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Saving the World One Currency at a Time: Implementing the Tobin Tax

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SAVING THE WORLD ONE CURRENCY AT A TIME: IMPLEMENTING THE TOBIN TAX

I. INTRODUCTION

The Twentieth Century ushered in an era of astounding economic and technological growth that continues to be unrestrained by national borders. Such expansive growth and globalization affect every nation, enabling industrialized countries to achieve unprecedented prosperity. The impact of globalization is less favorable on developing nations.[1] In order to avail themselves of industrialized nations' capital markets and investors, developing nations suffer the loss of control over their national policies, the flight of capital to industrialized nations, the weakening of their currencies, and the ever-widening economic gap between "have" and "have not" countries.[2]

Since the liberalization of currency regulations in the 1970s, industrialized nations have reaped the benefits of unrestrained currency transactions.[3] While unavailable under the "pegged" currency valuation system established in Bretton Woods after World War II,[4] short term

1. The consequences of globalization for developing countries include "unstable exchange rates; extensive short-term debt [in the] . . . private sector[]; deteriorating terms of trade; rise of protectionism in some industrialized countries against manufactured goods in which developing countries have a comparative advantage . . .; and the raids of speculation against their currency." Frank R. Rampersad, *Coping with Globalization: A Suggested Policy Package for Small Countries*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 115, 116 (July 2000). See Jon Mandle, *Globalization and Justice*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 134-37 (2000) for an examination of some commentators' views that globalization itself is a threat to culture and tradition that cannot be outweighed by developing countries' needs or the need to control market instability.

2. "The July 1999 United Nations Development Report notes that globalization has widened the gap in living standards between rich and poor nations, and that the United States has become increasingly dominant in both cultural and economic affairs." David A. Zalewski, Book Review, J. ECON. ISSUES, Mar. 1, 2000, at 244. *See, e.g.*, Harry Barnes, *Rich Pickings: A Worldwide Tax on Currency Speculation Would Give Billions to the Poor,* THE GUARDIAN, Mar. 8, 2000, *available at* LEXIS, News Library (explaining that international currency speculation has contributed to a great deal of the economic turmoil that underlies underdevelopment and poverty in developing countries).

3. Beatrice Newbery, *Development-Finance: Speculation Tax To Prevent Disasters,* INTER PRESS SERVICE, Sept. 8, 1999 (noting that the large volume of trading is partly due to the use of electronic trading). Commentators speculate that international currency transactions exceed $450 trillion annually. Brian Kenety, *Delegates Quarrel Over Call for Tobin Tax Study,* INTER PRESS SERVICE, June 30, 2000, *available at* http://www.ips.org/geneva/0107/gva0107b.htm. Of this, an estimated $1.5 trillion in international currency transactions take place daily for speculative purposes only. *Pointers–Taxing Speculation,* FOREIGN REPORT, June 22, 2000. Currency derivatives are also traded at an additional nearly $1 trillion per day. *See* Newbery, *supra*. *See also* Barnes, *supra* note 2 (explaining that "80% of the speculation is undertaken in just seven countries and most transactions occur in only a few large institutions").

4. Geoffrey G.B. Brow, *The Tobin Tax: Turning Soros into Plowshares?,* 9 TRANSNAT'L L. & CONTEMP. PROBS. 345, 350-54 (1999). In an attempt to stabilize the international economy after

currency speculation has become a profitable and popular form of investment under the free-floating currency system that exists in today's global economy.[5] However, economists' fears that such speculation could undermine international currency were not realized until the 1990s, when numerous countries felt the devastating impact of market volatility.[6] As a result of the volatility, commentators and economists have renewed calls for international monetary reform in order to prevent future currency crises.[7] This plea for international monetary reform presents a promising opportunity for developing countries.

In the 1970s, renowned economist James Tobin proposed the creation of a tax on international currency transactions, subsequently dubbed the "Tobin Tax."[8] The Tobin Tax would simultaneously address the two distinct issues of market volatility and aid for developing countries. The tax, originally valued at 1% and subsequently reduced to .1%-.25%,[9] would increase the

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World War II, the Allied countries reached an agreement in Bretton Woods, New Hampshire that established a "pegged" currency system. *Id.* at 350. Under the pegged currency system, the International Monetary Fund ("IMF") gave member states a par value for the currency based on its value compared to the value of the U.S. dollar, which was based upon the gold standard. *Id.* at 350-51. Member states were required to use the par value unless they received special permission from the IMF to change the value of their currency. *Id.* at 351.

5. Over time, member states lost confidence in the Bretton Woods system, ultimately electing to utilize a free-floating system. *Id.* at 351-52. By 1973, all major currency countries rejected the Bretton Woods model allowing their currencies to float freely. *Id.* at 352.

6. *Id.* at 368-75 (examining exchange rate crises in Europe, Mexico, and Asia). *See also* Mandle, *supra* note 1, at 133 (noting the widespread belief that the Asian financial crisis of 1997 was exacerbated by short-term currency transactions).

7. Brow, *supra* note 5, at 375. *See infra* note 26 and accompanying text. *See also* Duncan Green, *Make Global System Work for the Poor,* (Apr. 23, 1999), *at* http://www.globalpolicy.org/socecon/glotax/curtax.cur7_1.htm (advocating reforming the IMF in light of the needs of developing countries as highlighted by recent financial crises). Commentators have not limited calls for reform to international monetary systems. Domestic exchange rate policies, especially exchange rate liberalization, in developing countries are also under fire, however, for contributing to the economic degradation that has taken place in those countries since the 1970s. DANI RODRIK, THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES: MAKING OPENNESS WORK 99, 128 (1999). Some developing countries have actively sought to maintain appropriate exchange rates, only to have their efforts undermined by international economics. *See* N.A. Rweyemamu, *Foreign Investment Policy: Kenya's Experience, in* DEVELOPING WITH FOREIGN INVESTMENT 260, 277 (Vincent Cable and Bishnodat Persaud eds., 1987); RODRIK, *supra* (demonstrating the importance of international economics and approval to leaders of developing countries). Regional exchange policies may also affect countries' economies. For example, member countries of the CFA franc zone had uncompetitive exchange rates before the CFA franc's devaluation in 1994. RODRICK, *supra*, at 128.

8. James Tobin, *A Proposal for International Monetary Reform,* 4 E. ECON. J. 153 (1978), *reprinted in* James Tobin, ESSAYS IN ECONOMICS: THEORY AND POLICY 488 (1982).

9. Enriqué R. Carrasco & Kristen J. Berg, *Praxis-Oriented Pedagogy: The E-Book on International Finance and Development*, 32 LOY. L.A. L. REV. 733, 744 (1999). *See* Jim Barnett, *DeFazio Seeks Tax to Protect Poorer Nations from Trade Woes,* PORTLAND OREGONIAN, Apr. 12, 2000, *available at* 2000 WL 5392548 (describing the U.S. Congress's concurrent resolution, which proposes a Tobin-like tax that could be as low as one-tenth of one percent). This estimate may be

transaction costs of international financial transactions, thereby reducing the short-term profit motivation that drives currency speculation.[10] Originally, Tobin envisioned that individual countries would assess the tax and collect its proceeds for national use.[11] As the tax is typically proposed, however, the proceeds of the tax would fund international efforts to alleviate poverty or would be distributed to developing nations directly as foreign aid.[12]

Part I of this Recent Development will examine the oft-ignored needs of developing countries, the global circumstances giving rise to those needs, and the international community's failed attempts to address or resolve them. This Recent Development will then delve into the background of the Tobin Tax and how it responds to the recently resurrected calls for international monetary reform. Finally, this Recent Development will examine the advantages and disadvantages of the tax, including the two predominant hurdles to implementing the tax: enforceability and international cooperation.

