic relocation is real or not, since the mere perception suffices to stop the FTT from ever becoming reality. In sum, only the global approach will be able to alleviate the (political perception of) risk of relocation with negative effects on countries' current positions in the global financial system.

3.4. **Funding Global Public Goods**

In this section I argue further that the central objective of the tax renders the option for global implementation the method of choice. In its December 2009 Conclusions, the European Council "*emphasise[d] the importance of renewing the economic and social contract between financial institutions and the society they serve and of ensuring that the public benefits in good times and is protected from risk.*"[43] In this statement, the European Council underwrites the regulatory objective of financial taxation ('protection from risk'), but also subscribes to public perception that this sector is not taking on its fair share of the tax burden while posing significant risks for the real economy. The regulatory

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[38] European Parliament, Special Committee on the Financial, Economic and Social Crisis, 'Crisis Management, Burden Sharing and Solidarity Mechanisms in the EU: A Follow-up Study to Financial Supervision and Crisis Management in the EU', (June 2010), 42.

[39] However, the Leading Group report argues that this is a poor example due to design problems in the Swedish tax. See note 37, 17.

[40] 'Finance Ministers Fail to Agree on EU Financial Transaction Tax', Taxation International 7 September 2010.

[41] Ibid.

[42] See note 10, 18.

[43] European Council Conclusions, 10-11 December 2009, 7.

aspect has been highlighted previously, and here I briefly reflect on the 'fair contribution' aspect of the FTT.

As the financial sector has boomed in size and profitability over the past two decades, it is expected to make a fair and substantial contribution to public finances. This argument can be made in general, or specifically in relation to the financial crisis. In general, there is the argumentation of fairness: where huge profits are reaped, there should be a contribution to society. Specifically to the financial crisis: given that the financial sector was seen to bear a major responsibility for the crisis, and having received substantial government support, the sector should now contribute to fiscal consolidation. However, if the EU wishes to have an FTT installed at global level, it is probably best not to strongly pursue this rationale for the tax, but rather the 'fair contribution' perspective. This is so because significant countries such as China, India, Australia and Canada did not engage in bailouts as many European countries and the USA have done. This argument would therefore have less traction. Hence, in mustering political support for a global FTT, and in designing the distribution of FTT proceeds (see further below), it is best to focus on earmarking revenue for the provision of global public goods.

At the turn of the Millennium, countries gathered in the General Assembly agreed to root out extreme poverty and hunger, achieve universal primary education, and achieve six other development goals by 2015 (MDGs). Between 2012 and 2017, the shortfall in finance required to meet international development and environmental commitments is estimated to be in the range of USD 324-336 billion per year during that five-year period.[44] With those numbers and the 2015 deadline closing in, the financial crisis has severely compromised the potential for governments to sustain their financial commitment to the MDGs. Hence it has been suggested that the proceeds of taxing the financial sector would go towards supporting the MDGs. The tax could make amends where UN members have previously faltered on delivering on their MDG commitment, with the financial sector thereby also contributing more fairly to society. Contrary to the IMF arguments, the Leading Group argues that the FTT could be considered as better suited to that objective than other options on the table such as FAT or FSC.[45] The FAT is a levy on profits and remuneration of financial institutions, and the FSC on liabilities and assets. In essence, these are taxes of financial sectors of each country. This national character makes them rather ill-suited for the broader 'global giving back' argument, namely the connection between taxing a global financial sector, and providing global public goods. From an implementing perspective, it would be highly difficult to ensure and enforce that income from taxing the global financial sector would flow to increased support for the MDGs. Hence, taxing the sector at global level, and dispersing them at global level, has the benefit of ensuring spread of the burden of payment of global public goods throughout the global economy. A global contribution by all, to global goods enjoyed by all.

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[44] See note 37, 1.
[45] See note 37, 14.

3.5. **The EU and an FTT Convention**

In the light of the preceding considerations the EU should emphasize the rationale of contributing to global public goods. First, the argument of an FTT contributing to national public coffers is likely to fall on stony ground with a number of countries which did not engage in bailouts, and negotiating national apportionments could endanger the FTT project as a whole, with little added value over alternative and more feasible options. Second, the option to finance development and the environment through the FTT ('a Robin Hood argument') is likely to gain more support. Given the global nature of the financial system, the fact that no-one is immune, and the preservation of global public goods being an equal responsibility for all, a financial contribution for their preservation can only be organised at the international level. A number of important regulatory elements also require a global consensus, including the risk of regulatory arbitrage, the need to constrain the volume of financial transactions at a global level, the need to ensure that the global financial sector exists in function of the needs of the real economy, and the need for an agreement on levying and distributing proceeds of the transaction tax.

For all the aforementioned reasons, the European Union should seek the negotiation and ratification of a new multilateral framework agreement to establish the FTT: a Multilateral Framework Convention on the Financial Transaction Tax (hereafter: FTT Convention, or FTTC).

