

# The legitimacy of the G20 – a critique under international law

*Kern Alexander*<sup>\*</sup>, *Karin Lorez*<sup>\*\*</sup>, *Martin Zobl*<sup>\*\*\*</sup> and *Daniel Thürer*<sup>\*\*\*\*</sup>

## Introduction

The establishment of the G20 in 1999 as a group of finance ministers and central bank governors representing nineteen countries and the European Union has evolved to become the preeminent international forum for debating and initiating reforms of the international economic, monetary and financial systems.<sup>1</sup> The G20 was initially intended to be different from other international economic and financial institutions as it was designed to take into account the interests of both economically advanced and developing market countries.<sup>2</sup> In doing so, it expanded on the work of the G7 in overseeing global economic governance issues in the world's most advanced economies.<sup>3</sup> The G20 also addressed weaknesses in the International Monetary Fund's conditionality and financial support programmes that became evident during the Asian crisis.<sup>4</sup> Despite the value of having such a broad-based global economic governance group, the G20 never achieved its full potential in the early 2000s mainly because the United States and other G7 (and later G8) countries continued to pursue their multilateral economic and financial policies through alternative fora outside the G20.<sup>5</sup> Later, the United States and other G7 countries attracted much criticism following the onset of the global financial crisis that erupted in late 2007 and intensified in 2008 mainly because of flawed U.S. and European financial regulatory policies.<sup>6</sup> As the financial crisis spread, a type of 'trial by fire' emerged as the G20 Heads of States convened in Washington DC in November 2008 to adopt a Joint Action Plan to deal with the crisis that included fiscal and

---

<sup>\*</sup> Professorial Chair for International Law and Finance, University of Zurich. The authors would like to thank M Law Alexandra Balmer for her helpful research assistance.

<sup>\*\*</sup> Associate, PricewaterhouseCooper, PhD in Law, University of Zurich.

<sup>\*\*\*</sup> Research Fellow, the Institute for International Law, University of Zurich, PhD in Law, University of Zurich.

<sup>\*\*\*\*</sup> Professor emeritus for International Law, European Law, Public Law and Comparative Constitutional Law at the University of Zurich.

<sup>1</sup> In 2008, the G20 expanded to twenty permanent members, 19 countries plus the EU. Communiqué of Finance Ministers and Central Bank Governors, 'Meeting Of G-20 Finance Ministers and Central Bank Governors' (G20 Conference, Berlin, January 1999).

<sup>2</sup> Communiqué of the G20 Finance Ministers and Central Bank Governors (G20 Meeting, Berlin, 1999) point 2.

<sup>3</sup> See International Monetary Fund, Group of Seven <[www.imf.org/external/np/exr/facts/groups.htm#G7](http://www.imf.org/external/np/exr/facts/groups.htm#G7)> accessed 24 March 2014.

<sup>4</sup> Declaration Summit on Financial Markets and the World Economy (G20 Meeting, Washington, 2008) II.

<sup>5</sup> The Group of Twenty: A History 45ff <[www.g20.utoronto.ca/docs/g20history.pdf](http://www.g20.utoronto.ca/docs/g20history.pdf)> accessed 26 March 2014.

<sup>6</sup> Discussing weaknesses and failure of US financial regulation prior to the crisis: See Committee of Inquiry of the Causes of the Financial Crisis: The Financial Crisis Inquiry Report, *The Financial Crisis Inquiry Report* (Official Government Edition 2011 3-441, ISBN 978-0-16-087983-8); And the de Larosiere Report discussing the weakness in European Union financial regulation prior to the crisis: J de Larosiere, Report of The High-Level Group of Financial Supervision in the EU (Brussels, 2009) <[http://ec.europa.eu/internal\\_market/finances/docs/de\\_larosiere\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf)> accessed on 17 March 2014.

monetary measures to reinvigorate domestic economies and additional measures to assist poorer countries affected by the crisis.<sup>7</sup>

The G20 Washington DC summit was the first of several meetings at which the G20 addressed weaknesses in the global economic and financial system and re-established itself as the preeminent international institution for promoting economic and financial policy and regulatory reform. It would do so by coordinating macro-economic reforms (ie., monetary and fiscal policies) with the International Monetary Fund and financial regulatory reforms with the newly constituted Financial Stability Board.<sup>8</sup> Shortly thereafter, the G20 Heads of State met in London in April 2009 – a critical time for the world economy, which was suffering a serious credit crunch and economic recession – and adopted a communique and agreement that added more detail to the G20's role as international economic and financial policymaker. Crucially, the London Summit Communique stated: “[a] global crisis requires a global solution”, observing that actions taken by fiscal authorities and central banks “will constitute the largest fiscal and monetary stimulus and the most comprehensive support programme for the financial sector in modern times.”<sup>9</sup>

Despite these bold initiatives, the G20 has been criticised, among other things, for not being an open and transparent institution with respect to its decision-making, and for assuming a mandate as leading international economic policymaking body without any formal legal mandate or consent by non-G20 member countries who are subjected to its norms and standards.<sup>10</sup> Despite the growing literature that has critically analysed the G20 from an economic and political economy perspective,<sup>11</sup> this article analyses the G20 institutional structure and functionality from an international law perspective. Part I traces the G20's institutional development and the growing strains in its international policymaking function. Part II considers the principle of legitimacy as established under public international law to analyse the legitimacy of the G20 based on the rule of law, the principle of democracy, and good governance standards (transparency and accountability). Part III discusses different ways to overcome the legitimacy and efficiency deficits in the G20 framework. Part IV considers some of the main alternative models of international economic governance and suggests possible institutional reforms for the G20.

## **I. G-20 developments and the growing critique**

---

<sup>7</sup> In doing so, the G20 approved the creation of the Financial Stability Board to take the lead in adopting international financial regulatory reforms and to work with the International Monetary Fund in coordinating the FSB's financial regulatory reforms with the Fund's macro-prudential economic and financial oversight function.

<sup>8</sup> Leader's Statement London Summit (G20 Conference, London, 2009) point 15.

<sup>9</sup> Leader's Statement London Summit (N 8).

<sup>10</sup> See generally N Woods, 'The G20 Leaders and Global Governance' GEG Working Paper 2010/59, 7f <[www.globaleconomicgovernance.org/sites/geg/files/Woods\\_GEG%20WP%202010\\_59.pdf](http://www.globaleconomicgovernance.org/sites/geg/files/Woods_GEG%20WP%202010_59.pdf)> accessed 17 March 2014.

<sup>11</sup> S Choo and C R Kelly, Promises and Perils of New Global Governance: A Case of the G20 (2012) Chi. J. Int'l L. 491, 32 <[http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1158&context=fac\\_schol](http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1158&context=fac_schol)> accessed 17 March 2014; see also Woods (N 10) 7.

The G20 formally proclaimed itself the premier international institution to oversee global economic and financial policy at the G20 Heads of State London Summit on 2 April 2009<sup>12</sup>. The G20 and the Financial Stability Board (which was to be accountable to the G20) membership were to include the leading advanced developed countries and the largest developing country economies.<sup>13</sup> This reconstituted membership enabled the G20 to claim that they represented economies that accounted for approximately 80% of the world's GDP.<sup>14</sup> During the London Summit, the world economy was in the grip of a deep economic slowdown and financial market malaise. This provided the impetus for G20 leaders to adopt a massive fiscal stimulus plan (increased government spending and tax reductions) to help national economies recover from the global financial and economic crisis that had begun in late 2007. It was also agreed at the London Summit that over US\$ one trillion would be channelled through international financial institutions (IFIs) to stimulate weakened national economies. The US\$ one trillion consisted of an increase of \$500 billion<sup>15</sup> for the International Monetary Fund's "New Arrangement to Borrow" programme<sup>16</sup> to be made available in the form of loans to central banks of countries hardest hit by the crisis. The G20 also agreed to an increase of at least \$100 billion<sup>17</sup> in additional lending for the Multilateral Development Banks (ie., Asian Development Bank) and \$250 billion<sup>18</sup> in subsidies for banks in support of trade finance. Together with national efforts to stimulate recovery, the G20 package constituted "a global plan for recovery on an unprecedented scale."<sup>19</sup>

Later in 2009, at the Pittsburgh Summit, the G20 agreed on a comprehensive set of objectives for financial regulatory reform, including, among other things, enhanced bank capital and liquidity requirements under the Basel III agreement, general principles for the resolution of large financial institutions, and centralised clearing of most OTC derivative contracts.<sup>20</sup> At the Toronto Summit in July 2010, the G20 reviewed the results of its Mutual Assessment Process, which was designed to ensure that G20 members and other non-G20 jurisdictions were in the process of implementing the main economic and financial regulatory reform measures adopted by the G20 and Financial Stability Board.<sup>21</sup> The mutual assessment process was considered crucial for ensuring that there was an effective international economic response to the crisis and that all countries were doing their part to stimulate a global recovery while

---

<sup>12</sup> Ibid; Leader's Statement London Summit (N 8).

<sup>13</sup> For current G20 member states, see International Monetary Fund, Group of Twenty <[www.imf.org/external/np/exr/facts/groups.htm#G20](http://www.imf.org/external/np/exr/facts/groups.htm#G20)> accessed 24 March 2014.