Part II will address the difficulty of implementing a Tobin Tax by examining two proposed approaches and discussing how they seek to resolve the dual problems of establishing effective enforcement mechanisms and attaining international cooperation. The first approach creates an international organization that implements and enforces the tax on an international level. While this approach is traditionally favored by Tobin Tax proponents, it faces the potentially insurmountable obstacle of gaining widespread

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overly conservative, as it falls at the low end of the .1% to .25% range proposed by most proponents of the tax. *See U.S., French, European Lawmakers Call for Tax on Global Money Funds,* AGENCE FRANCE PRESSE, Apr. 11, 2000, *available at* LEXIS, News Library [hereinafter "*U.S., French, European Lawmakers*"].

10. *U.S., French, European Lawmakers, supra* note 9.

11. Myron W. Kronisch, *Time for Another Look at Alternative U.N. Revenue,* 147 N.J.L.J. 23 (1997). "Like any tax collected by states, it could remain with the governments that collect it, whether for national programs, for dedication to international assessments, or for distribution as tax relief to the citizenry. Alternatively, those governments could take a fixed share and forward a specified percentage, or the entire net amount, after deducting national administrative costs, to the U.N." *Id.* Interestingly, the author proposes that the U.N. consider accepting tax proceeds not as a tool to fund developing countries but as a means of replacing funds the United States, as "the world's No. 1 U.N. deadbeat," has failed to pay. *Id. See also* Carrasco & Berg, *supra* note 9, at 744 (explaining that Tobin believed the tax would give countries greater control over their domestic policies by providing them both better control over the flow of capital into and out of their borders).

12. Some Tobin Tax proposals have provided for the proceeds to be used to fund other causes. *See, e.g., Tax Legislation: DeFazio and Wellstone Push Resolution for Tobin Tax to Curb Currency Speculation,* DAILY TAX REP. (BNA) No. 71, Apr. 12, 2000 [hereinafter DeFazio and Wellstone] (explaining a proposal in the U.S. Congress that would provide a Tobin-like tax, the proceeds of which would be used for both developing countries and environmental clean-up); Brow, *supra* note 5, at 377-378 (describing former U.N. Secretary General Boutros Boutros-Ghali's suggestion that the proceeds be used for peacekeeping and other functions of the United Nations). Most Tobin Tax proposals, however, provide for the proceeds to be used in efforts to aid developing nations, such as assisting development and alleviating poverty. *See, e.g.*, Mumia, *infra* note 15. *See also* Newbery, *supra* note 3.

international approval and cooperation. In addition, it fails to present a solution to the problem of enforceability. The second approach uses an international agreement whereby countries implement the tax on a domestic level and contribute the proceeds to the international community.

Part III will set forth a recommendation that adopts the second alternative, an international agreement between countries to collect the Tobin Tax domestically and remit the proceeds to the international organization responsible for distributing them. Implementation of the Tobin Tax at a domestic level would have several advantages, including the ability to utilize existing tax collection systems within individual countries that make use of advanced technology and experience, thereby reducing the overall cost of implementation. In addition, domestic implementation would enable individual countries to maintain sovereignty over the taxation of their foreign exchange markets. Countries could minimize the burden of implementing the tax by offsetting the cost of administration against tax proceeds prior to distribution to the governing international organization. Finally, because an international agreement requires international cooperation and the participation of key countries, a few of which have expressed initial opposition to the Tobin Tax, the proposal would limit the required number of participating countries. At the same time, it would provide countries with an incentive to implement the Tobin Tax by allowing them to reduce or eliminate their foreign aid obligations, thereby reducing the burden of international efforts and financial obligations on national governments.

II. HISTORY

A. Plight of Developing Countries

Developing countries face myriad challenges. The governments must often deal with numerous overwhelming social problems, including disease, malnutrition, and rampant unemployment,[13] as well as unstable governments, financial constraints, weak infrastructures, and lack of technology and technological expertise.[14] With few financial resources, developing countries

13. Nancy S. Zahedi, *Implementing the Rotterdam Convention: The Challenges of Transforming Aspirational Goals into Effective Controls on Hazardous Pesticides Exports to Developing Countries,* 11 GEO. INT'L ENVTL. L. REV. 707, 712 (1999). *See also* Margaret Legum, *Tax Polluters To Raise Money for a General Income Grant,* BUSINESS DAY (South Africa), Mar. 14, 2000, *available at* http://www.bday.co.za/bday/content/direct/1,3523,578574-6078-0,00.html (explaining that poverty is the beginning of a path to the destruction of society and results in "abuse of women and children, crime, delinquency, drugs and madness").

14. Christine Batruch, "*Hot Air" as Precedent for Developing Countries? Equity Considerations,*

must rely on the international community for assistance in overcoming such tremendous obstacles.

While developing countries make up a substantial portion of the international community, dominance by industrialized nations[15] is clearly evidenced by the international community's failure to address, adequately consider, or resolve the problems facing developing countries.[16] International agreements are a means by which the international community may articulate its concerns and establish common goals and policies.[17] However, international agreements may overlook the needs of developing countries or address them without the participation of the developing countries themselves, thereby disproportionately reflecting the needs and views of industrialized countries.[18] Even if given the opportunity, developing

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17 UCLA J. ENVTL. L. & POL'Y 45, 58-59 (1998–99).

15. As one commentator has noted,

> [T]o whom will national economic policymakers be accountable? The implicit answer provided by the globalization model is that they will be accountable to foreign investors, country fund managers in London and New York, and a relatively small group of domestic exporters. In the globalized economy, these are the groups that determine whether an economy is judged a success or not, and whether it will prosper . . . .
>
> [A finance minister in a developing country] is spending the vast majority of his time worrying about how the rest of the world evaluates his management of the economy. Traditional developmental concerns have been all but squeezed out. For this minister, it is global markets that dictate policy, not domestic priorities.
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> . . . .
>
> International markets, particularly financial ones, do not always get things right with respect to economic efficiency. They are even less likely to get things right with regard to societal outcomes suitable to each nation's aspirations.

Rodrik, *supra* note 7, at 150-52 (1999). *See also* Pauline Mumia, *Ecumenical Team Calls for a Just and Moral Economy,* ALL AFRICA NEWS AGENCY, Apr. 17, 2000, *available at* http://www.una.dk/ffd/South_ngo/Godkendt_syd/allAf_Moral_Economy.htm (describing the belief of some nongovernmental organizations (NGOs) that the steady rise in poverty throughout the 1990s indicates the "neo-liberal" free market economy has not benefited developing countries but instead has widened the gap between rich and poor).

16. *See, e.g.*, *supra* note 2.

17. Agreements, such as treaties and conventions, have proven to be more useful in international law because they are more reliable than customary law. C. Russell H. Shearer, *International Environmental Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation,* 7 TUL. ENVTL. L.J. 391, 419 (1994).