4. THE LEGAL & INSTITUTIONAL FEATURES OF THE MULTILATERAL FTT CONVENTION

4.1. **The Functions of the FTT Convention**

To achieve the objectives explained in the previous section, the FTT requires global organisation with a mature international institutional framework to oversee its various aspects. More concretely, starting with its negotiation and during its lifetime, the legal and institutional regime of the FTT would at least have to fulfil the following functions:

(1) Political decision-making during the negotiation on the existence and nature of the regime itself.
(2) Substantive rule-making and rule adjustment through institutions geared to ensure the dynamic nature of the legal regime.[46]
(3) Administration and management of information for macro-prudential purposes.
(4) Dispute settlement between parties through judicial means.
(5) Levying the tax in cooperation with contracting parties.

[46] Dispute settlement and rule-making evidently overlap, but in this context rule-making is delimited to decisions by 'legislative' institutions of the FTT regime.

(6) Distribution of proceeds of the tax in line with the objectives for which the tax is earmarked.

To attain these functions three options could be pursued.

First, setting up a limited international legal framework which is not an international organisation proper, but an intergovernmental conference without independent institutions endowed with decision-making powers. A limited secretariat would serve the needs of the IGC, and the framework would at most consist of a legal bringing together the current actors already active in the sphere of global economic governance. While politically possibly the most feasible avenue, this model could legally not properly accommodate a financial transaction tax.

Second, setting up a standalone *new* international organisation with specific FTT purposes, with legal personality and mature institutions to implement, oversee and manage its indubitably complex legal and political system. This regime would co-exist with the current international financial institutions and draw on their expertise for substantiating, implementing and overseeing the FTT. While feasible to implement the FTT, it would have the problem of competition and resource duplication, notably with the IMF. This may be a politically viable option to negotiate since the standalone regime would be disconnected from issues such as IMF governance or linkage with the WTO and the Doha Round. However, instituting the FTT would provide an ideal moment for deeper overhaul of the global economic governance system as a whole, though the FTT might get lost in translation in such an ambitious project.

The third and final option is integrating the new legal regime into the International Monetary Fund. Negotiations on a framework convention for taxation of global financial transactions would either trigger or be part of a more thorough overhaul of the Bretton Woods system. It would provide an opportunity to transform the functions of the IMF into a Global Economic Governance Organization (GEGO). The regime would take on the form of the WTO with institutions at its centre, managing a number of agreements: the FTT alongside the Articles of Agreement. Synergy with the WTO dispute settlement could be foreseen, though could also merely serve as inspiration.

In the next subsections I shall consider more in-depth which of these three options is most feasible in legal and political terms; in light of the six functions they are expected to fulfil.

4.2. Function One – Political Decision-making on the FTT

4.2.1. *Institutionally: Role for the G-20*

The first function is political decision-making during the negotiation on the existence and nature of the regime itself, as well as during its lifetime; a role for which the G-20 is best suited. This body would have a dual role with regard to the FTT. First, political impetus to commence negotiations on the FTT Convention (FTTC) will have to come from this body, since at present it possesses

the most political legitimacy in international economic governance.[47] In the words of the Toronto summit declaration, it is "*the premier forum for our international economic cooperation*."[48] The G-20 would provide the political impetus and draw the initial chalk lines for the several rounds of undoubtedly challenging negotiations to follow. Second, it would need to establish for itself a firm leading political role during the lifetime of the FTT regime. As we shall see in considering the substance of the FTTC (Function five: levying), it will require regular legal and political follow-up with appropriate adjustments as markets adapt and evolve. While the G-20 might thus initially suffice to generate political momentum, over time this body would have to develop a more formal, institutionalized stature in the system of global economic governance, as outlined further.

At this juncture the G-20 is a flexible, open-ended, high level policy-deliberation mechanism that gained political clout due to the 2008 global financial crisis. Legally, the G-20 is not an international organisation, but an informal body without a formal constituting document, without formal requirements for memberships, and with no formalized voting mechanism.[49] It has no legal personality, and no powers have been formally conferred upon it. It possesses a two-level structure, with (bi-)annual meetings at head of state level, and meetings (as before) by the finance ministers and central bank governors. Substantively, the G-20 can discuss any matter it chooses, because there is no formal link with an international organisation with limited conferred competences. The deliverables from summit meetings take on the form of G-20 leaders' statements or summit declarations, and it does not produce legally binding instruments. The implementation of its policy agenda depends on formally instituted international organisations (IMF, WTO, OECD),[50] national governments, or other bodies such as the FSB or the Basel Committee. Hence, the G-20 is characterized by its informal nature, which would require formalisation in support of the FTT.