<sup>14</sup> G20, About <[www.g20.org/about](http://www.g20.org/about)> accessed 13 March 2014; P Subacchi and S Pickford, 'Legitimacy vs Effectiveness for the G20: A Dynamic Approach to Global Economic Governance' Chatham House International Economics IE BP 2011, 6 <[www.chathamhouse.org/sites/default/files/1011bp\\_subacchi\\_pickford.pdf](http://www.chathamhouse.org/sites/default/files/1011bp_subacchi_pickford.pdf)> accessed 14 March 2014.

<sup>15</sup> Leaders Statement Pittsburgh Summit (G20 Conference, Pittsburgh, September 2009) 3, 10.

<sup>16</sup> International Monetary Fund, IMF Standing Borrowing Arrangement <<http://www.imf.org/external/np/exr/facts/gabnab.htm>> accessed 1 April 2014.

<sup>17</sup> Leaders' Statement the Pittsburgh Summit (N 15) 10.

<sup>18</sup> Leaders' Statement the Pittsburgh Summit (N 15) 18.

<sup>19</sup> It was estimated that this unprecedented and concerted fiscal expansion would amount to \$5 trillion, i.e., approximately 8% of world GDP.

<sup>20</sup> Leaders' Statement the Pittsburgh Summit (N 15).

<sup>21</sup> The G-20 Toronto Summit Declaration (G20 Conference, Toronto, July 2010).

adopting the necessary regulatory reforms.<sup>22</sup> To address the inflationary risks and potential market distortions of such massive fiscal and monetary stimuli and the recapitalisation of the banking sector, the G20 encouraged countries to adopt credible exit strategies, and for advanced economies to agree on principles of fiscal consolidation, as well as further steps to strengthen financial sector stability through increased regulation.<sup>23</sup>

Despite much progress in combatting the crisis and preventing much of the world's economy from falling into a global depression, the G20 has not been as successful or willing to address macro-prudential strains in financial markets that have the potential to cause a global financial crisis. Economists have identified two important areas of concern:<sup>24</sup> First, volatile cross-border capital flows, where the balance of adjustment falls heaviest on countries running capital account deficits and which do not have adequate access to reserve currency assets to finance these deficits. Second, massive accumulation of reserve currencies by certain countries (i.e., China) has arisen over the last decade because of substantial deficits in the trade and capital accounts of many countries that have been caused in part by weak regulation of cross-border capital flows. Any adjustments by countries running substantial deficits (i.e., the U.S. reversal of monetary easing through its "tapering" policy) that result in current or capital account surpluses could have an aggregate deflationary impact on the global economy, with especially adverse effects for developing and emerging market countries.

These continuing strains on the global financial system have particularly harsh implications for developing and emerging market countries.<sup>25</sup> In light of this, G20 policy initiatives appear to be ignoring what most economists agree are serious imbalances and fragilities in the global financial system.<sup>26</sup> For instance, at their meeting in Brisbane in 2014,<sup>27</sup> the G20 central bank governors and finance ministers agreed to take "concrete actions" to address the global economic slowdown and to implement structural financial regulatory reforms that would aim to heal the economic scars caused by the global financial crisis.<sup>28</sup> Such "concrete actions"

---

<sup>22</sup> Indeed, the IMF and World Bank estimated that with improved coordination among national policymaker's responses that global economic output could be increased by 4.5% in 2010. See IMF, *World Economic Outlook* (World Economic and Financial Surveys, April 2010) XIV <[www.imf.org/external/pubs/ft/weo/2010/01/pdf/text.pdf](http://www.imf.org/external/pubs/ft/weo/2010/01/pdf/text.pdf)> accessed 24 March 2014.

<sup>23</sup> The G-20 Toronto Summit Declaration (N 21).

<sup>24</sup> See D Strauss-Kahn, Speech (High-Level Conference on the International Monetary System, Zurich, 11 May 2010) on file with author.

<sup>25</sup> Leader's Statement London Summit (N 8) point 15, 25.

<sup>26</sup> M Miller, *Macro-Governance and the Great Game of International Monetary Reform* (Background paper for RWBC-Paris Session5, the Transition Framework, December 2010) 5ff <[www2.warwick.ac.uk/fac/soc/economics/staff/academic/miller/events/rwbcparis.pdf](http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/miller/events/rwbcparis.pdf)> accessed 27 March 2014.

<sup>27</sup> Communiqué Meeting of Finance Ministers and Central Bank Governors (G20 Summit, Brisbane, February 2014). At Brisbane, the G20 has done little more than to adopt the broad principles outlined in a IMF paper prepared shortly before the Summit. The IMF paper predicts that, based on current policies, real GDP in the G20 will grow by 3.8-3.9 per cent in both 2014 and 2015, substantially better than the 3.2-3.3 per cent achieved in the last two years: International Monetary Fund, *Global Prospects and Policy Changes* (IMF Report for the G20, Brisbane, February 2014) <[www.imf.org/external/np/g20/pdf/2014/021914.pdf](http://www.imf.org/external/np/g20/pdf/2014/021914.pdf)> accessed 1 March 2014.

<sup>28</sup> The G20 communique at Sydney called for increases in global economic growth of 0.5 percent per annum from 2014-18, thus raising world output by over 2 per cent (\$2.25 trillion) in the final year of the period. Australia, the G20 host country in 2014, had been pushing for the adoption of a global growth target, and US treasury secretary Jack Lew said after the meeting that this target marked a profound change of tone for the

would, they asserted, include reforms aimed at adding more than \$2 trillion to the global economy over five years, marking a shift in emphasis at G20 level from advocating austerity to promoting growth as the financial crisis recedes.<sup>29</sup> However, no specific policies or details were announced concerning what these “concrete actions” would be. Although the G20 communique calls for enhanced international cooperation, which of course is necessary for achieving an effective global economic response, it lacks any details about what economic policy adjustments should be made.<sup>30</sup> For instance, the G20 did not address specifically how developing and emerging market countries should adjust their economies in response to more restrictive monetary policy by developed countries (ie., US Federal Reserve’s “tapering policy”).<sup>31</sup> Moreover, the G20 did not address how developing and emerging market countries could be assisted in adjusting their economies through a combination of weaker currencies, tighter monetary policies and reduced growth targets, and whether these policy adjustments would be adequate in reducing current and capital account imbalances. In other words, the G20 has failed to take into account how their members’ economic and monetary policy adjustments and regulatory reforms have resulted in a protracted economic slowdown and more private and public sector austerity, especially for developing and emerging market countries.<sup>32</sup> This should not be surprising, however, given that most developing and emerging market countries, and even some developed countries, are not G20 members. This raises important issues on the G20’s role in global economic governance and the effectiveness, accountability and legitimacy of G20 economic and financial policymaking under international law.

## II. The legitimacy of the G-20 under international law

### 1. *The Requirement of a democratic and equitable international economic order*

---

G20, compared with the focus on budgetary austerity in previous years. Others, like the ECB and the German Finance Minister, were much more sceptical, and in fact no new measures have yet been adopted to help attain the growth targets. The real test will come at the Brisbane G20 Summit in November 2014, when concrete measures are intended to be unveiled. See Communiqué Meeting of Finance Ministers and Central Bank Governors (N 27).

<sup>29</sup> Communiqué Meeting of Finance Ministers and Central Bank Governors (N 27).

<sup>30</sup> To elaborate on this view see comments of Barclays bank economist Christine Keller who stated “It is difficult to see how such improved co-operation would change much in practice” Szu Ping Chan, *The Sunday Telegraph* (London, 23 February 2014) 2, on file with author.

<sup>31</sup> This prompted India’s central bank governor, Raghuram Rajan, to criticize “the US and other industrialized countries for running selfish economic policies as their recovery leads to turmoil in emerging markets”. He said “emerging markets had helped pull the world out of the 2008 financial crisis and should not be ignored now.” See R Harding, J Aglionby, D Strauss et al., ‘India’s Raghuram Rajan hits out at unco-ordinated global policy’ *Financial Times* (London, 30 January 2014). However, see also G20 official communiqué 2014 at Brisbane stating: “All our central banks maintain their commitment that monetary policy settings will continue to be carefully calibrated and clearly communicated, in the context of ongoing exchange of information and being mindful of impacts on the global economy.” Communiqué of the G20 Meeting of Finance Ministers and Central Bank (N 27) point 4; see also L Egan and J Strupczewski, G20 aspires to faster economic growth, roadmap sketchy (Reuters, 23 February 2014) <[www.reuters.com/article/2014/02/23/us-g20-australia-idUSBREA1L02Q20140223](http://www.reuters.com/article/2014/02/23/us-g20-australia-idUSBREA1L02Q20140223)> accessed 24 March 2014.

<sup>32</sup> IMF, *World Economic Outlook* (April 2013) 19ff <[www.imf.org/external/pubs/ft/weo/2013/01/pdf/text.pdf](http://www.imf.org/external/pubs/ft/weo/2013/01/pdf/text.pdf)> accessed 27 March 2014; For Africa: IMF African Department, *Impact of the Global Financial Crisis on Sub-Saharan Africa* (2009) <[www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf](http://www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf)> accessed 27 March 2014.