18. Some commentators claim that the IMF and the World Bank ignore arguments that markets must be "socially embedded" in order for market reform measures to effectively promote economic development. Zalewski, *supra* note 2, at 242. As a result, the institutions' attempts to force economic policies on developing countries in exchange for financial assistance are often economically and socially disruptive. *Id. See also* Bing Ling, *Developing Countries and Ozone Layer Protection: Issues, Principles and Implications,* 6 TUL. ENVTL. L.J. 91, 96 (1992) (explaining that, in the Montreal Protocol on Substances that Deplete the Ozone Layer, developing countries did not become involved in the process until after the agenda and general issues had been discussed and, as a result, most developing countries were not satisfied with the Protocol's provisions regarding assistance to and obligations of developing countries); Shearer, *supra* note 17, at 416 (contending that "international

countries often have insufficient financial resources to participate in the mechanisms and organizations established by international agreements.[19]

In addition to general goal and policy setting, international agreements often impose substantial regulations on member countries. Developing countries frequently find compliance with such standards and regulations prohibitively costly.[20] They also complain that industrialized countries place the increasingly costly burden of international regulation on developing countries, while providing insufficient assistance to enable the developing countries to bear this burden.[21] Although some international organizations

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institutions do not allow for greater input from developing nations to compensate for dominance exerted by developed nations in agenda setting and international law articulation").

> There is an inevitable tension between the democratic ideal of universal participation and the need for speedy, efficient decision-making, as well as between the respective claims of statehood, population, and wealth. The tension has increased as the number of states has grown while global economic decision-making, far from reflecting a polycentric world, has become concentrated in the hands of the United States, Europe, and Japan—with just over 10 per cent of the world's population.
>
> This concentration of decision-making is reflected in the voting arrangements of the Bretton Woods institutions. Even more important, it is also a factor in the exclusivity of such groups as the G7. And major powers dominate the negotiating processes of GATT, where all parties are nominally equal but actually very unequal. The countries that benefit from these inequalities would never accept such undemocratic arrangements in their own societies, and, in part at least, their economic strength derives from that rejection.

Commission on Global Governance, Our Global Neighbourhood at Chapter Four: Managing Economic Interdependence, *at* http://www.cgg.ch/contents.htm (the article further explains that global governance should provide, *inter alia*, "systemic financial stability: a stable monetary system, a capacity to deal with major systemic slumps and shocks, and prudential regulation of international financial markets").

19. The Second Meeting of the Parties to the Montreal Protocol sought to amend the Montreal Protocol in order to provide financial and technical assistance to developing countries in order to enable them to participate in the Protocol regime. Ling, *supra* note 18, at 97. In order to effectively participate in the development of international agreements, developing countries must obtain financing to enable their national representatives to attend and participate in meetings of international organizations. These costs are distinguishable from the often significant costs developing countries must incur to comply with the standards established by the international agreement, such as the expense of implementing environmental protection programs. *See infra* note 21. *See also* Ling, *supra* note 18, at 112.

20. "Opponents of environmental countervailing duties also argue that developing countries cannot afford to meet the environmental laws of the developed world, and thus, the imposition of countervailing duties against their products would freeze them out of world markets." Robert F. Housman & Durwood J. Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545, 558 (1993).

21. Zahedi, *supra* note 13. For example, approximately half of the developing signatories of the Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals and Pesticides in International Trade had insufficient financial resources to adhere to the convention's obligations of adopting pesticide control legislation, implementing it, and establishing the agencies necessary to enforce it. *Id.* at 712. Nearly eighty-four percent believed they would not be able to meet the international standards because of economic restraints. *Id. See generally* William Wilson, *Environmental Law as Development Assistance*, 22 ENVTL. L. 953 (1992).

have sought to provide quantitative assistance, the largest and most influential organizations have failed to meet their financial assistance goals.[22]

B. Development of the Tobin Tax

The unfettered flow of capital is a fundamental principle in most agreements affecting the international economy.[23] However, it has wreaked havoc on currency rates and adversely affected national economies worldwide.[24] As one commentator explains, "We can imagine cases in which judicious application of capital controls could have prevented a crisis or greatly reduced its magnitude."[25] As a result, many economists recommend restraints on such damaging market activity as short-term currency speculation.[26] James Tobin conceived his tax for this purpose.

The imposition of a tax on financial transactions in order to counteract the

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22. "Few rich countries have reached the agreed UN aid target for overseas aid budgets." Barnes, *supra* note 2. The Trust Fund established by the Swedish International Development Authority and the International Union for the Conservation of Nature (IUCN) assists developing countries on technical and legal issues arising in environmental legislation. Wilson, *supra* note 21, at 969-70. During its first two years in existence, thirteen developing nations requested assistance. *Id.* at 970. The World Bank, on the other hand, has established goals and policies but has yet to implement them. *Id.* at 968-69. Similarly, while the United Nations' Agenda 21, which included what was hoped to be an effective mechanism whereby developing countries would receive funds to enforce international regulations, was only mildly successful due to a lack of enforcement of countries' financial commitments. *United Nations: More Action Said Needed to Blend Environmental Protection, Development*, INT'L ENVTL. DAILY (BNA) at D-3, June 2, 1994, *available at* LEXIS, News Library.

23. This trend appears to be changing. Originally established by the Bretton Woods system, the IMF's primary purpose is to stabilize currency. Brow, *supra* note 5, at 350. "Indeed, even the IMF—historically a vocal proponent of completely unfettered capital markets—has supported the limited use of taxes and restrictions on some international financial transactions." William R. White, Note, *The Tobin Tax: A Solution to Today's International Monetary Instability?*, 1999 COLUM. BUS. L. REV. 365, 388.

24. Rampersad, *supra* note 1. "'[I]nternational [financial] turmoil is wreaking havoc in all emerging markets. It threatens the social and economic progress achieved in the last decade and the political consensus for greater economic and financial progress, which underpins the progress.'" *Id.* at 116 (quoting Inter-American Development Bank, *Introduction to the Seminar "New Initiatives to Tackle International Financial Turmoil,"* Paris France (Mar. 14, 1999)).

25. RODRIK, *supra* note 7, at 149.

26. Zalewski, *supra* note 2, at 243 (explaining that some commentators believe "increased financial volatility has been a contributing factor to economic stagnation since the early 1970s"). *See also What Does That Mean . . . "Tobin-tax"?*, DRESDNER BANK TRENDS, June 1, 1999 (suggesting the Tobin tax could be used for short-term stabilization but should not replace other monetary reform measures); White, *supra* note 23, at 367 (claiming the IMF "has acknowledged that volatility in international currency markets can lead to decreased levels of transnational investment and trade, harming the world economy"); Commission on Global Governance, *supra* note 18 (calling for reformation of the IMF and describing how the current international monetary system is flexible but unstable while alternatives, such as governmental regulation and fixed exchange rates, are stable but inflexible).

disruptive effects of instability in the international market is not a new idea.[27] In the 1970s, James Tobin introduced an important variation on the theme. He recommended the imposition of a tax on international capital flows that would not merely allow individual countries to mitigate the impact of economic instability on domestic economies but would actually reduce instability at an international level.[28] While the tax would be imposed on all international transactions, its low rate and repeated application to transactions that have brief turnaround times[29] would reduce the incentive to invest in destructive short-term currency speculation while having a minimal, potentially immaterial effect on long-term capital flows.[30] Early in 2000, Canada revived the international community's interest in the Tobin Tax when it recommended that the United Nations perform a study on the tax's advantages and disadvantages.[31]

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27. *Retarding Short-Term Capital Flows Through Withholding Tax,* IMF Fiscal Affairs Department, Working Paper 3 (2000) [hereinafter IMF Working Paper]. In the 1930s, Keynes introduced a tax on financial transactions that was designed to "discourage speculative activities which are not in line with economic fundamentals." *Id.*

28. *Id.* at 4. The goals of taxes proposed by Keynes and Tobin are fundamentally different because the former is intended to "merely moderate the impact of volatile world capital flows on a country's domestic economy" whereas the latter is "aimed at reducing global destabilizing speculative capital movements." *Id.* This Recent Development explains that the Tobin tax's broader goal makes it more susceptible to the problems of international cooperation and enforceability than Keynes' domestic tax. *Id. See infra* notes 68-75 and accompanying text.