Given its crucial role during the initiation and mature phases of the FTT legal framework, the present form of the G-20 is not suited to decide on something as fundamental as taxing a global financial system to ensure funding for global public goods. Firstly, it does not possess the legitimacy to decide central issues which also concern the 172 non-member countries. This is because it lacks formal rules for membership based on objective indicators, and as a consequence it requires more formal stature. Second, its informal nature implies that it draws political clout solely from the atmosphere of crisis, thus giving it limited longevity in the long run. Hence, while from a pragmatic perspective the G-20 would initiate the FTT process, subsequent negotiations would have to be as inclusive as possible and reform the G-20 in the process. Because the

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[47] I deliberately use 'most' to indicate that while there are certainly many debates on the inclusiveness of the G-20 (developing nations notably), at present the body is nevertheless the premier political forum for global economic governance.

[48] G-20 Toronto Summit Declaration, 26-27 June 2010, 1.

[49] N. Woods, 'The G-20 Leaders and Global Governance', GEG Working Paper 2010/59 (October 2010).

[50] Ibid.

FTT would essentially imply deep reform to global economic governance, countries excluded from the G-20 could only support this body's central role if the rules for membership of the G-20 are clearer and formalised. G-20 reform is thus necessary to ensure that geographical fragmentation does not hamper the effectiveness of the tax itself. Hence, in support of the FTT one could ascribe to the suggestion to reform the G-20 into a Global Economic Council (GEC).[51] The GEC would transform the G-20 into a more formalized decision-making body within the institutional framework of the existing Bretton Woods institutions,[52] and would have formal rules of membership. These rules would bring long-term durability to the main body overseeing global economic governance, through a regime that is appropriately reflective of the relative and evolving importance of nations and regions. In relation to the IMF, this transformed G-20 would be institutionally positioned above the IMF's Board of Governors, which is politically the equivalent of the earlier and first format in which the G-20 met, the Ministers of Finance.[53] In this model, the G-20 would take on a role and position similar to that of the European Council in the European Union, a role of political steering, grand decision-making and the general direction in global economic governance.

As I shall point out further (Function two: rule-making), a number of new institutions will be necessary to implement a global financial transaction tax, notably institutions which have the ability to respond dynamically to evolution, innovation and engineering in the financial sector. A fixed, legitimate, high-level decision-making body mustering the political weight the G-20 currently enjoys is integral to that objective.

4.2.2. *Substantively: Initial Chalk Lines for the FTT*

As the premier forum for international economic cooperation the G-20 would draw the broad chalk lines of the FTT to be negotiated thereafter. The June 2010 Toronto G-20 Summit Declaration mentioned rather cursorily financial taxation (without actually calling it that), in relation to the resolution of ´too-big-to-fail´ financial institutions.[54] In Toronto it stated its support for an FTT under the heading 'Financial Sector Responsibility', as follows:

> "*21. We agreed the financial sector should make a fair and substantial contribution towards paying for any burdens associated with government interventions, where they occur, to repair the financial system or fund resolution.*
> *22. To that end, we recognized that there is a range of policy approaches. Some countries are pursuing a financial levy. Other countries are pursuing different approaches. We agreed the range of approaches would follow these principles:*
> *– Protect taxpayers;*

[51] J. Vestergaard, 'The G-20 and Beyond: Towards Effective Global Economic Governance', 4 Danish Institute for International Studies DIIS Report (2011).

[52] Ibid, 9.

[53] Ibid, 44.Vestergaard suggests that it would function as the Board of Governors, whereas I suggest it should be hierarchically placed above it.

[54] See note 48, 5.

– Reduce risks from the financial system;
– Protect the flow of credit in good times and bad times;
– Take into account individual countries' circumstances and options; and,
– Help promote a level playing field.
23. We thanked the IMF for its work in this area."[55]

On this basis we can already formulate four key points on the direction the G-20 ought to take with the FTT.

First, the language is deliberately vague on the national, regional or global level at which to pursue a financial levy. The reference to government interventions '*where they occur*' came at the request of countries such as India, Canada, Japan and China which did not bail-out their financial sectors. They therefore do not feel as compelled as Western nations to have the financial sector compensate them for their interventions. Furthermore, the distinction between some countries pursuing the financial levy and other countries having different approaches makes clear that while a global FTT is not excluded, enthusiasm is certainly highly limited. This passage points to a deeper schism between Western and Asian nations, namely the different approaches to banking regulation and supervision. Prior to the 2008 crisis, Western nations' approaches were broadly deregulatory, whereas in Asian countries such as Japan and China the opposite was true. Since Asian countries have been less averse to regulating their financial sectors,[56] they view this as one of the key reasons for not having had to bail out their financial institutions. Therefore, if the EU wishes to realize the FTT, it must emphasize the systemic market corrective function of international financial taxation, and push an FTT complementary with emerging powers' vision on regulating finance. In this sense, the EU is to actively engage the changed power structure of global economic governance as part of the process of installing the FTT.