The UN General Assembly has stressed the importance of a democratic and equitable international order in a number of resolutions.<sup>33</sup> Most recently, General Assembly Resolution 63/189 notably applies this principle to the international economic order by stating:

“(t)he right to an international economic order based on equal participation in the decision-making process, interdependence, mutual interest, solidarity and cooperation among all States.”<sup>34</sup>

Moreover, General Assembly Resolution 3201 requests states to adhere to the following principles regarding the organization of the international economic system:

“b. The *broadest co-operation* of all the States members of the international community, *based on equity*, whereby the prevailing disparities in the world may be banished and prosperity secured for all;

c. *Full and effective participation on the basis of equality* of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, while devoting particular attention to the adoption of special measures in favour of the least developed land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities, without losing sight of the interests of other developing countries; [...]

e. [...] No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right; [...].”<sup>35</sup>

Even though these provisions are legally non-binding and primarily intended to address the economic inequalities between western developed and former colonial countries,<sup>36</sup> they reveal two things: First, regarding substantive content they suggest a growing understanding that prosperity and development are universally desirable aims. Second, they clarify that the fate of the global economy, and the questions inevitably connected to it, should not be determined by a handful of economically advanced nations, but by a broader range of countries, including developing and least-developed countries (LDCs). In fact, Resolution 3201 strongly encourages effective co-operation of all members of the international community based on the principle of equality.<sup>37</sup> If the authority to determine the content of international economic norms and to issue regulations lies in the hands of a few countries, this may result in a greater imbalance of economic and political power and create (another) oligarchy in international

---

<sup>33</sup> See for example United Nation General Assembly Resolution 63/189 „[...] everyone is entitled to a democratic and equitable international order.“ UNGA Res. 63/189 (18 December 2008) UN Doc A/RES/63/189 ciper 1. See also earlier UNGA Res. 61/169 (19 December 2006) UN Doc A/RES/61/169 and UNGA Res. 59/193 (20 December 2004) UN Doc A/RES/59/193 and UN Counsel on Human Rights UNCHR Resolution 8/5 (18 June 2008) UN Doc A/HRC/8/5.

<sup>34</sup> UNGA Res. S-6/3201 (1 May 1974) UN Doc A/RES/S-6/3201 (Declaration on the Establishment of a New International Economic Order) ciper 4 (emphasis by author).

<sup>35</sup> UNGA Res. S-6/3201 (N 34) ciper 4 (emphasis by author).

<sup>36</sup> See D Thürer and T Burri (2012) ‘Soft law’ *Encyclopedia of Public International Law*, 2012 on file with author.

<sup>37</sup> UNGA Res. S-6/3201 (N 34) ciper 3 „Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.“

relations. Indeed, this would be contrary to an equitable economic order and may endanger economic and political stability.<sup>38</sup>

## 2. *Universalized institutions and legitimacy principles in international law*

### a) *Development of institutions and procedural principles*

Since the founding of the United Nations, the international community has developed rules and procedures to address and resolve problems arising from the challenges of globalisation. For instance, decolonisation and the subsequent acceptance of newly de-colonialized states into the international community as sovereign members are important achievements in the history of international law.<sup>39</sup> The UN has achieved a near universal membership of 192 states, all of which have voting rights in the General Assembly as well as in various UN committees. Indeed, the influence of developing and emerging market countries in the decision-making structures of most international organisations has grown despite persistent economic and social inequalities between developed and developing countries that are still partly reflected in the institutional structures of these organisations.<sup>40</sup> Although the Bretton Woods institutions - the World Bank and the International Monetary Fund - and the World Trade Organisation have established near universal regimes to coordinate and regulate the economic, monetary and trade policies<sup>41</sup> of their member countries, respectively, decision-making and agenda setting in these organisations remains largely in the domain of developed countries and a few large developing countries.<sup>42</sup> At the same time, regional organisations and associations have been established (outside the European Union), such as the African Union (AU), the Organization of American States (OAS), and the Association of Southeast Asian Nations (ASEAN), to promote regional cooperation in economic, financial and trade matters, and have made progress in integrating developing and emerging market countries into their decision-making structures.<sup>43</sup>

The development of international law in the post-war era, however, has not been limited to the institutional dimension.<sup>44</sup> Indeed, international law has established fundamental norms and

---

<sup>38</sup> See however C P Kindleberger, *The World in Depression 1929-1939* (University of California Press 1986) (espousing hegemonic stability theory arguing for the need of a hegemonic power (or few powers) who are able and willing to serve as an international lender of last resort for other countries experiencing temporary funding problems in order to maintain a stable global financial system).

<sup>39</sup> UNGA Res. S-6/3201 (N 34).

<sup>40</sup> This is according to economic value of quotas of their members which are determined in part by members economic output, see: IMF, IMF Members' Quotas and Voting Power, and IMF Board of Governors <[www.imf.org/external/np/sec/memdir/members.aspx](http://www.imf.org/external/np/sec/memdir/members.aspx)> accessed 1 April 2014.

<sup>41</sup> The WTO has 153 and the IMF has 187 member states. The OECD has a limited circle of members because it is generally only open for democratic countries with liberal economic systems. Also, discussing the role of law in monetary and trade policy, see E Baltensperger and T Cottier, 'The Role of International Law in Monetary Affairs', in *International Law in Financial Regulation and Monetary Affairs* (Oxford: OUP) 357-381, pp 371-74.

<sup>42</sup> N Woods and A Narlikar, 'Governance and the limits of accountability: the WTO, the IMF, and the World Bank' *International Social Science Journal* Volume 53 Issue 170 569-583, 573.

<sup>43</sup> On regional integration and FDI in emerging markets, see J Kubny, F Mödlers and P Nunnenkamp, 'Regional Integration and FDI in Emerging Markets' Kiel Institute for the World Economy, Working Paper No. 1418, April 2008 <[http://www.ifw-members.ifw-kiel.de/publications/regional-integration-and-fdi-in-emerging-markets/KWPcomplete\\_21.4.pdf](http://www.ifw-members.ifw-kiel.de/publications/regional-integration-and-fdi-in-emerging-markets/KWPcomplete_21.4.pdf)> accessed 24 March 2014.

<sup>44</sup> See generally: C M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' *International and Comparative Law Quarterly* 38, 850-866.

principles of law and procedure that serve as reference points to assess the legitimacy (or legitimation)<sup>45</sup> of international institutions and the effectiveness of the rules and norms they create. In this regard, international law consists of both important substantive norms and principles (so-called material legitimacy) as well as fair decision-making processes and ways of reaching conclusions and opinions on contentious issues (so-called procedural legitimacy).<sup>46</sup> Although material legitimacy is necessary and desirable for a functioning legal and political system, it cannot guarantee its full acceptance by states over time unless there is procedural legitimacy. To this end, Franck (1990) has defined legitimacy as:

“[...] a property of a rule or rule making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>47</sup>

In light of Franck’s definition, it seems questionable whether and to what extent there is a trade-off between legitimacy and efficiency in decision-making as is often suggested.<sup>48</sup> Especially with respect to international law, which largely lacks centralised decision-making authorities and enforcement procedures, but rather relies on universal adherence by states and decentralised compliance structures, material and procedural aspects of legitimacy, as defined by Franck, seem to have merged in a conceptual sense.

Although the international economic organisations mentioned above accomplished a great deal in rebuilding the post-war global economic system, their decision-making frameworks have been largely controlled by the advanced developed countries and more recently by a few large emerging market economies (so-call ‘BRIC’ nations). Based on Franck’s theory of legitimacy, it is submitted that the many developed and developing countries that have neither been adequately consulted, nor meaningfully involved in developing the content of international economic norms. Nevertheless, they are subjected to these norms and therefore have reason to question their effectiveness and legitimacy on the grounds that these norms have not been formed in accordance with generally accepted principles of right process. On

---

<sup>45</sup> This paper does not distinguish between the two terms legitimation and legitimacy even though legitimacy is sometimes used with a different meaning. Legitimation generally means the justification of political power under normative and sociological (factual) aspects. See R Wolfrum, ‘Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations’ *Legitimacy in International Law* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 1994) 1 et seq., 6; N Petersen, ‘Demokratie als teleologisches Prinzip, Zur Legitimität von Staatsgewalt im Völkerrecht’ (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 204) 2009 5.

<sup>46</sup> See D Thürer, ‘Von der komplexen Gestalt des Völkerrechts’ 2005-present (Internationale Gemeinschaft und Menschenrechte, 2005) 307ff, 313: The realization that legitimation of international rules, regime and international order as a whole emerges from processes of open and fair forming of opinion is important; see also T Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995).

<sup>47</sup> T Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990) 24.