29. The transaction cost of the tax on short-term transactions would be double the tax rate because it would be imposed both at the time the currency was purchased and at the time it was sold. *This Week: Finance: The Tobin Tax: A Strategy Against Currency Speculation,* BUSINESSWORLD (Philippines), July 5, 1999 [hereinafter "BusinessWorld"]. As a result, the "double taxation" would be prohibitively costly for short term currency transactions wherein profit arises from very small currency price differentials. *Id. But see infra* note 33.

30. "While the rate would be low enough not to have a significant effect on longer-term investment where yield is higher, it would cut into the yields of speculators moving massive amounts of currency around the globe as they seek to profit from minute differentials in currency fluctuations." Kenety, *supra* note 3. Paul Bernd Spahn, a German economist, proposes a two-tiered variation of the Tobin Tax that would impose a uniform low tax rate on all currency transactions with an additional surcharge to be imposed on transactions during periods of exchange rate turbulence. *Id.* See DRESDNER BANK TRENDS, *supra* note 26, for a hypothetical demonstrating how the Tobin tax is more effective when applied to transactions that have shorter maturities.

31. Catherine Rama, *"Tobin Tax" Study Proposed for UN Social Summit Final Text,* AGENCE FRANCE PRESSE, June 29, 2000, *available at* LEXIS, News Library. "[A] majority of UN member states [sic] supports the idea of a study, as do NGOs, trade union, and parliamentarians." Kenety, *supra* note 3. Only three countries, including the United States and Australia, initially opposed Canada's proposal. Geoffrey Barker, *UN-Friendly,* AUSTRALIAN FIN. REV., July 17, 2000, *available at* http://www.comp.utas.edu.au/units/kxa155/rkyv/FR0/FR0J1/FR0J117a.htm [hereinafter "UN-Friendly"]. The opponents' primary concern appeared to be the inclusion of the term "Tobin tax," which was ultimately removed by agreement between the United States and Canada. *Id.*

> [T]he director of the UN's social policy and development division . . . described [the US-Canada agreement on] the communique as an 'astonishing breakthrough,' saying it meant 'there is to be a study authorised without dissent by the member countries of the UN into a currency transaction

1. Advantages

As Tobin intended, the primary advantage of the Tobin tax would be the reduction of currency speculation, resulting in increased foreign exchange market stability.[32] An important advantage of the Tobin Tax is that it may be

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tax, the Tobin tax, and other potential sources of revenue for social development.

Id. See Kenety, *supra* note 3 (explaining that Japan is the third opponent of Canada's proposal). There is insufficient information to determine Japan's rationale for opposing Canada's proposal. *See infra* note 39. *But see* Geoffrey Barker, *UN To Pursue Study of Tobin Tax,* AUSTRALIAN FIN. REV., July 4, 2000 (contending that Japan's opposition wavered). While Canada's proposal was ultimately adopted without dissent, some commentators warn that the U.N.'s omission of the term "Tobin Tax," as negotiated by the United States, suggests the final agreement was not supportive of a Tobin Tax. Paul Robilliard, *Tobin Currency Tax Is Not The Answer,* AUSTRALIAN FIN. REV., July 21, 2000.

32. *For Its Own Protection, The World Needs the Tobin Tax,* THE GLOBE AND MAIL, Mar. 16, 1999, *available at* http://www.halifaxinitative.org/hi.php/Tobin/77 (reciting a letter to the Canadian legislature "signed by some 40 professors of economics and other disciplines, and by representatives of some 45 non-governmental organizations"). In the letter, the writers recognized the tax's potential weaknesses. "The Tobin tax will not stop all speculative activity; in fact, it was never designed to. The tax will be avoided to a certain extent, as all taxes are. Technical and administrative challenges to implementation exist, but are clearly outweighed by the cost of the status quo and are not insurmountable." *Id.* Some economists contend that, contrary to expectations, a tax on financial transactions will not reduce currency speculation and, consequently, will have no impact on economic instability. "The idea [of a Tobin Tax] was . . . dismissed as 'stupid' by 1999 Nobel economics laureate Robert Mundell who has said it would not reduce speculation." Curb Speculators, *supra* note 42. *See also* Paul Davidson, *The Tobin Tax: Coping with Financial Volatility,* E. ECON. J. 105 (Jan. 1, 2000) (contending that transactions costs on international financial transactions are independent of time and thus have a negligible impact on short-term currency speculation). *But see* White, *supra* note 23, at 369 (contending that, while portfolio theory suggests firms should be risk-neutral to exchange rate risk, the reality is that firms *are* affected by exchange rate risk). "[E]xcess volatility will decrease aggregate transnational investment levels and overall economic growth, and interventions in the [foreign exchange] market may be justified." *Id. See also* Brow, *supra* note 5, at 393-94 (explaining that some studies indicate decreased turnover in transactions "inevitably" decreases volatility and commentators question other studies that have resulted in contrary findings). Others argue that while a tax can reduce currency speculation, this particular tax will not because of the low proposed tax rate.

> [C]ritics of the Tobin proposal point out that in the 'emerging market' world of extremely high currency risks, investors who expect a short-term devaluation of as little as three or four percent would not be deterred from a speculative transaction by a Tobin tax set at 0.1 to 0.5 percent.
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> Indeed, given the scale of recent 'emerging market' devaluations (50 percent in Thailand and Indonesia, 40 percent in Brazil) the tax would be totally irrelevant.

Kenety, *supra* note 3 (explaining that, despite this argument, critics admit that "the Tobin tax would reduce pre-crisis speculative short-term flows and thus help avoid the problem of overvalued exchange rates in the first place"). *But see* White, *supra* note 23, at 390 (contending that, given the fact that more than 80% of foreign exchange transactions are very short term in nature, extending over seven days or less, a tax even as low as .1% could severely curtail the vast majority of speculative currency transactions). Finally, some critics argue that the tax will not be effective because traders may simply create derivative instruments to avoid taxation. Brow, *supra* note 5, at 392.

> Contrary to criticism, traders may not be able to escape the tax by inventing some type of financial instrument. First, most derivatives will be covered by a Tobin Tax because foreign gains and losses on derivatives are already reported under [U.S. tax law]. As for more sophisticated derivatives, James Tobin points out that the more removed an instrument becomes from the underlying exchange, the greater the transaction costs. This means, if traders use ultra-exotic

imposed with little or no impact on long-term investments.[33] Thus, while the short-term currency speculation market segment is intentionally slowed, the rest of the market remains free to operate virtually without restraint.[34]

The Tobin Tax has several other advantages, the most obvious of which is the ability to raise a tremendous amount of money.[35] Though Tobin initially conceived of the tax as a means of reducing destructive instability in the currency market, the primary side effect of the tax, its tax proceeds, is undeniably attractive. In addition to the tax proceeds, another advantage is the international community's general acceptance of such a potentially controversial tax.[36] While there will always be commentators and legislators

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> derivatives to avoid a Tobin tax, at some point, the cost of evading the tax will exceed the tax itself.

Id. at 397.

33. *See, e.g.*, IMF Working Paper, *supra* note 27, at 3 (explaining that the basis for Keynes's proposal was that a tax on financial transactions would encourage long-term currency transactions and discourage speculative ones).