Second, in the above quote there is no reference to a connection between a financial levy and dispensing the revenue towards the MDGs or other public goods. The objective of market correction is clearly present in the form of risk reduction and protection of the flow of credit. The only statement on the distribution of the revenue is the 'protection of taxpayers', language which is deliberately open-ended on connecting taxation to refunding taxpayers for the bail-outs in a number of advanced economies. Not all is lost for the FTT in function of global public goods, given the November 2010 Seoul Consensus on Shared Growth. The Union can make a good case can for the FTT to contribute to the Consensus as a means of innovative financing for development. The Consensus document draws its title from the fact that because of global interconnectedness, the crisis has disproportionately affected the most vulnerable in the poorest countries. The document also argues that "*as the premier forum for our international economic cooperation, because the G-20 has a role to play complementing efforts of aid donors*", "*growth must be shared*".[57] That

[55] Ibid, 18.
[56] Special Section on International Banking, The Economist, 15 May 2011.
[57] Seoul Development Consensus for shared growth, Annex I to the Seoul G-20 Summit Declaration.

argument is in line with the reasoning behind the FTT: taxing a sector which is currently perceived not to hold up its end of the social contract, taxing its activities at global level and dispersing the proceeds at global level. In this fashion, benefits as well as the burden is shared throughout the global economic system. Thus, the EU must explicitly connect the FTT to the objectives of the Seoul Consensus.

Third, the reference to 'promoting a level playing field' is an intriguing one open to many interpretations. From a legal perspective, it could be the most important innovation to global financial governance. At present international trade law is based on non-discrimination in the form of MFN and national treatment, but hardly so in international financial law. Hence, implementation of the FTT could imply a highly desirable sea-change to this area of international economic law, by introducing the same principle in the international financial system.[58] The Union would do well to further the FTT for that reason, as it would be in line with its obligation in Article 21 TEU, namely, to support international multilateralism based on the rule of law.

Fourth and finally, the G-20 would have to make a principled decision on the appropriate institutional setting for the FTT. Would this be a legal framework connected to the IMF, or would it stand as an independent international organisation? Answering this question would imply that the G-20 make a principled political decision on the role of the FTT in reforming or not reforming the Bretton Woods system. At the very least, for the FTT to function, the G-20 would have to recruit the necessary technical support from the IMF, Financial Stability Board (FSB) and other institutions. Aside from supporting the FTT negotiations, the IFI's position during the lifetime of the FTT regime could include formal incorporation of these bodies. Aside from the IMF, the regime would also require links with the FSB. It is hosted by the Bank for International Settlements and is composed of national supervisory financial bodies, financial ministries and central banks, and thus has been described as '*a network of networks*'.[59] At present, the IMF, the FSB as well as the Bank for International Settlements already collaborate in support of the political organ that is the G-20. For example, in preparation for the G-20 Finance Ministers and Central Bank governors they prepared a report entitled '*Macroprudential policy tools and frameworks*'.[60] In sum, during an initial phase, the IMF, FSB and other entities would provide the necessary private and public policy input to the negotiation process on the FTTC. However, formal institutionalisation will become necessary in order to levy the FTT, as will be shown further when discussion the second function of the FTT regime, rule-making and rule-adjustment.

[58] T. Cottier and M. Krajewski, 'What Role for Non-Discrimination and Prudential Standards in International Financial Law?', 13 Journal of International Economic Law (2010), 817-835.

[59] S. Sterkx, J. Wouters and T. Corthaut, 'The International Financial Crisis, Global Financial Governance and the European Union', 52 Leuven Centre for Global Governance Studies Working Paper (2010), 12.; T. Porter, 'Why International Institutions matter in the Global Credit Crisis', 1 Global Governance (2009), 5.

[60] International Monetary Fund, Financial Stability Board, Bank for International Settlements Macroprudential policy tools and frameworks – Update to G-20 Finance Ministers and Central Bank Governors, (14 February 2011).

Those being the key elements emerging from the Toronto Declaration, it is then notable that the Seoul G-20 Summit of November 2010 did no longer include taxation of the financial sector in its final declaration.[61] This might change during the remainder of 2011, now that the G-20 is headed by France. The objective for France and the EU at the G-20 meeting in Cannes should be to agree to convene an intergovernmental conference to negotiate a multilateral binding agreement setting out the framework for a global financial transaction tax.

4.3. **Function Two – Rule-making and Rule Adjustment**

The FTT regime would not only require top level political decision-making, but would also require institutions with the power to adopt dynamic revisions of the content of the framework agreement as needed. It would be particularly important to have a 'legislative' mechanism that deals with financial innovation which might be created in the future across different jurisdictions.[62] Further, a sufficient level of legal uniformity is necessary, and dynamic decision-making authorities would avoid that the regime quickly becomes obsolete through financial innovation and engineering. The institutions of the FTT Convention below G-20-level would thus include a ministerial level to make decisions on a yearly basis, as well as a permanent cooperation body for day-to-day management. Additionally, there should be some kind of formalised cooperation between countries' relevant supervisory authorities and central banks to commonly agree on which instruments to include in preparation of the high-level decision making body of the FTTC. Given this, the most feasible option is to reform the IMF and strengthen its institutions notably by connecting it more formally to the G-20 at the highest level, and the FSB and similar bodies at the technical level.