<sup>48</sup> On legitimacy J G Støre, G20 must throw open its doors to the world (The Age, 9 June 2010) <[www.theage.com.au/business/g20-must-throw-open-its-doors-to-the-world-20100608-xts2.html](http://www.theage.com.au/business/g20-must-throw-open-its-doors-to-the-world-20100608-xts2.html)> accessed 24 March 2014; The Group of Twenty (N 4) 46 ff; A Karrer, The G20 and Switzerland: what to expect? (International Chamber of Commerce, Zurich, 26 June 2013, 1-10) 7f; On effectiveness R Gwyn (2010) International affairs now truly international (The Toronto Star, 11 June 2010) <[www.thestar.com/opinion/editorialopinion/2010/06/11/gwyn\\_international\\_affairs\\_now\\_truly\\_international.html](http://www.thestar.com/opinion/editorialopinion/2010/06/11/gwyn_international_affairs_now_truly_international.html)> accessed 24 March 2014.



the other hand, however, the decision-making of these institutions represents established values and time-tested, approved procedures of multilateral collaboration. In particular, the United Nations has evolved into the only global institutional forum with universal membership whereby states can negotiate and decide economic, monetary and trade matters with an acceptable degree of legitimacy.<sup>49</sup> These accomplishments should not be jeopardised through new forms of international governance that fail to incorporate generally accepted principles of international law as applied to the decision-making of international institutions.

#### *b) Rule of law, principle of democracy and good governance*

In connection with Franck's "generally accepted principles of right process", three widely recognised systems of legal rules stand out whose meaning shall be investigated more closely:

First, the growing recognition and importance of the principle of the rule of law, which demands that all authoritative acts are to be governed by a pre-existing system of substantive and procedural rules, can be observed.<sup>50</sup> For instance, some common lawyers assert the basic principles of the rule of law to be Fuller's classic eight principles.<sup>51</sup> Under international law, the rule of law can be applied to international institutions as well. Indeed, Harlow (2006) has observed that:

"[i]n classical administrative law systems, then, the rule of law normally requires that the government acts always within its powers; follows the proper procedures; and provides equality of access to courts and other machinery for adjudication. [...] At global level, the key requirement of the rule of law is a legal order with fixed and stable general principles, together with formal rights of access to courts for the resolution of disputes. The rule of law doctrine may also operate to lock the machinery in place through a process of constitutionalization."<sup>52</sup>

Second, the principles of democracy have practically been universalized during the last few decades. Democracy has become an obligation of international law defining how states should organize themselves and from which a right to democracy can be derived.<sup>53</sup> It has become a general principle of law that legitimises the exercise of power and the maintenance of political

---

<sup>49</sup> See also Global Governance Group (3G) in: UNGA „Annex to the letter dated 11 March 2010 from the Permanent Representative of Singapore to the United Nations addressed to the Secretary-General – Strengthening the Framework for G-20 Engagement of Non-members" (11 March 2011) UN DOC A/64/706, cipher 2.

<sup>50</sup> See D Thürer, 'International Rule of Law – innerstaatliche Demokratie' *Schweizerische Zeitschrift für internationales und europäisches Recht* 4, 1995, 455ff.

<sup>51</sup> L Fuller, *The Morality of Law* (rev.ed., Yale University Press 1965) 38-39, stating that rules must be ascertainable and not "ad hoc", "publicized", not "retroactive", "understandable", not "contradictory", not "impossible", not subject to excessive changes, and "congruence between rules as announced and administered". See also A Jakab, 'Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany' *International and Comparative Law Quarterly* 933ff. 2009, 940 discussing differences between Austria and Germany in conceptualising the rule of law.

<sup>52</sup> C Harlow, 'Global Administrative Law: The Quest for Principles and Values' *EJIL* 17 2006 187ff, 195.

<sup>53</sup> T Franck, 'The Emerging Right to Democratic Governance' *AJIL* 86 1992, 46ff.

order that applies across national borders as well as to international organisations and institutions of all kinds.<sup>54</sup> Democracy, rightfully called the “organizational consequence of human dignity”,<sup>55</sup> is based on the principle of being affected, or otherwise known as the “all-affected principle”.<sup>56</sup> The all-affected principle is an important principle of democracy that involves identifying those people who exercise decision-making or governance powers and those people who are governed by such powers, and demands the participation of all addressees in the decision-making process. Another criterion is the accountability of all governmental or institutional actors who are entrusted with executing delegated public tasks.<sup>57</sup>

The good governance standard is the third system of rules closely connected to and overlapping with the first two.<sup>58</sup> These standards are not only expected to be implemented on a national level by state and administrative departments but also on an international level. In this regard, the EU has played a pioneering role by adopting a system of rules and standards to fulfil the principles of transparency and openness, democratic accountability and participation and responsiveness.<sup>59</sup> Even though the EU has a strongly integrated institutional and legal structure, its governance framework could become a model for other international institutions with less integrated structures.<sup>60</sup> In practice, good governance requires the alignment of state interests with the interests of the identified group of people over whom the state exercises governance authority. These governance principles also apply at the supranational and international levels with the exercise of decision-making power being subject to the aforementioned principles of transparency and openness, accountability, participation and responsiveness.<sup>61</sup>

These three systems of legal rules have become widely recognized criteria for any form of exercise of power.<sup>62</sup> For these reasons, adherence to all mentioned criteria has become indispensable for determining the legitimacy of multilateral cooperation and decision-making.

---

<sup>54</sup> S Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010); D Thürer, ‘A Common Law of Democracy? An Experimental Conceptualization’ (eds) *Les droits de l’homme et la constitution* (Collection Genevoise, 77ff) on file with author.

<sup>55</sup> P Häberle, *Europäische Verfassungslehre* (6<sup>th</sup> edn, Nomos 2009) 296.

<sup>56</sup> J Karlsson, The boundaries of transnational democracy: Alternatives to the all-affected principle of democratic inclusion <[www.mothugg.se/wp-content/uploads/2010/04/Johan-Karlsson-Alternatives-to-the-AAP-ISA09.pdf](http://www.mothugg.se/wp-content/uploads/2010/04/Johan-Karlsson-Alternatives-to-the-AAP-ISA09.pdf)> accessed 17 March 2014; see also J K Schaffer, ‘Affected and Subjected: The All-Affected Principle in Transnational Democratic Theory’ <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2274644](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274644)> accessed 17 March 2014.

<sup>57</sup> See M Zobl, *Demokratisierung des Völkerrechts?* (Schulthess Verlag 2012, ISBN 978-3-0349-0606-7).

<sup>58</sup> See S Seppänen, *Good Governance in International Law* (2003, ISBN 9521013125); D C Etsy, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’ *Yale Law Journal* 115 2006 1490ff.

<sup>59</sup> See Treaty on European Union (2010/C 83/01) Art 10 Para 3 Sentence 2 “Decisions shall be taken as openly and as closely as possible to the citizen”; and the Treaty on the Functioning of the European Union (2010/C 83/01) Art 15 para 1: “In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible”. See also European Commission, White Paper on European Governance of the EU Commission COM(2001) 428 <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf)> accessed 28 March 2014.

<sup>60</sup> Ibid (N 57). For critique in light of EU Democratic Deficit Debate see Charlemagne, ‘A democratic debate’ (*The Economist*, 26 October 2013).

<sup>61</sup> Good governance is not always defined the same and with such the principles assigned to them vary. The ones mentioned however are the ones most commonly named: see S Seppänen (N 58) 100ff.

<sup>62</sup> See Harlow (N 52) 211, expressing a sceptical view.

### 3. *Legitimacy problems and critique of the G20*

A grouping of states, such as the G20 that deems itself the premier forum for international economic questions and makes decisions with global application, cannot and must not be satisfied with adopting an output which at best could be considered legitimate. All its actions, beginning with the organisation's structure to its deliberation and finally its decision-making process must be founded on and meet all standards of legitimacy. Whilst analysing the G20 based on these standards, major discrepancies become visible.

#### a) *Rule of Law*

It is difficult to show that the G20's institutional design complies with the rule of law principle. As discussed before, the G20 was formed as an informal *ad hoc* grouping of governments and central banks in 1999 in response to the Asian financial crisis.<sup>63</sup> As a loose intergovernmental network,<sup>64</sup> it bears little, if any structural and legal resemblance to formal international organisations established under international law. Particularly striking is that the establishment of the G20 was not based on any legal instrument, such as a treaty, charter or statute that would have defined the fundamental organizational and procedural principles in a binding and transparent manner.<sup>65</sup> The lack of a sound legal basis also precluded national parliaments from having any influence through ratification on the founding and organisation of the G20.<sup>66</sup> Before the first meeting in 1999, the G20 participants were chosen and invited by officials of the U.S. Treasury and German Finance Ministry.<sup>67</sup> The process by which G20 members were selected<sup>68</sup> lacked any procedural protocol and provided no clear criteria for how or why members were selected. The G20's informal approach to member selection remains in place today. This reflects an alarming lack of organisational process and would be questionable as a matter of organisational practice for any international institution.<sup>69</sup> As such, it distorts not only the constitutional separation of powers between legislative and executive functions but also should be viewed critically from a democratic principle perspective.<sup>70</sup>

---

<sup>63</sup> See F Weiss, Finanzkrise und internationales öffentliches Recht (Presentation at the Deutschen Gesellschaft für Völkerrecht, 1 April 2011) 30 (on file with author).