> The implied transaction cost inflicted by the [Tobin] tax, even if imposed at a very low nominal rate (say, 1 percent or lower), would be hefty on transactions with a short turn-around time, but would diminish rapidly as their time horizon lengthens. Hence, the Tobin tax appears to be a neat instrument to cool the heels of volatile cross-country speculative capital movements, which invariably have a short time horizon, without at the same time damaging longer-term international capital flows, which presumably are primarily influenced by economic fundamentals.

Id.

34.

> [With the imposition of a Tobin Tax], market institutions would be geared to help those who would otherwise be left behind. Clearly, then, [the Tobin Tax aims] not to arrest globalization but to ensure that it is more just and that its benefits are more widely shared that they would be under a laissez-faire regime.

Mandle, *supra* note 1, at 134 (explaining that the Tobin Tax would minimize any adverse impacts on globalization by working with the market rather than replacing it).

35. As with the volume of international currency transactions and the amount of the tax itself, the possible amount of proceeds generally varies from $50 to $300 billion annually. *U.S., French, European Lawmakers*, *supra* note 9. *See also* Newbery, *supra* note 3 (explaining that, with proceeds potentially in excess of $250 billion per year, proceeds could be "five times more than the world currently spends on aid and . . . would pay off all international debt within eight months"). Commentators argue that these figures do not account for the reduction in international currency transactions that would likely result from the imposition of the tax. White, *supra* note 23, at 391-92 (noting that "[m]ore recent projections are far more conservative and arrive at annual estimates in the $100 billion range, depending on the tax rate levied," but the figure may be as low as $40 billion if the tax caused a change in the fundamental structure of the currency market).

36. *See AFX European Press Summary—Monday*, AFX NEWS, July 3, 2000, *available at* LEXIS, News Library (indicating Denmark's prime minister supports a Tobin Tax); *Call for Tax on Currency Speculation*, BRISTOL EVENING POST, Jan. 21, 2000, *available at* LEXIS News Library (summarizing a view of a proponent within the United Kingdom legislature); Ray Martin, *Canada Leads Fight on Tax Speculation*, THE EDMONTON SUN, Apr. 7, 1999, *available at* www.halifaxinitiative.org/hi.php/Tobin/76 (mentioning Canadian legislative efforts to support a Tobin Tax); Elisabeth Winkler, *Earthmother*, BRISTOL EVENING POST, Mar. 25, 2000, *available at* LEXIS, News Library (noting the United Kingdom's rising movement in support of a Tobin Tax); *supra* note 31 (examining the international support for and critics of Canada's proposal). Supporters include

who deem taxes to be inherently undesirable,[37] some argue that reasonable taxes are acceptable and may be desirable as components of developing countries' domestic policies.[38] Similarly, some commentators contend that domestic taxes, or lack thereof through investment-encouraging tax incentives, bear little or no impact on the decision-making process of corporations engaging in long-term projects.[39]

2. Disadvantages

The Tobin Tax has several disadvantages. As with other cooperative international efforts,[40] a few large industrialized nations, especially the

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NGOs, such as the Association for the Taxation of Financial Transactions for the Aid of Citizens (ATTAC), which has local associations in Europe, Africa, and North and South America. *Tobin Tax Lobby Goes onto the ATTAC*, AGENCE FRANCE PRESSE, June 29, 2000, *available at* LEXIS, News Library [hereinafter "ATTAC"]. *See also World Council of Churches Say the Special Session in Geneva Will Not Alleviate Problems of Poor Countries*, PAC. ISLANDS BROADCASTING ASS'N NEWS SERVICE, June 26, 2000. *See also supra* notes 31-32. *See also Worthy Crusade Quotes*, THE WORLDPAPER, Dec. 1, 1999 (quoting Barber Conable, former president of the World Bank as calling the Tobin tax "'one of the most intriguing potential ways to stabilize UN financing without damaging sovereignty or distorting market flows'"); BUSINESSWORLD, *supra* note 29 (indicating the IMF has moved from opposition to unofficial support for the Tobin Tax since the international currency crises took place).

37. *See* Barnett, *supra* note 9 (reciting a member of the Cato Institute's belief that "the tax runs counter to U.S. notions about freedom of capital"). *But see infra* note 38.

38. "Some consensus exists on what constitutes a reasonable trade strategy for African countries . . . *do* replace quantitative restrictions with tariffs; *do* avoid extreme variations in tariff rates . . . *don't* tax export crops too highly. Provided that the qualifiers in this list of guidelines ('extreme,' 'excessively high,' etc.) are interpreted reasonably, these desiderata remain useful." RODRIK, *supra* note 7, at 130.

39. Although many developing countries have introduced far-reaching fiscal incentives for inward investment—tax holidays, supported by accelerated depreciation allowances and investment allowances or subsidies—surveys suggest they are of modest importance influencing investment decisions in general. Businessmen appear to regard them as of limited significance for the post-tax profitability of new investments in relation to other influences . . .

Vincent Cable & Bisnodat Persaud, *New Trends and Policy Problems in Foreign Investment: The Experience of Commonwealth Developing Countries, in* DEVELOPING WITH FOREIGN INVESTMENT 1, 10-11 (Vincent Cable & Bishnodat Persaud, eds., 1987). *See, e.g.*, Sheila Page, *Developing Country Attitudes Towards Foreign Investment, in* DEVELOPING WITH FOREIGN INVESTMENT 28, 41 (Vincent Cable & Bishnodat Persaud eds., 1987) (contending that tax incentives have limited impact on investment decision making); Roger C. Riddell, *Zimbabwe's Experience of Foreign Investment Policy, in* DEVELOPING WITH FOREIGN INVESTMENT 280, 297 (Vincent Cable & Boshnodat Persaud eds., 1987) (explaining that high corporate tax rates in Zimbabwe are a factor in investment decision making, but are "not a dominant deterrent").

40. Western legislators and academics often complain that international agreements treat developing countries preferentially by allowing them to meet less stringent requirements and contribute fewer financial resources to the regulatory regimes. Sean Michael Neal, *Bringing Developing Nations on Board the Climate Change Protocol: Using Debt-For-Nature Swaps to Implement the Clean Development Mechanism*, 11 GEO. INT'L ENVTL. L. REV. 163, 167 (1998) (explaining legislators and academics disagreed with the Kyoto Climate Change Protocol's nonbinding

United States,[41] are the most vocal opponents of the Tobin Tax.[42] Critics

obligations on developing countries). The sentiment has found approval in U.S. politics. "The U.S. Senate has already expressed its disapproval of the protocol due, in large part, to the lack of support from developing countries." *Id.* at 168. Likewise, "[t]he Clinton Administration has responded to these criticisms by promising to push for support from developing nations." *Id.*