4.4. **Function Three – Administration & Dissemination of Information**

The FTT would require a strong secretariat to provide secretarial and administrative services, including liaison between its political decision-making structures, other international actors, national authorities responsible for levying the tax, and organisations dispersing proceeds of the tax. In line with the market corrective function of the FTT, it would also have an important function as regards information gathering, data analysis and information dispersal. Levying a broad based FTT in itself poses significant technical challenges as regards availability of information, but it would also generate large amounts of data. The IMF Research Department underlined that one of the key problems of the 2008 financial crisis was the lack of transparency and the lack of information available to decision-makers. IMF staff thus argues that obtaining better infor-

[61] G-20, TheG-20 Seoul Summit Leaders' Declaration, 11-12 November 2010.
[62] European Commission, see note 16, 14.

mation is an essential step in order to improve systemic risk assessments.[63] In a nutshell they conclude that information should be: more accessible, more timely, go beyond traditional statistical approaches and should draw on new sources.[64] The FTT could thus contribute to macro-financial stability not merely through its own expected impact on speculative trading, but the novel and comprehensive nature of the information generated by and required to run a global FTT could be used to achieve market corrective function of the tax. The FTT legal framework would therefore have to be equipped with strong institutions to manage this information flow. Given that such expertise is most readily present at the IMF, efficiency mandates that this organisation be reformed to accommodate the FTT regime. In interpreting, generating and using those data, it could then be contemplated to formalize a connection between that reformed IMF and the FSB and the Committee on the Global Financial System hosted at the BIS (Function two). Such connections would be further supportive of strengthening macro-financial analysis and constructing early warning mechanisms to identify risks and underlying vulnerabilities at an early stage.

4.5. **Function Four – Dispute Resolution**

Implementation and levying of the FTT in accordance with internationally agreed rules would occur at regional and/or national level. Given that it is indispensable to avoid distortion of competition and geographical relocation (e.g. 'a level playing field' – see above), the regime requires a robust system to settle disputes over differences in interpretation and implementation. A binding dispute settlement mechanism as instituted in the WTO in 1994 would be necessary to ensure smooth application of the FTT, and to ensure parties' continued commitment to the principles laid down in the FTTC. Proposing a dispute settlement mechanism under international financial law is not entirely new. In November 2009 the former IMF Chief Economist proposed the establishment of a dispute settlement mechanism for exchange rate controversies, such as that between the US and China.[65] It is, however, highly unlikely that China would agree to such binding dispute settlement. Nonetheless, Johnson argued back in 2009 that consensus was shifting to the idea that the WTO would have more legitimacy over exchange rates too: first, because smaller and poorer countries can bring and win cases against heavyweights such as the USA and the EU; and second, because the WTO also has proven tools for violations of acceptable trade practices with specific sanctions. Both arguments could be transposed to the FTT context. The financial transaction tax would require such a regime to ensure the level playing field to which the G-20 committed. As part of reforms to that end, one could even envisage a global economic governance organisation as an umbrella over the IMF and the WTO, with broader institutionalised

[63] G. Dell'Ariccia, et al., 'Lessons and Policy Implications from the Global Financial Crisis', WP/10/44 IMF Working Paper (2010), 26.

[64] See note 7.

[65] S. Johnson, 'Obama in China: Breaking the Exchange-Rate Deadlock', The New York Times, 5 November 2009.

dispute settlement, connecting FTT proceeds to the Doha compromise, and with the G-20 as the global economic council to provide political direction of the overall economic system. If not feasible, the reformed IMF or the autonomous FTT organisation could independently organise a WTO-inspired dispute settlement system specifically related to its taxation purposes.

4.6. **Function Five – Levying the Tax**

In popular discourse, the financial transaction tax is commonly stated to 'simply imply a low rate' that would hardly be felt by the financial system. In reality the technical complexities related to setting the tax rate and levying the tax on very different kinds of financial transactions is much greater than this popular statement implies. In order to work effectively, the product coverage and the tax rates should differ only marginally – or ideally be equal – across different members to the FTT regime. This to avoid financial institutions relocating to markets with lower tax rates, different definitions of financial transactions, or smaller product coverage.[66] Otherwise, relocation to countries outside of the FTT jurisdiction or with smaller coverage or rates is inevitable. As a consequence, for an FTT to work effectively it is necessary that a global consensus is attained on the tax *rate* (how high), on the *scope of the tax* (which instruments to include, e.g. derivatives or not?), the *tax base* (tax notional value or alternatives?) as well as *the taxable event* (what is a financial transaction?).