<sup>64</sup> Regarding the meaning of such networking structures see: A M Slaughter, *A New World Order* (Princeton University Press 2004); H Zhang, G20 and global governance: Challenges and impacts (eds) *G20 and Global Development* (German Development Institute 2010) 61 <[www.yorku.ca/ycar/GDI\\_G20\\_Korea.pdf](http://www.yorku.ca/ycar/GDI_G20_Korea.pdf)> accessed 1 April 2014.

<sup>65</sup> J Wouters and T Ramopoulos, 'The G20 And Global Economic Governance: Lessons From Multi-Level European Governance?' *Journal of International Economic Law* 15(3) September 2012 751ff, 764.

<sup>66</sup> S Kirchner, 'Effective Law-Making in Times of Global Crisis – A Role for International Organizations' *Goettingen Journal of International Law* 2, 2010, 267ff, 274.

<sup>67</sup> J Vestergaard, 'The G20 and Beyond: Towards Effective Global Economic Governance' (2011) DIIS Report 2011:04, 14 with further references <[www.diis.dk/graphics/Publications/Reports2011/RP2011-04-G20-and-beyond\\_web.pdf](http://www.diis.dk/graphics/Publications/Reports2011/RP2011-04-G20-and-beyond_web.pdf)> accessed March 2014; discussing how US and German officials called other member governments over the telephone to request that they join the G20.

<sup>68</sup> Subacchi and Pickford (N 14) 3.

<sup>69</sup> See discussion on alarming trend towards "governmentalisation" and simultaneous "de-parlamentarisation" of international relations: Wouters and Ramopoulos (N 65) 765.

<sup>70</sup> See regarding the danger of a "constitutionally structural predominance" of the executive: C Tomuschat and R Schmidt 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen' (eds) *Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Basel vom 5. und 8. Oktober 1977* (Walter de Gruyter 1978, 27.

Other discrepancies in G20 institutional structure should be mentioned with respect to the principles of international organisation law. For instance, the G20's lack of legal personality raises institutional concerns, along with the absence of a fixed secretariat and headquarters.<sup>71</sup> Although this flexible and less legalistic institutional structure is often praised as an advantage due to less rigid bureaucracy, it nevertheless entails governance risks with respect to accountability under international law, ability to respond to interested groups and individuals as well as effectiveness in coordinating with other international economic organisations and institutions.

Apart from the G20's defective institutional structure, it can be criticised for not having any formal connection to the United Nations or, more specifically, to the UN Economic and Social Council (ECOSOC) as the institution responsible for economic questions pursuant to Article 63 of the UN Charter.<sup>72</sup> The G20 also lacks formal institutional or legal links to the Bretton Woods institutions (ie., the IMF and World Bank) or other international economic organisations (ie., the WTO). Furthermore, there are serious concerns regarding the objectivity and transparency of the G20's process for selecting its permanent and visiting members and deciding what role for non-member states.<sup>73</sup> Spain, the Netherlands, Poland and Iran, for example, have served as visiting (not permanent) G20 members, but they individually have higher gross domestic products than some permanent members, such as Saudi Arabia, Argentina and South Africa.<sup>74</sup> Similar questions arise regarding Switzerland with its importance as an international financial centre, which is neither a G20 permanent nor visiting member.<sup>75</sup> Moreover, there are no apparent reasons why the EU is a permanent member of the G20, resulting in some EU states being represented twice, while other regional organisations only have "visiting member" status.<sup>76</sup> Generally, there are no objective and transparent criteria for admitting states into the G20 as permanent members, nor for approving them as visiting members. Neither is there a process for identifying and consulting non-members when they have particular issues of concern in advance of G20 meetings. The main forms of G20 participation – permanent member, visiting member and non-member - seem rather arbitrary and unreliable in an organisational sense and appear to undermine the effectiveness of the deliberation process. On the one hand, this variable geometry has the advantage that the structure of the group of states can be adapted flexibly to whatever the G20 decides for its political-economic agenda.<sup>77</sup> On the other hand, considerable political

---

<sup>71</sup> The rotating instead of fixed secretariat: Subacchi and Pickford (N 14) 6.

<sup>72</sup> United Nations, Charter of the United Nations, 1945, 1 UNTS XVI. See also: C Tietje, 'Architektur der Weltfinanzordnung' Beiträge zum Transnationalen Wirtschaftsrecht Heft 109 (Mai 2011, ISBN 978-3-86829-358-6) 35.

<sup>73</sup> AM Brill and J K Glassman, Who Should the Twenty Be? (2012) <[www.ntu.org/news-and-issues/economy/who-should-the-twenty-be.html](http://www.ntu.org/news-and-issues/economy/who-should-the-twenty-be.html)> accessed 17 March 2014, propose a reassessment of the criteria for the G-20-membership to increase the legitimacy that leads them to conclude that several of today's member states are out of place and need to be replaced by non-members.

<sup>74</sup> Vestergaard (N 67) 23.

<sup>75</sup> See D Jordan, Die G20 und die Schweiz: Beidseitiger Bedarf des Dialogs (October 2011) 56ff <<http://dievolkswirtschaft.ch/archive/alltocs/201110.html>> accessed 7 April 2014.

<sup>76</sup> Vestergaard (N 67) 14.

<sup>77</sup> Wouters and Ramopoulos (N 65) 769.

discretion and arbitrariness are involved in deciding whether to extend an invitation to non-members<sup>78</sup>.

*b) Principle of democracy, representativeness in particular*

A democracy-orientated approach to legitimacy demands the equal participation of the parties involved or at least the representation of the important interest groups in the political process. The G20 addresses the problem of its representativeness and justifies itself as follows:

“Together, member countries represent around 90 per cent of global gross national product, 80 per cent of world trade (including EU intra-trade) as well as two-thirds of the world’s population.”<sup>79</sup>

Based on the economic weighting of its members as a proportion of world GDP, the G20 provides a positive assessment of its legitimacy:

“The G20’s economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system.”<sup>80</sup>

The reliance on GDP, international trade weighting and population size as the main criteria for G20 permanent membership raises important questions about whether other economic and non-economic factors should be considered as well. It also raises concerns about how these factors should be weighed in importance. In fact, it appears that the G20 has no clear or specific formulation on how it should legitimize itself, resulting in a more or less coincidental and arbitrary application of these criteria. Although the representativeness of the G20 was a substantial improvement on the composition of countries in the G8, which consisted mainly of western industrialized nations,<sup>81</sup> the essential and basic problem of representation has not been resolved by the expanded membership of the G20. For instance, a third of the world population, which amounts to 2 billion people, or 173 states respectively, are still not permanently represented at G20 summits. Furthermore, in the current system, neither low income states nor more advanced but small economies (i.e., Singapore, Norway, Switzerland) have permanent representation. Finally, Africa, represented only by South Africa as a G20 permanent member, is underrepresented,<sup>82</sup> vis-à-vis other world regions.<sup>83</sup> Nevertheless, the people and political communities in unrepresented countries are confronted by the same challenges and risks in the global economy as are the larger, more economically advanced G20 permanent members; but non-G20 members possess neither the voting rights nor a meaningful right to be heard at G20 meetings. Therefore, the G20’s representativeness is inadequate.

---

<sup>78</sup> For instance, the G20 host country has significant influence in deciding whether to invite non-member countries and jurisdictions to G20 meetings and summits. States that preside regional forums (African Union etc.) are treated preferentially.

<sup>79</sup> See G20, ‘About G20’ <[www.g20.org/docs/about/about\\_G20.html](http://www.g20.org/docs/about/about_G20.html)> accessed January 2013.

<sup>80</sup> Ibid.

<sup>81</sup> Therefore dominating the networks ideas with Western ideas: Choo and Kelly (N 11) 56.

<sup>82</sup> Where it is questionable if South Africa is capable of representing such a diverse continent’s interest on its own, see Wouters and Ramopoulos (N 65) 769.

<sup>83</sup> Vestergaard (N 67) 20ff.

Another issue arises with respect to the representation issue. If international law is not solely viewed from the perspective of inter-state relations, but from the standpoint of fundamental individual rights as well, an individual's representation by a head of state at international legal fora may be unsatisfactory. This is because elected leaders and representatives of states can only represent the views of the majority of the voters who elected them, whereas minority voting interests may be inadequately represented. An inter-subjective (instead of an inter-governmental) perspective on international law requires the inclusion of other elected representatives, such as elected minority party national parliamentarians as well as representatives from local and regional governments within a state and non-governmental interest groups.<sup>84</sup> In this regard, it has been argued that the only way for effective democratic control of international organisations is by having a directly elected international parliamentary panel.<sup>85</sup>

### *c) Good governance: transparency and accountability*

These considerations lead directly to the good governance-criteria of transparency and accountability. Transparency is a partial aspect of both the principle of democracy and good governance. It requires openness in decision-making<sup>86</sup> and ultimately constitutes a prerequisite for every type of observation, control and influence by outsiders; it is the prerequisite for all democratic procedures.<sup>87</sup> The G20 does not typically conform to this criterion: The summit meetings are held behind closed doors, protocols are not published and preparatory consultations with non-members scarcely exist.<sup>88</sup> Non-G20 member countries and the public only learn of the results from the negotiations by way of communiqués, and little, if any, information is provided on how the G20 reaches its decisions. Finally, the lack of transparent criteria for G20 membership raises serious governance concerns.