41. The United States argues that the United Nations is not entitled to tax its member nations. Rama, *supra* note 31. *See also* Kenety, *supra* note 3 (explaining that "US senator Jesse Helms vehemently [opposes] . . . what he derides as a 'UN tax'"). The United States was the primary opponent of Canada's proposal to study the tax, which was supported by around forty NGOs. Rama, *supra* note 31. The United States initially opposed Canada's proposal because "the UN and its agencies are not mandated to tax member nations." *Id.* This argument may have some merit. In proposing the establishment of an apex body within the United Nations, the Commission on Global Governance emphasized the fact that it does not propose introducing a "taxing power" within the U.N. system. Commission on Global Governance, *supra* note 18. "User charges, levies, taxes—global revenue—receiving arrangements of whatever kind—have to be agreed globally and implemented by a treaty or convention." *Id.* However, the United States ultimately showed a willingness to cooperate when Canada agreed to exclude the specific "Tobin tax" name from its proposal. UN-friendly, *supra* note 31. Australia likewise appeared somewhat more willing to cooperate when the proposal excluded the "Tobin tax" language, calling the U.S.-Canadian agreement 'very satisfactory.' *Id. See also* Kronisch, *supra* note 11 (arguing that, in addition to having no authority to levy taxes, the United Nations has no means of collecting them). Despite overall opposition to the tax, the legislature of the United States includes some supporters of the Tobin Tax. In April of 2000, a concurrent resolution was introduced in the Senate and the House of Representatives that supported a domestic tax on cross-border, short-term currency transactions. DeFazio and Wellstone, *supra* note 12. DeFazio explains that the tax is designed to prevent excessive currency speculation. "'Although Wall Street barons may think this country is isolated from international financial crises, the U.S. is not immune . . . . It is only a matter of time before Americans will feel the effect of the financial devastation in other parts of the world.'" *Id.* (quoting Rep. Peter DeFazio). *See also* Brow, *supra* note 5, at 351-52 (examining currency problems the United States has faced in the past, including the reduction in the U.S. trade balance, the increase in U.S. overseas liabilities, and the insufficiency of U.S. gold reserves that prompted American leaders to change the U.S. currency from the gold-standard to a free-floating currency in the early 1970s).

42. Kenety, *supra* note 3. Japan is also opposed to the Tobin Tax, but there is little information available on the Japanese government's views or rationale. *Id.* Australia is also a vocal opponent to the tax. *Id.* However, rather than indicating a substantive reason for its opposition, Australia's position seems to reflect a general unwillingness to cooperate with efforts of the United Nations.

> Australia's active hostility to an entirely non-binding UN study of the Tobin tax (and there are serious arguments for and against it) reflected the Federal Government's increasingly aggressive and dismissive attitude toward [the] United Nations . . . .
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> . . . .
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> The Tobin tax issue reflected [the Australian government's] antipathy to international economic initiatives by UN social policy bodies . . . .

UN-Friendly, *supra* note 31. *But cf.* Ernest Rodeck, *Tobin Tax May Be Way Out of Financial Ruin*, AUSTRALASIAN BUS. INTELLIGENCE: THE AGE, Oct. 25, 1999 (arguing that Australia should support the Tobin Tax because it would protect Australia's currency and thus would be in Australia's best interests). France's views have changed over time. The current administration, particularly Finance Minister Laurent Fabius, seemingly disapproves of the Tobin tax because of "practical difficulties" and "difficulties over what to do with the money collected." *France Backs Off Tobin Tax To Curb Speculators*, AGENCE FRANCE PRESSE, Aug. 22, 2000, *available at* LEXIS, News Library [hereinafter "Curb Speculators"]. *See France's Fabius Sees No Need for ECB Rate Increase,* DOW JONES INT'L NEWS, July 8, 2000 (recounting Fabius's claim that "European finance ministers are hostile to any shift in policy that might cause Europe's young economic recovery to fade" and "most governments argue that a tax on international transactions will increase transaction costs, thereby acting as a barrier to investment.[43] Another argument against the Tobin Tax is that it will adversely affect the foreign exchange market itself. For example, the tax could create economic distortion by failing to distinguish between beneficial, long-term financial transactions and detrimental, short-term speculative transactions.[44] Some commentators argue that any intervention in the market would cause market inefficiencies.[45] Others disagree, however, claiming the foreign exchange market is not currently efficient and would therefore benefit from a reduction in exchange rate instability, such as would be effected through the imposition of the Tobin Tax.[46] One commentator explains that, with implementation of the

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and international financial institutions are hostile to [the Tobin Tax]"); *Keeping the Tobin Tax Away*, WALL ST. J. EUR., Aug. 23, 2000, *available at* 2000 WL-WSJE 21069004 (elucidating Fabius's views as opposing the tax but praising its proponents); *BoF's Trichet "Very Much Opposed" to Tobin Tax*, DOW JONES INT'L NEWS, June 29, 2000 (discussing the Bank of France Governor's opposition to the Tobin Tax). *But see supra* note 36 (addressing support for the Tobin Tax within the international community, including the European Union); *French Prime Minister Jospin Proposes Multilateral Discussion on Tobin Tax Idea*, INT'L TAXES (BNA) No. 130 (July 6, 2000) (explaining that Fabius "unveiled France's newfound interest in the Tobin Tax June 28 during an address before the National Assembly . . . noting that it was the perfect meeting of two ideas: the need to fight poverty and underdevelopment and the need to better regulate global capitalism"); Allister Heath, *False Dawn: France Is Not Back*, WALL ST. J. EUR., July 6, 2000, 2000 WL-WSJE 21065649 (showing a split of opinion within the French government).

43. *See also* Newbery, *supra* note 3 (claiming that NGOs that promote the Tobin Tax, such as War on Want, face criticism that the tax will discourage international investment and trade).

> The NGO defends the tax by explaining that '[u]p to 40 per cent of current trade takes the form of the shipment of goods between the branches of transnational corporations financed by bookkeeping entries, rather than conversion of one currency into another. Therefore most of these transactions are not even liable to the tax . . . .
>
> In fact, trade would most likely be boosted by a Tobin Tax as greater confidence in exchange rate levels would allow better planning and forecasting of trade transactions[.]'

Id. (quoting War on Want spokesman Steve Tibbett). *See also* Brow, *supra* note 5, at 397 (explaining that "[t]he Bretton Woods Commission concluded that the current system of floating exchange rates is responsible for lower economic growth rates around the world"); White, *supra* note 23, at 387 (demonstrating, *inter alia,* firms engaging in international investment would benefit from a reduction of exchange rate risk).

44. *Is the Tobin Tax Impracticable?*, LA LIBRE BELGIQUE, June 2, 2000 (explaining that some legislators are concerned that the tax is impracticable because "it hasn't the means to distinguish speculative fluxes from non-speculative ones"). IMF Working Paper, *supra* note 27, at 5. The IMF admits that this argument is valid not only for the Tobin Tax but also for unilateral measures, such as domestic taxes on financial transactions flowing in and out of a particular country. *Id.* The IMF counters this argument by balancing the relative cost of the economic distortion against the cost of instability within the foreign exchange market. *Id.* The IMF further contends that, combined with the low administrative costs of implementing the tax with the use of existing domestic systems, any economic distortions created by the tax would be "largely mitigated." *Id*. *See supra* note 33 for a discussion of tax's impact on long-term transactions.

45. White, *supra* note 23, at 368.

46. Davidson, *supra* note 32 (explaining that some economists argue that the Tobin tax is an excellent tool to overcome exchange rate misalignment that occurs from the asymmetric information

Tobin Tax, "[t]he market will still determine exchange rates; it will just do so more efficiently than it presently does."[47]

While the controversial tax sparked much debate over the proper balance between free market economics and social need, the most critical argument in opposition of the tax is enforceability. If the Tobin Tax is implemented at an international level, which international organization would monitor international currency transactions? How could this organization assess and collect the tax and how effective would it be?[48] Given the role of technology in effectuating transactions in the foreign exchange market, establishing a new international organization or preparing an existing one to enforce the tax would be both technically challenging and costly.[49] Alternatively, individual countries could implement and enforce the tax at the domestic level and send the proceeds to an international organization for distribution.[50] Under this approach, there are three primary challenges to enforcement. First, countries will have a strong incentive to refuse to comply with an international agreement implementing the tax in order to attract investors who are unwilling to pay the tax.[51] Second, assuming countries do comply, what international organization would enforce the countries' obligation to part

available in the foreign exchange market). "[E]mpirical studies evaluating the forward foreign exchange market cast doubt on the [foreign exchange] market's overall efficiency. Specifically, research into the use of forward exchange rates as a predicter of future "spot" rates indicated that forward premiums are *systematically* biased and predict changes in the future spot rate that are in the opposite direction of those actually observed." White, *supra* note 23, at 373. *See also* Brow, *supra* note 5, at 360 (explaining that some theorists believe foreign exchange market distortion is caused by currency speculation).