As regards the tax rate it is not simply 'wet finger work' of deciding that 0.01% seems an politically acceptable or appropriately low tax rate, but rather the number would have to depend on considerations related to (i) how much the relevant market will decline given the tax rate charged, (ii) the limitations the chosen rate imposes on liquidity, (iii) the amount of avoidance and circumvention as it relates to the height of the tax, and (iv) the wish to have a tax that is neutral across different asset classes or taxes assets differently.[67] All depend on complex calculations and political decisions, for which information is not always readily available. Given the idea of broadly taxing different classes of financial transactions, the international regime would have to reflect agreement on different tax rates reflecting the different lifespan, different liquidity requirements in the relevant markets, the perceived risk posed by the instruments, as well as the nature of the counterparts in the financial transaction. For example, should the tax differentiate between stock trading vs. derivatives trading or treat differently regulated banks vs. hedge funds?

As regards the scope of the tax, either the legal framework should aim at a scope *as wide as possible*, or conversely, as narrow as possible, such as only taxing currency transactions (Tobin Tax). This is so, because the risk of diversion to other products or to other legal entities would be too great. For example, it would not be sufficient to focus purely on the banking system, and the scope of the tax should also include mutual funds, pension funds and insurance

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[66] European Commission, see note 16, 18.
[67] D. Baker, supra note 24, 2.

companies. While undoubtedly politically sensitive to negotiate, strong national or regional differentiation is not desirable since that would only stimulate regulatory arbitrage. In that sense, a Tobin Tax is the lesser ambitious option, though probably the most politically feasible option to negotiate.

It is further necessary to define what falls under financial transactions, because the term does not merely include trade in securities, currencies or derivatives – usually targeted by the discussions on the FTT – but also lending, depositing, or acquiring insurance contracts.[68] The EU currently defines financial instruments in the Capital Markets Directive.[69] However, it would be necessary to agree the tax base at global level in order to ensure the level playing field. By consequence, it is thus necessary to have global definitions of financial products and transactions.

Finally, the tax base would need to be decided at international level too. When taxing derivatives, it would make a huge difference to tax the (usually very large) notional value of the contract, or rather the specific price of the contract. Additionally, there will be the need for comprehensive rules on ensuring that legal incidence and economic incidence coincide, in order to ensure that the burden does not come straight back to individuals.[70] Finally, financial transactions are either conducted centrally on an exchange, or through centralized or decentralized 'over-the-counter' (OTC) transactions between financial institutions. An FTT with a broad scope would imply the challenge of having to include both methods of trading, for example both stock exchanges as well as the OTC foreign exchange market.

In sum, the FTT requires a level of harmonisation currently unseen to the global financial system. This regime is currently composed of informal and formal networks, and a variety of hard but often soft legal binding documents. Consequently, the FTT would require a legal and institutional revolution to the international financial system, which explains the hesitant stance of earlier reports drawn up at technocrat level. The staff of the Commission and the IMF has an understandable scepticism given that it is highly implausible that such a far-reaching regime will ever see the light of day.

4.7. **Function Six – Distribution of FTT Proceeds**

If the tax is introduced at global level, all countries supposedly carry its burden and should benefit from it. However, financial transactions are concentrated in financial centres such as London, Frankfurt, New York, Singapore or Hong Kong. Hence, both the burdens and benefits of the tax (risk of relocation, revenue, etc.) would be borne by a small number of countries. Although levying

[68] European Commission Staff Working Document, Innovative financing at a global level, Brussels 1.4.2010 SEC(2010) 409 final, 26.

[69] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1)

[70] See note 10, para 25.

would occur in the relevant national jurisdictions, the global approach needs to incorporate a mechanism to share the risks and benefits of the system.

First of all, one part of the levied tax would have to go to the countries hosting the exchanges or where the OTC trade occurs. The other part would be used towards contributing to global public goods. As regards national apportionment, this would be limited to a form of compensation for public costs related to hosting these financial activities, and not part of a greater scheme of national apportionment. National apportionment as the chosen method to disperse the proceeds of the tax to fund global public goods would have two significant drawbacks: first, it would be difficult to negotiate respective national shares. Second, the funds would likely disappear in national general budgets with no direct linkage to the financing of global public goods. It is therefore preferable to directly earmark FTT income for the financing of the MDGs and the provision of global public goods such as the environment, health, etc.