The principle of representation is closely connected to the principle of accountability.<sup>89</sup> Effective democracy and good governance not only require representative and transparent structures but additionally the possibility to hold the decision makers accountable through adequate monitoring and control mechanisms. Accountability can be assessed in different

<sup>84</sup> See F H Cardoso, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations of 2004, especially 23ff; as well European Commission White Paper on European Governance of the EU (N 51) "Civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs" 14.

<sup>85</sup> See R Falk and A Strauss, 'On the Creation of a Global People's Assembly: Legitimacy and the Power of Popular Sovereignty' Stanford Journal of International Law 36 2000 191ff (proposing a second UN chamber as necessary to provide adequate representation of the people).

<sup>86</sup> Seppänen (N 58) 102. Moreover, see discussion of the principle of accountability in international financial soft law in C Brummer, *Soft Law and the Global Financial System: Rule Making In The 21<sup>st</sup> century* (Cambridge: Cambridge University Press) 190-198. See also European Commission, White Paper on European Governance of the EU Commission (N 58) 432.

<sup>87</sup> J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009) 330. See contrasting view why transparency may be 'unhelpful' for the G20 and FSB in Brummer (N 86) 198, suggesting that although the 'G20 and FSB have been relative laggards regarding accountability', this can be explained in part because of their more overt political status for which transparency is unhelpful in achieving sensitive in negotiating and prioritising economic and financial policy initiatives.

<sup>88</sup> It is desirable that the effort to include non-members – as last year's hosting country Mexico did (see above) – shall be continued and increased at future summits. Wouters and Ramopoulos (N 65) 771.

<sup>89</sup> See Cardoso (N 84) 24: "One of the key principles of representative democracy is connecting citizens to the decisions that affect them and ensuring public accountability for those decisions".

ways. First, by means of direct and indirect political mechanisms that involve the election and dismissal of representatives by the people. Second, through judicial review and oversight to provide for effective checks and balances on administrative rulemaking and unconstitutional statutes, and similar oversight of administrative or governmental actions can be achieved through public and private watchdogs, such as ombudsmen, NGOs, the media and other civil society groups.<sup>90</sup>

The G20 does not respect these constraints in at least two ways: First, non-member states do not have any means to influence G20 decision-makers. Second, heads of state, heads of governments and central bank governors are the main decision makers, representing an excessive governmentalisation of international economic relations while legislative and civil society bodies are generally refused participation at G20 summits. Although critical media reports, an observant public as well as scientific and political debates<sup>91</sup> can counterbalance the accountability deficit to a certain degree, they do not replace the missing political influence of the concerned and affected population during the G20 policymaking phase.

### **III. The need for reform of the international financial architecture**

#### *1. General*

The founders of the post war institutions recognised the advantages of limited membership and voting rights in larger international institutions but at the same time also acknowledged the importance of widespread multilateral support of international decisions. In the course of decolonization and the dissolution of the Soviet Union, modern international law and the UN organisations expanded to include a majority of states – among these formerly colonized or non-autonomous countries – into their institutional structure despite continuing inequalities in their political and economic powers. Despite indisputable advantages regarding flexibility, informality and swiftness, the G20 represents the renunciation of modern developments in international law and multilateral institutional structures. On a short-term basis this form of cooperation may seem tempting and even justified (mostly) to powerful states, in the long-term it threatens to undermine existing international institutions and to return international relations to the oligarchical structure of great power politics that existed in the 19<sup>th</sup> century.

The foregoing analysis in any case shows that the institution that calls itself the “premier forum” for international economic questions,<sup>92</sup> suffers from serious legitimacy deficits. It has not yet produced evidence of the effectiveness of its decision-making; whether it can be produced, will depend upon whether the structure and operating mode can be harmonized with internationally recognized legitimacy criteria. Principles such as the rule of law, democracy and good governance are part of these criteria. While the rule of law demands a reliable basis in the law, the principle of democracy requires a stronger integration of non-members based on the principle of all-affected, as well as revised transparency and accountability for decision makers in light of good governance.

---

<sup>90</sup> Seppänen (N 58) 103.

<sup>91</sup> The intra state checks-and-balances system must fulfil its duty. See Choo and Kelly (N 11) 64.

<sup>92</sup> See G20 (N 79).

These defects should be remedied if the G20 wants to realize its ambitions in global economic governance and fulfil its role in a credible and effective way. International legal history and diplomacy provide useful lessons, as the Congress of Vienna set the agenda for international politics in the early to mid-nineteenth Century by granting disproportionate influence and voting power to the leading European countries at the time,<sup>93</sup> which is no longer acceptable in the 21<sup>st</sup> century.<sup>94</sup> In the following section, we discuss different approaches to international economic governance and suggest in particular some alternative reforms to international financial regulation.

## 2. *Options under the status quo*

One area of reform could be to maintain the existing institutional structure of the G20 while expanding its external relations with other international organisations and non-G20 countries. As a premier forum for global economic issues, the G20 has dedicated itself to adopting regulatory reforms to prevent financial crises and addressing macro-economic imbalances. Therefore, it is important for the G20 to position itself apart from existing international organisations while at the same time supporting their work. This concerns in particular the IMF and the FSB, which substantially contribute to the G20 agenda.<sup>95</sup> At the same time the forum is committed to the interests and views of the entire international community, especially of those states who are not G20 members, and to incorporate the views of all states without undermining the effectiveness of the decision making process. Wider support, in the shape of objective and standardized consultation mechanisms, could increase the legitimacy and accountability of the G20. It is also important to establish a permanent and transparent exchange with civil society organizations as well as with the business and the research community.<sup>96</sup> In addition, national public sector actors, such as central banks and supervisory authorities, should work more closely with NGOs and representatives of the business sector.<sup>97</sup> In the longer-term there is no way of effectively negotiating the principles of global economic policy, including international financial standards, with all affected states. Small states with a certain economic and financial importance such as Switzerland and Singapore are likely to make their voice heard even under the current system.<sup>98</sup> Nevertheless, for the majority of non-members such internal channels remain blocked despite being equally confronted with issues of international financial and economic regulation. They may only exert their influence

<sup>93</sup> See generally R Langhorne, 'The Collapse of the Concert of Europe' (Palgrave Macmillan 1981).

<sup>94</sup> Similarly, the comparison of the Norwegian Foreign Minister: J G Støre, 'Time for G-20 to address its legitimacy' (The Straits Times Manila 6 April 2010) <[www.regjeringen.no/en/dep/ud/aktuelt/taler\\_artikler/uten/riksministeren/2010/g\\_20\\_cooperation.html?id=600820](http://www.regjeringen.no/en/dep/ud/aktuelt/taler_artikler/uten/riksministeren/2010/g_20_cooperation.html?id=600820)> accessed January 2013. Compare also: D Thürer, Hegemony (eds) *Encyclopedia of Public International Law* (Oxford University Press 2012).

<sup>95</sup> R H Weber and D W Arner, 'Toward a New Design for International Financial Regulation' University of Pennsylvania Journal of International Economic Law Vol. 29 391-453 447ff SSRN: <<http://ssrn.com/abstract=1367527>>.

<sup>96</sup> Also B Carin, P Heinbecker, and others, 'Making the G20 Summit Process Work: Some Proposals for Improving Effectiveness and Legitimacy' CIGI G20 Papers/No. 2 June 2010, 11ff <[www.cigionline.org/publications/archive/30/2010-06](http://www.cigionline.org/publications/archive/30/2010-06)> accessed January 2013.

<sup>97</sup> J-B Gossé and D Plihon, 'The Future of Financial Markets and Regulation: What Strategy for Europe?' hal-00613251, 2011 10-11.

<sup>98</sup> Karrer (N 48) 4-7, 9ff. For instance, the Swiss National Bank President held the position of Vice-President of the FSB, which, at least for a short time, enhanced the role of Switzerland in international financial regulation and allowed it a certain amount of political influence in the context of the G20. See Swiss State Secretariat, Press Release, at <[www.admin.ch/aktuell/00089/index.html?lang=de&msg-id=42093](http://www.admin.ch/aktuell/00089/index.html?lang=de&msg-id=42093)> accessed January 2013



on the periphery of G20 meetings. Therefore, cooperation among non-member States with similar interests might be the best opportunity for them to influence G20 policies. The most prominent example of such cooperation is the Global Governance Group (3G), an informal grouping consisting of 30 members. Open to all non-G20 states, it has set itself the aim to pool its influence and assert its interests in a constructive dialogue with the G20. The G3 does not primarily see itself as counterpoint to the G20, but tries to support them in making their decision-making processes consultative, inclusive and transparent.<sup>99</sup> If the G3 succeeds in doing so and at drawing enough attention to itself to solidify its consultative status, it could establish itself as an efficient mouthpiece for non-members in the long-run. In this sense, it would also enhance the legitimacy and ultimately the effectiveness of the G20.