47. Brow, *supra* note 5, at 395 (contending that the foreign exchange market is currently distorted because of existing factors, such as noise traders).

48. IMF Working Paper, *supra* note 27, at 3 (explaining that "the practical feasibility of the Tobin tax has been bedeviled by a host of economic, administrative, and political complexities . . . [because] proponents of the Tobin tax continue to stress that its application . . . must be universal and uniform to prevent leakage of any kind"). *See also* Brow, *supra* note 5, at 392 (contending that tax proposals by international organizations, such as the IMF, would "not [be] a realistic option" because of opposition by the United States).

49. In order to be effective, mechanisms for assessing and collecting the tax would have to be both sophisticated and technologically advanced. See White, supra note 23, at 396-98 for a discussion of the securities regulatory process in which, as regulators become more sophisticated, traders would develop more exotic derivative instruments in an effort to avoid taxation. While the creation of a new international organization is costly in itself, providing it with the tools necessary to become a sophisticated and technologically advanced regulatory body could be prohibitively expensive.

50. *See infra* notes 63-72 and accompanying text. *Cf.* Brow, *supra* note 5, at 378-89 (examining tax treatment of currency transactions under U.S. law and comparing ways in which the tax could be implemented within the United States, such as at the market level through an excise tax or at the domestic level as a federal income tax).

51. *See infra* notes 56-57 and accompanying text. "Experts have been divided about whether a reasonably watertight levy was possible on any terms. If the tax is not to be widely evaded, many think that all governments even the tax havens should cooperate." *The Tobin Tax for the Greater Global Good*, WORLDPAPER, Dec. 1, 1999 [hereinafter "Worldpaper"].

with the tax proceeds and how would it do so? Finally, the variety of locations where currency transactions take place make universal enforcement difficult if not impossible.[52]

While the Tobin Tax has several advantages and disadvantages, one of the largest obstacles that may stand in the way of its adoption by the international community is the need for international cooperation. In order to impose a tax on international currency transactions, there must be widespread agreement on the terms of the tax.[53] While most currency transactions take place in only a few countries and currencies,[54] the tax would provide countries with an incentive to hold back approval on any international agreements implementing it.[55] For example, if an international agreement on the Tobin Tax was widely adopted, currency traders could shift their transactions to those markets that did not impose the tax, thereby rewarding countries that did not bind themselves to the terms of the agreement.[56]

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52. "Currencies can be exchanged anywhere or nowhere. Parties may be thousands of miles apart and need not use bank deposits. Bonds or derivatives will serve. Tax exchanges in one place in one form, say skeptics, and they will surely shift to another." Worldpaper, *supra* note 51. *But see infra* note 57.

53. White, *supra* note 23, at 399-402. *See also* IMF Working Paper, *supra* note 27, at 3.

54. *See* DeFazio and Wellstone, *supra* note 12 (explaining that the five countries with the most dominant currencies, namely the United States, the United Kingdom, the European Union, Japan, and Switzerland, must cooperate and support the Tobin Tax in order for it to be effective).

55. White, *supra* note 23, at 399-402.

56. Charlotte Denny, *Tobin's Tax Plan Finds Favour Only With the Finns: Economics Made Easy*, GUARDIAN, Apr. 10, 2000, *available at* LEXIS, News Library. It should be noted that this argument assumes the Tobin Tax will not be considered a part of binding, nonconsensual international law. *But see Business: Tobin or not Tobin? Nice Idea, . . . But Out of the Question*, OBSERVER, Sept. 5, 1999, *available at* LEXIS, News Library (quoting a senior economist as saying, in response to the argument that countries could attract short-term currency traders by refusing to cooperate with international efforts to impose a Tobin tax, "Britain has sovereignty over most of the world's tax havens. It could click its fingers and there would be nothing they could do about it"). It has also been asserted that

> [i]f major currency trading countries adopt the tax . . . the major foreign exchange markets and the major foreign exchange participants will be included within its scope. There is reason to doubt that trading will simply move offshore to a tax-free haven. For one thing, low-cost tax havens like the Cayman Islands have failed to attract most banking activ ity away from New York, London, and Tokyo. The cost of moving to such locations, including moving the technological infrastructure and, more importantly, the traders themselves, will be high . . . . Finally, the migratory impulse might not be so overwhelming. The United Kingdom and Japan both currently have security transaction taxes of 0.5% and 0.21% respectively, yet that fact has not affected their positions as global financial centers.

Brow, *supra* note 5, at 396-97.

III. ANALYSIS

The Tobin Tax is an ideal tool to aid in the resolution of two very important and somewhat interrelated problems: instability in the international currency market and the needs of developing countries. Though it is not a perfect solution to the world's problems, the advantages of the Tobin Tax far outweigh its disadvantages.[57] As a result, the question should not be whether to adopt the Tobin Tax; it should merely be how to adopt it.

One approach would be to create an international organization to implement and enforce the tax on an international level.[58] The majority of currency transactions on which the Tobin Tax would be assessed take place within a few industrialized countries.[59] While the purpose of the tax is to stabilize the foreign exchange market, the effect would be to shift wealth from a narrow portion of the economies of industrialized countries to the international community for application to worldwide problems, such as poverty. As a result, implementation of the Tobin Tax through an international organization would be symbolically consistent with the effect of the tax itself because it would require international cooperation and represent economic interdependence.[60]

This approach has several advantages. An international organization would provide uniform implementation. As a result, countries would be assured that each member nation would receive comparable treatment,

57. The Tobin Tax has several significant advantages. *See supra* text accompanying notes 32-39. While some critics believe that the Tobin Tax will have little or no effect on instability in the foreign exchange market, the consensus appears to be that the Tobin Tax will indeed reduce currency transactions. *See supra* notes 32, 44 and accompanying text.

While the Tobin Tax has several disadvantages, an effective implementation plan may reduce or eliminate many of them. For example, an implementation plan that effectively combines incentives to adopt the Tobin Tax with the means to enforce participating countries' obligations would mitigate the problem of enforceability. *See supra* notes 48-52 and accompanying text. Likewise, the use of incentives could encourage international cooperation. *See supra* notes 53-56 and accompanying text.

58. Brow, *supra* note 5, at 377. One author suggests that an Economic Security Council could be developed to implement and enforce the Tobin Tax within the institutional framework of the United Nations, *inter alia*. Rampersad, *supra* note 1, at 121. An Economic Security Council, or ESC, was proposed in 1995 as an apex body within the United Nations. Commission on Global Governance, *supra* note 18. The ESC would operate similar to, but independent of, the U.N. Security Council and would focus on issues affecting the international economy. *Id.* While the current institution informally governing economic decision making, the G7, predominantly represents the interests of industrialized countries, the ESC would represent a wider constituency, including developing countries and countries with alternative economies, such as Communist countries. *Id.*

59. *See supra* note 54.