The problem with earmarking is one that is commonly discussed in literature on taxation, and in fact a number of EU countries explicitly prohibit the earmarking of tax revenues to specific objectives.[71] Two key points explain this attitude to earmarking: first, this practice causes budgetary inflexibility, by restricting decision-makers in redirecting public income, as is necessary now or in the future.[72] Furthermore, earmarked revenues lead to rigidity by mismatching tax revenue to costs of the earmarked project or objective, since the income earmarked does not necessarily reflect the true costs of achieving the set policy objective (either by providing too little or too much funding). Arguably, the risk of inefficient allocation of funds and pre-committing future income applies also at international level.[73] However, earmarking of FTT revenues could mobilise funds directly for global public goods where otherwise they might suffer from lack of funding. The FTT Convention would thus have to balance such concerns with a principled commitment to a number of global public goods, and then possess sufficiently flexible structures (institutions and decision-making) to continuously evaluate the rationale for earmarking proceeds to specific global public goods (MDGs, climate change, and so on). The institutions of the FTT Convention would then have the responsibility to accord the proceeds according to the distributive formula laid down in secondary law of the FTTC. Indicatively, revenue could be committed to either or all of the following international sources:

– Funds could be allocated as *resources to the IMF* which would utilize them to support further its lending activities with specific earmarked objectives. The IMF already has special arrangements such as the Poverty Reduction Facilities, the Heavily Indebted poor Countries Initiative, and the Poverty Reduction and Growth Facility. In this field cooperation with the World Bank is already tight-knit, which would continue. However, this option is likely to

[71] Belgium, for example.
[72] European Commission, see note 68, 13.
[73] Ibid, 14.

be the least preferable, since the role of the IMF in development is certainly not viewed as positive by all, certainly by some developing nations.

- The proceeds could serve to fund so-called *debt swaps*, whereby heavily indebted poor countries are relieved of a certain amount of their debt burden, and in return receive grants for specific purposes such as health, environment, and so on.
- To other *multilateral/regional development banks*, the international development agency or the African Development Fund. Such an earmark would be in line with the G-20 Pittsburgh communiqué which committed itself to ensuring that the development banks would have sufficient capital to fulfil their core challenges.
- *Contribution to funds of UN Specialized Agencies,* specifically to UNICEF, UNEP, UNDP, UNAIDS, UNHCR, WFP etc., depending on the decision on which public goods should be supported by the FTT proceeds.
- Innovative financing through special regimes such as the *International Finance Facility for Immunisation* (IFFI) could provide a useful example. This functions through donors providing long-term pledges which are converted by the IFFI by selling bonds on the capital markets, and through that fashion has access to capital more readily available to support its health care objectives. The proceeds of the financial transaction tax could take the place of, or figure alongside such long term pledges, and the capital raised in this fashion could be disbursed to donors in accordance with their own mechanism.

These are but a few suggestions, the choice of which partially depends on the legal structure chosen to implement the FTT. Particularly the relationship to the World Bank and the IMF will be crucial. In the case of the IFFI, for example, the World Bank acts as adviser and treasurer for the charity, which itself is incorporated as a charity in the United Kingdom. Conversely, an IMF-run FTT Convention would require either distribution of funds within its mandate (lending, debt relief) or a revision of its functions and relationship to for example UN specialised agencies and the provision of grants to other donors. In substance, the debate in the context of the FTT would have to draw on such initiatives as the Monterrey Consensus on Financing for Development (2002 and its follow up conference in Doha in 2008) as well as the work of the Leading Group on Innovative Financing for Development.

5. THE FTT AND THE UNION AS A GLOBAL ACTOR

In this paper I have argued that the global implementation of a financial transaction tax is the only viable option for political, legal and economic reasons. Such a tax would have as its purpose to finance global public goods, and thus ensure a fair contribution of the global financial sector to global public goods. Additionally, such a tax would have a significant regulatory impact towards a more stable financial system and therefore require a sea-change to international financial institutions. Beyond these international arguments there are

also strong EU-focused imperatives as to why the Union should pursue the *global* FTT with commensurate beneficial effects on the legalisation and institutionalisation of global economic governance. Namely, the Union would reap a double dividend from lobbying for – and possibly realizing the global implementation of the FTT. First, success in this regard would be supportive of the Union's self-imposed promise and image of the value-based international actor;[74] and second, it would do much to provide post-Lisbon legitimacy towards its own citizens through effectiveness as an international actor. The 2001 Laeken Declaration on the future of the European Union strongly asserted both points in its characteristically grand language:[75] "*Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?*" Further in the Declaration, the European Council argued that leading role is one of the key expectations of Europe's citizens: "*The image of a democratic and globally engaged Europe admirably matches citizens' wishes. (...) they also want to see Europe more involved in foreign affairs, security and defence, in other words, greater and better coordinated action to deal with trouble spots in and around Europe and in the rest of the world.*" This role for the Union whereby it 'stabilizes' the world, and 'points the way ahead' is not merely a moral imperative, but a legally binding obligation embedded in primary law. Article 3(5) TEU states that in its relations with the wider world, "the Union shall (...) contribute to peace, (...) the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty (...) as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." Thus, the Union is morally and legally obliged to pursue equality amongst wealthy and poorer nations, to support their development and ensure 'fairness' between them. In doing so, the TEU not only imposes substantive requirements on EU international relations, but also a strong methodological imperative: according to Article 3 TEU and confirmed in Article 21(1) TEU, "shall be guided by the principles which have inspired its own creation and which it seeks to advance in the wider world: (...) respect for the principles of the United Nations Charter and international law." In other words, the Union must pursue a global order reflecting its own values of fairness and justice, entrenched in multilateral solutions based on the rule of law. The global implementation of a financial transaction tax through a multilateral, binding international convention requiring unprecedented positive change to international financial governance arguably checks all those boxes. This is also why Barnier, Barroso, Sarkozy, Merkel and others have argued that the Union '*should lead by example.*'[76] However, given the market corrective function, the risk of regu-