### 3. *Further reform proposals*

From a long-term perspective, the question arises whether more fundamental reforms to the global financial order are merited to overcome the existing lack of legitimacy and to maintain a more balanced multilateral regime.<sup>100</sup> Currently, several proposals and models exist in this regard but they still are not very detailed and should be further elaborated.

#### a) *G20 as governing body of the IMF*

The G20 has not only shown defects in its internal structure, but acts detached from international law and in isolation from international institutions, which are also responsible for global financial policy (i.e., the IMF). Nevertheless, the G20 has assumed the important task of monitoring the Financial Stability Board (FSB)<sup>101</sup> as well as international standard-setting bodies such as the Basel Committee on Banking Supervision (BCBS).<sup>102</sup> Together with the G20, to which it is accountable, the FSB takes on a significant leadership role in the design and implementation of international financial regulation.<sup>103</sup>

In response to criticism about these institutional structures, the FSB called on the G20 to have closer cooperation with the IMF. Subsequently, the two organizations have worked together in coordinating their respective functions, including the monitoring of the global financial system and assessing risks for individual countries, publishing early warnings and making

<sup>99</sup> See also I A Chowdhury, 'The Global Governance Group („3G“) and Singaporean Leadership: Can Small be Significant?' ISAS Working Paper No 108 May 2010 7ff.

<sup>100</sup> See C Tietje and M. Lehmann, 'The Role of Prospects of International Law in Financial regulation and Supervision', 133-150, 147-150 in T Cottier, JH Jackson & R. Lastra, *International Law in Financial Regulation and Monetary Affairs* (Oxford: OUP, 2012)(discusses some models of international regulatory reform).

<sup>101</sup> The Financial Stability Board was established as a successor to the Financial Stability Forum (FSF) at the G20 summit in April 2009. It monitors the international financial system, exposes weaknesses and develops regulatory policies that support financial stability. The FSB brings together national financial authorities, international financial institutions and regulatory and supervisory authorities with experts from the central banks. Membership brings certain obligations: safeguarding financial stability, openness and transparency of the financial sector, the implementation of international financial standards and regular consultation reports.

<sup>102</sup> See K Alexander, 'Global Financial Standard Setting the G10 Committees, and International Economic Law' Brooklyn Journal of International Law 34 2008-2009 861ff. Also, the Basel committee in trying to promote the accountability and legitimacy of its international standardization process increased its membership to twenty countries, including Australia, Brazil, China, India, Korea, Mexico and Russia.

<sup>103</sup> As the G20, the FSB has been criticized on several occasions for its lack of legitimacy. This has led to the ongoing efforts to provide the FSB with legal personality. Compare also Communiqué G20 Leaders Summit (Cannes 3-4, November 2011).

recommendations. Together they perform macro-prudential surveillance of systemic risk and other threats to financial stability and recommend regulatory controls and supervisory practices.<sup>104</sup> The IMF implements this approach by explicitly addressing systemic risk in its regulatory work.<sup>105</sup> In effect, the cooperation between the FSB and the IMF is an important step towards integrating micro-prudential regulation and macro-prudential supervision.<sup>106</sup> This institutional cooperation has enhanced the IMF's role in macro-prudential oversight and thus reinforced its influence as an international financial organisation. The successes achieved in macro-prudential oversight and in developing international standards could lead to closer cooperation between the G20 and IMF in these and other areas.

In order to strengthen the leadership role and at the same time the legitimacy of the G20, Lord King of Lothbury, former Governor of the Bank of England, argued for the formation of a Global Economic Council (GEC) in 2010, consisting of the G20 states whose main function would be to oversee the IMF and other international economic institutions.<sup>107</sup> To which extent such a body would be equipped with supervisory and regulatory powers was to be subject to future deliberations. Lord King suggested, however, that a GEC could address issues such as monetary policy, exchange rates, balance of payment imbalances as well as tax policy. Such international legal integration of the G20 into the IMF does not resolve all shortcomings of the current international financial architecture, especially regarding the representativeness of the UN specialized agencies. The IMF should not be subject to further international legal integration until its allocation of special drawing rights and the associated weighting of voting rights of individual IMF member states has been implemented. The appointment of Christine Lagarde as Director confirmed to many the image of an IMF too one-sidedly aligned to Western interests. The need to establish a "revitalized multilateral mandate" for the IMF and to institute internal management reforms to enhance its effectiveness is widely recognized today.<sup>108</sup> These criticisms could hamper any efforts to equip the IMF and the G20 with additional competences in the sense of Lord Kings' proposal. Accordingly, a realignment of the G20 should be coupled to a reform of the IMF.

#### *b) Independent global financial order (WFO)*

---

<sup>104</sup> Compare also IMF, IMF-FSB Early Warning Exercise <[www.imf.org/external/np/exr/facts/ewe.htm](http://www.imf.org/external/np/exr/facts/ewe.htm)> accessed January 2013.

<sup>105</sup> The IMF's Global Financial Stability Reports and World Economic Outlook Reports are the flagship publications regarding global governance and surveillance.

<sup>106</sup> Micro-prudential supervision focuses mainly on the solvency and risk management practices of individual financial institutions, depositors and investor protection. In contrast, macro-prudential supervision includes assessing the overall risk in the financial system, the infrastructure of the financial system and the connections between financial institutions and markets, and the risks of the common challenges in the financial systems. See JC Trichet, Macro-prudential supervision in Europe (Text of The Economist's 2nd City Lecture, London, 11 December 2009) <[www.bis.org/review/r091218b.pdf](http://www.bis.org/review/r091218b.pdf)> accessed 7 April 2014. Macro-prudential regulation includes, among other things, the development of regulatory standards which measure the degree of debt in the financial system as a whole and aim to limit it by requiring financial institutions to hold larger cash reserves for short-term burdens from unsecured bank deposits respectively countercyclical capital regulation.

<sup>107</sup> M King (Speech at the University of Exeter, Exeter, 19 January 2010) <[www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2010/speech419.pdf](http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2010/speech419.pdf)> accessed 17 March 2014.

<sup>108</sup> IMF, IMF Governance Reform (Final Report 24 March 2009) <[www.imf.org/external/np/omd/2009/govref/032409.pdf](http://www.imf.org/external/np/omd/2009/govref/032409.pdf)> accessed 17 March 2014.

Another approach would be the formation of a new independent international organization, which meets the legitimacy criteria and would replace the G20. In this sense, the creation of a World Financial Organization (WFO) or World Financial Authority (WFA)<sup>109</sup> has been proposed, which would act as an umbrella organization providing membership to all states and constituting a forum for important financial and monetary authorities.<sup>110</sup> The WFO would be responsible for ensuring the stability of the international financial system and could complement the functions of existing international organisations such as the World Trade Organisation, which also aims at liberalizing and regulating international trade. The WFO would however exercise a broader mandate by monitoring the macro-economic policies of its Member States (balance of payments, reserves, external debt, exchange rates, liberalisation of capital flow), while regulating and coordinating national supervision of financial markets. Its main activity would be gathering and assessing market data, harmonising standards and procedures as well as proposing and adopting international regulatory standards and rules. National authorities would have a legal obligation to implement regulations and standards. The WFO would adopt standards and make other decisions through weighted voting of states. It would adopt political and strategic goals and adopt other decisions at an annual ministerial conference. The IMF and the World Bank would be subordinate to the organization, constituting technical institutions, which supported the WFO in performing its tasks. Also a dispute settlement mechanism should be established, analogous to that of the WTO, which would settle disputes between states or between states and international organisations. The democratic legitimacy of such a WFO could be increased by adding a parliamentary body, analogous to the European Parliament or to the International Labour Organisation's Assembly, while observer status would be granted to NGOs and other civil society groups.<sup>111</sup>

### *c) Proposals related to the United Nations*

Meanwhile, perhaps a more realistic medium-term possibility would be to integrate the G20 into the United Nations system. The UN is still the only global institution with universal participation and widely recognized legitimacy.<sup>112</sup> The Global Governance Group (3G) therefore rightly demands:

“The G20 process should recognize and reflect this reality. The G20 process and its actions and decisions should complement and strengthen the United Nations.”<sup>113</sup>

---

<sup>109</sup> See J Eatwell and L Taylor, *Global Finance at Risk* (Cambridge: Polity Press 2000) (proposing a World Financial Authority to regulate liberalised financial markets). See also, K. Alexander, R. Dhumale & J. Eatwell, *Global Governance of Financial Systems: the International Regulation of Systemic Risk* (Oxford: Oxford Univ Press 2006), chap 5 (proposing a modified version of a WFA that would establish a framework treaty to coordinate the voluntary standard setting of international financial bodies that would have a broader membership and clearer decision-making rules to address accountability and legitimacy concerns).

<sup>110</sup> See E Denters, ‘Regulation and Supervision of the Global Financial System’, *Amsterdam Law Forum* Vol. 1 Nr. 3 2009 63ff, 73ff; similar also Jakob Vestergaards, who proposes a Global Economic Council that should act as joint board of governors of the World Bank and the IMF: Vestergaard (N 67) 44ff.

<sup>111</sup> See F Weiss, *Finanzkrise und internationales öffentliches Recht* (Presentation at the Deutschen Gesellschaft für Völkerrecht, 1 April 2011 (on file with author) 30. Regarding UN: R Falk and A Strauss, ‘Toward Global Parliament’ *Foreign Affairs* 80 (1) 2001, 212ff.

<sup>112</sup> UNGA UN DOC A/64/706 (N 49).

<sup>113</sup> *Ibid.*

In Resolution 63/303 of 9 July 2009, the UN General Assembly itself emphasizes its responsibility with regard to the global financial order and underlined its legitimacy in this regard:<sup>114</sup>

“We reaffirm the purposes of the United Nations, as set forth in its character, including ‘to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character’ and ‘to be a centre for harmonizing the actions of nations in the attainment of these common ends’. The principles of the Charter are particularly relevant in addressing the current challenges. The United Nations, on the basis of its universal membership and legitimacy, is well positioned to participate in various reform processes aimed at improving and strengthening the effective functioning of the international financial system and architecture.”<sup>115</sup>

As to the extent of cooperation or depth of integration, a wide variety of constellations is imaginable: ranging from a reinforced and institutionalized dialogue with the competent UN bodies, to incorporating the G20 into decision making procedures, to even the (complete) absorption of the G20 into the UN system.

Today regular exchanges between political and administrative institutions of all levels take place (governments, administrations, parliaments and international organizations). Such horizontal and vertical government networks, which are informal in nature, are attributed an eminent significance in terms of transnational policy-making and regulation.<sup>116</sup> In this sense, the dialogue between the G20 on the one hand and non-member states and UN organs and specialized agencies on the other hand must be expanded further. A stronger interconnection would have the advantage that the G20 would improve coordination of its policies with other international institutions while taking the needs of non-Member States into account. However, institutional weaknesses such as the rule of law, transparency and accountability have not been overcome. The 3G has submitted further proposals on the formalization of the dialogue between the G20 and non-members states<sup>117</sup> and the UN General Assembly. Specifically, they propose G20 initiatives and recommendations should be designed to complement and support existing UN economic initiatives. Furthermore, the importance of cooperation between the G20, the UN and other UN member states is emphasized, particularly in the form of consultations in the period leading up to G20 summits. Moreover, the participation of the UN Secretary General and his Sherpas should be formalised at the summits. While the Secretary General could not represent the individual countries’ positions, he could at least undertake steps to develop a basic consensus of all UN members towards the G20. In addition, the G20 process should remain a flexible, variable body in which permanent states can consult non-member states depending on the topic and interests at stake. Finally, the G20 should establish regular contact with regional organizations (such as APEC, ASEAN, AU Commission, EU, NEPAD) to address issues of concern. Such initiatives are evidence of the need for wider political support and more democratic legitimacy of the decision-making processes of the

---

<sup>114</sup> Tietje (N 72) 35.

<sup>115</sup> UNGA Res 63/202 (13 July 2009) UN DOC A/Res/63/202 Annex No 2.

<sup>116</sup> See A M Slaughter: ‘Government Networks: The Heart of the Liberal Democratic Order’ (eds) *Democratic Governance and International Law*, (Cambridge University Press 2000) 199ff.

<sup>117</sup> UNGA UN DOC A/64/706 (N 49) No 2.

G20. In addition to 3G's proposals, consultation mechanisms with other UN bodies – in particular the ECOSOC and the General Assembly – should be considered.

Building on the insight that none of the existing international institutions are adequately addressing today's global economic challenges, further radical reforms are being developed. Their realization would make the G20 obsolete. For example, the establishment of a World Economic and Social Security Council (ESSC), analogous to the UN Security Council, has been considered to be necessary to provide democratic supervision of international economic and financial institutions.<sup>118</sup> Such a body has been touted by numerous independent authors and expert commissions in recent decades.<sup>119</sup> Two reports shall be mentioned: First the Human Development Report 1994 of the United Nations Development Programme (UNDP) introduced a new, non-military understanding of human security, and suggested in this context the incorporation of a "decision-making forum at the highest level to review the threats to global economic security and agree on the necessary action".<sup>120</sup> Second, the Commission on Global Governance, launched by former UN Secretary-General Boutros Boutros-Ghali, identified the formation of an ESSC as a central element in their report. The Commission's report stated that the ESSC should have "the standing in relation to international economic matters that the Security Council has in peace and security matters".<sup>121</sup>

In fact, the establishment of an ESSC would not only mean a replacement or renewal of the G20 but also of the ECOSOC.<sup>122</sup> Such a body would not necessarily be operative itself, but would have the authority to issue binding orders to existing institutions such as the World Bank, the IMF, the WTO and other specialised UN agencies. While national governments could not be forced to follow the instructions of the ESSC, it would be possible to impose fines in cases of systematic non-compliance with recommendations. Analogous to the UN Security Council, the body would have to consider the economic weight of the member states and the appropriate representation of all smaller and less-developed states. To achieve this, the proposal foresees a semi-permanent membership of twelve years to be offered to ten countries with the most important economies, while the remaining ten seats would be occupied on a three-year basis.<sup>123</sup> The latter group of countries with shorter terms would be selected every three years by the UN General Assembly and could not be re-elected. The ESSC would be administered by representatives of Member State Finance Ministries, possibly supported by the heads of the state and government, especially for important decisions.

The proposal of the UN Commission on the Financial Crisis (the so-called Stiglitz Commission) to establish a Global Economic Coordination Council under the UN has similar

---

<sup>118</sup> F Stewart and S Daws, 'An Economic and Social Security Council at the United Nations', Working Paper Number 68 QEH Working Paper Series March 2001.

<sup>119</sup> Ibid 25ff.

<sup>120</sup> UNDP: Human Development Report 1994: New Dimensions of Human Security <[www.hdr.undp.org/en/reports/global/hdr1994](http://www.hdr.undp.org/en/reports/global/hdr1994)> p 10 accessed January 2013.

<sup>121</sup> Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press 1995).

<sup>122</sup> Stewart and Daws (N 118).

<sup>123</sup> See the ILO Regulation on Representation under Art 7 para 2 of the ILO Constitution: Out of 28 representatives there have to be 10 representing the main industrialised countries.

objectives.<sup>124</sup> The commission proposed to create a new executive political body superior to the Bretton Woods organizations and the WTO. As such, it would be legally bound by the constitutional organization of the UN, like the ESSC.<sup>125</sup>

From a pragmatic perspective, a regulatory and supervisory system building on existing institutions is best suited to meet both the claims for state sovereignty as well as the need for enhanced global financial market supervision. To satisfy the legitimacy criteria, it is essential that such a system meets fundamental constitutional and democratic criteria and is controlled by a democratically legitimized organ, for example a UN-Parliament.<sup>126</sup>

#### **IV. Conclusion**

Many public goods that traditionally belonged to the domain of the states have attained global character. These include safety, environment, and financial stability. Ultimately, the stability of the global economy and financial markets can only be effectively and sustainably secured by effective international regulation. The Bretton Woods institutions created after the Second World War are no longer able to meet fully the needs of today's global economy. Although the IMF, World Bank and WTO have their advantages in formal, stable institutional structures, they do not have the necessary scope of authority and legitimacy to address global economic and financial stability risks.

In the early phase of the financial crisis, the G20 was able to make considerable progress with its measures to stabilize the global economy (London Summit of 2009). However, its subsequent initiatives have not kept pace with the challenges of a weakening global economy and the need for an effective international regulatory system. The G20's recent lack of success can be attributed, in part, to its opaque institutional structure and a lack of accountability towards the countries subject to its initiatives. This article critiques the G20 institutional structure and decision-making process based on the international legal principle of legitimacy. Specifically, it argues that the G20's international policy initiatives and norms are not effective and legitimate because they have not been formed in accordance with generally accepted principles of right process. In addressing these legal and institutional weaknesses, the article considers a number of proposals to reform the G20 and to enhance international economic governance. In doing so, the article further argues that whatever reforms the G20 adopts should be assessed in the context of whether they comply with the principle of a democratic and equitable international order as set forth in various UN instruments. This would lead to a redefined and broader mandate of the G20, allowing non-G20 countries to participate in a meaningful way in G20 policy formulation. It also suggests that the G20 integrate its operations more durably to existing international economic organisations, such as the UN ECOSOC, IMF, World Bank and WTO, in order to build a more effective and

---

<sup>124</sup> U.N., Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (New York, 21 September 2009).

<sup>125</sup> See Tietje (N 72) 35.

<sup>126</sup> See Committee for a Democratic U.N., Call for Global Democratic Oversight of International Financial and Economic Institutions (1 April 2009) <[http://en.unpacampaign.org/statements/financial\\_crisis/index.php?PHPSESSID=13cf6b07e74d2d873f959a45d29944ca](http://en.unpacampaign.org/statements/financial_crisis/index.php?PHPSESSID=13cf6b07e74d2d873f959a45d29944ca)> accessed 17 March 2014.

complementary global economic governance structure. By doing so, the G20 would enhance its effectiveness and credibility in addressing the important challenges facing the global economy.