[74] U. Khaliq, Ethical Dimensions of the Foreign Policy of the European Union – A Legal Appraisal (Cambridge, Cambridge University Press, 2008); R. Petrov and P. Leino, 'Between 'Common Values' and Competing Universals – The Promotion of the EU's Common Values through the European Neighbourhood Policy', 15 European Law Journal (2009).

[75] European Council, Laeken Declaration on the Future of the European Union, 14-15 December, 2001, subheading 'Expectations of Europe's citizens'.

[76] See section 2 in this Working Paper.

latory arbitrage and the connection to global public goods, we have argued that the global solution is the only viable one.

If the argument stemming from EU primary law is perhaps slightly abstract and legalistic, the connection to expectations of European citizens should be less so. Indeed, the financial transaction tax is a concrete iteration of where the Laeken Declaration in the abstract spoke of EU citizens' wishes. This is underlined by the Commission's public consultation on the FTT which ended in April 2011. That consultation clearly showed that civil society across the European Union broadly supports the financial transaction tax.[77] From the Commission's summary report,[78] it is clear that NGOs and trade unions are strongly in favour of a broad-based financial transactions tax and that individual citizens also 'generally favour' such a broad-based levy. Conversely, and unsurprisingly, financial organisations and businesses, consultancies and their relevant representative organisations generally oppose any and all types of additional tax burden on the financial sector or financial markets in general.[79] Thus, given the broad popular support amongst European citizens it is submitted that successfully working towards the FTT at global level would bring the Union *legitimacy through effectiveness*. Individual Member States will be unable to exert sufficient influence in the G-20 to realize a global financial transaction tax, but should the Union manage to speak with its proverbial single voice in a sustained lobbying effort at the highest echelons, success may be within reach with commensurate effects on the EU's standing in the hearts and minds of European citizens.

6. CONCLUSION

If the European Union wishes to establish a global financial transaction tax, it must forcefully support further legalisation and institutionalisation of the global economic governance system. In order to achieve the objectives of market correction and funding global public goods, it is necessary that the FTT be organised at *global* level: mitigating global systemic risk posed by the financial system, sharing the benefits and burdens of the tax, and avoiding engineering are all best tackled internationally. Achieving these objectives is furthermore only possible by setting up a new international legal regime with a mature institutional set-up. This institutional set-up is either delivered by a reformed IMF, or by a new international financial organisation working in close cooperation with existing bodies such as the IMF, WB, FSB, BIS, etc. The FTT would require the G-20 to provide initial political impetus to the negotiation of the regime, and

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[77] All responses to the consultation as well as a summary by the Commission are available at:<http://ec.europa.eu/taxation_customs/common/consultations/tax/2011_02_financial_sector_taxation_en.htm> (Last accessed 16 August 2011)

[78] Commission summary report, May 2011, available at: <http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/financial_sector/summary_results_en.pdf>.

[79] 'Banks and markets oppose financial transaction tax, EurActiv,18 August 2011 <http://www.euractiv.com/en/euro-finance/banks-markets-oppose-financial-transaction-tax-news-507022>.

during the process would itself have to be transformed into the top political institution of the FTT regime. The framework convention would have mature institutions to ensure dynamic rule-making adapting the regime to financial engineering and innovation, and a dispute settlement system would ensure harmonious implementation across its member states. Distribution would occur through classical or more innovative means of financing. Consequently, in November 2011 at the G-20 Meeting in Cannes, the EU should propose the negotiation of a multilateral financial transaction tax convention.

Overall, setting up the Financial Transaction Tax Convention would require an unprecedented change to international financial governance, arguably to the systemic benefit of the international economic system. The regime would further introduce legal commitment and a level playing-field, thereby thoroughly changing (for the better) the international system of financial governance which is currently governed by club-like international networks which generate non-binding instruments which have failed to contain the financial system from spinning out of control.

For the Union as an international actor, to be seen to realize such an initiative could be a strong deliverable legitimizing the Union itself. Popular support for the financial industry to make good for the consequences of the financial crisis is broad, and positive support for the FTT could be the kind of success the Union needs for it to be viewed as legitimate in the eyes of European citizens.