60. See Commission on Global Governance, *supra* note 18, at Chapter Four: Managing Economic Interdependence, for an examination of the impact of globalization on the international community, as well as industrialized and developing countries individually, and the efforts of international and regional systems to cope with ensuing problems.

potentially motivating more countries to participate in the implementation of the tax. In addition, an organization operating under the auspices of a recognized international body, such as the United Nations or the World Bank, could utilize the larger organization's established enforcement and dispute settlement mechanisms. Although this approach is traditionally favored by Tobin Tax proponents,[61] it faces the potentially insurmountable obstacle of gaining widespread international approval and cooperation.[62] In addition, it fails to present a solution to the problem of enforceability. Rather, it merely designates which organization will be responsible for solving the enforceability problem.

The second approach is the use of national taxation systems to implement the tax at the domestic level.[63] This approach could use national banking and taxation systems to track international financial transactions and subsequently assess and collect the tax.[64] National governments would then contribute the proceeds to the international organization responsible for the distribution of the funds. Presumably, participating countries would only adopt this approach if they entered into a multilateral agreement with all other participating countries. Countries have a disincentive to implement the Tobin Tax unilaterally because imposition of the tax could put them at a competitive disadvantage.[65] As a result, countries will not likely enter into an agreement to impose the tax on themselves without assurance that other countries are equally bound to impose the tax within their domestic foreign

61. Rampersad, *supra* note 1, at 124.

62. *See supra* note 41 (discussing critics' arguments that the U.N. is not entitled to tax its members). If the tax were to be implemented by a body within the United Nations, implementation could face a constitutional hurdle because the United Nations lacks the power to tax its member nations. Rama, *supra* note 31. While garnering sufficient international cooperation to implement the Tobin Tax would be difficult, it may be impossible to achieve enough support to pass a proposal to grant the United Nations the "taxing power" necessary to implement a Tobin Tax agreement.

63. IMF Working Paper, *supra* note 27, at 1. In early 2000, the IMF proposed the imposition of a tax on financial transactions at the domestic level. *Id.* The IMF explains that the Tobin Tax is susceptible to three arguments: "[I]t would generate large economic distortions with respect to transactions unrelated to capital flows, require a high degree of international coordination in putting an effective enforcement mechanism in place, and raise very difficult issues about the disposal of the potentially large revenue from the tax." *Id.* at 3. The article further asserts that the unilateral imposition of a domestic tax on financial transactions would minimize the impact of instability in the foreign exchange market on the domestic economy. The unilateral imposition of the domestic tax would eliminate the problems of enforcement, international cooperation, and revenue disposal that the Tobin Tax faces. *Id.* at 4. Implementation at the domestic level has garnered some support among NGOs as well. "War on Want recommends that the tax be instated through an international agreement, backed by national legislation and suggests that it be applied where the transactions occur or where the deal is made, making collection of the tax the responsibility of the national central bank." Newbery, *supra* note 3.

64. Worldpaper, *supra* note 51 (considering the suggestion made by Canadian Rodney Schmidt).

65. *See supra* note 51.

exchange markets. Further, tax proceeds may be assessed and collected in a number of ways, such as reducing the total proceeds to be contributed to the international organization by the administrative costs incurred by the national government in implementing the tax.[66] Countries will likely express concern that, without a multilateral agreement in which all of the parties have comparable obligations, some countries will receive better treatment than others.[67]

There are several advantages to implementing the Tobin Tax at the domestic level. Such an approach would be cheaper than establishing an international organization because it would utilize institutions that are already in place.[68] It would also be more effective because it would employ the skill, experience, and technological capabilities that already exist in many domestic systems. Therefore, assessment and collection of the tax would be easier, thereby reducing the possibility that investors could avoid the tax by developing derivative instruments.[69] An additional benefit is that it would not necessarily require the universal cooperation that would be needed to implement the tax on an international level.[70] While domestic implementation may be more practical, some argue that this approach is risky because governments that implement the tax may choose to keep the

66. *See* Kronisch, *supra* note 11; *supra* text accompanying note 11.

67. *See infra* note 74.

68. IMF Working Paper, *supra* note 27, at 4-5.

69. Worldpaper, *supra* note 51. "Because of the insistence on new technology that enables the simultaneous settling of two payments involved in any trade, recently developed institutions form a single network for settling nearly all foreign-exchange transactions." *Id.* Thus, this approach addresses both the cooperative and technological aspects of enforcement of the Tobin Tax. *See supra* note 49. Practice within the United States provides an excellent example of the increased effectiveness of Tobin Tax enforcement through the use of domestic systems. The use of derivative instruments is commonplace within the stock market of the United States. *See supra* note 32. *See also* White, *supra* note 23. As a result, federal agencies that regulate the stock market and taxation likely have a great deal of experience with derivative instruments and may be better equipped to identify and monitor instruments that are being used to evade the tax. *Supra* note 32. Because some other countries, such as the United Kingdom and Japan, currently tax financial transactions, their domestic systems likely have enormous experience in monitoring and assessing and collecting taxes on derivative instruments. *See supra* note 56.

70. Worldpaper, *supra* note 51. "Any government could impose and collect the tax on trade in its currency." *Id.* Because the majority of currency transactions take place in only a few countries, an agreement to implement the Tobin Tax would arguably only require ratification by those countries in order to fulfill the tax's dual purposes of stabilizing the foreign exchange market and raising proceeds to aid developing countries. *See supra* note 54. If only a few industrialized countries ratify a multilateral agreement, however, they would be as guilty of legislating issues affecting developing countries without the actual participation of developing countries as other existing international agreements. *See supra* notes 18-19. In addition, if the international organization involved in collecting and distributing the tax operates within the United Nations, participating countries will not be required to pass a resolution granting the U.N. taxing power. Rather, the individual countries would be taxing themselves and merely contributing the proceeds to the organization voluntarily. *See supra* note 41.

proceeds rather than contribute them to the international community.[71] The existence of a multilateral agreement, with provisions governing enforcement of the tax and dispute settlement, could minimize such a risk.[72]

In entering into the multilateral agreements required to implement either approach, the parties would likely express certain concerns.[73] Countries in which the tax is imposed would seek to ensure that participating international organizations and other signatory countries fulfill their obligations under the agreement. Participating international organizations would seek to ensure that member countries fulfill their obligations under the agreement. Finally, both participating countries and international organizations would seek to ensure that governments and organizations that receive the tax proceeds use or distribute the funds properly.[74] As a result, parties to the required multilateral agreements must address accountability and enforcement.[75] If the multilateral agreements establish an organization to distribute the tax proceeds under a larger "umbrella" international organization, the agreements may incorporate the "umbrella" organization's dispute settlement mechanisms.

IV. MULTI-TIERED TOBIN TAX REGIME

The Tobin Tax is an efficient means by which the international community can simultaneously achieve real results in the reduction of

71. Worldpaper, *supra* note 51. "[This] mechanism would give the major financial powers an opportunity to benefit disproportionately. World opinion, however, may find this so outrageous as to prevent it from happening." *Id.*

72. *See infra* notes 74-81 and accompanying text.

73. The parties to a multilateral agreement would consist of (1) countries that either agree to be taxed by an international organization or assess and collect the tax at the domestic level and contribute the tax to an international organization, and (2) the international organization responsible for receiving or collecting the tax and redistributing it to selected organizations or governments for use or distribution in developing countries.

74. Collecting countries will seek to ensure that the commission and recipient countries and organizations handle tax proceeds properly and other countries impose the tax or allow the international organization to do so within their borders pursuant to the agreement. Under the international approach, any international organizations responsible for redistributing the tax will seek to ensure that member countries continually allow the organization to assess and collect the tax within their borders pursuant to the agreement. Under the domestic approach, the international organizations will seek to ensure that countries assess and collect the tax, and contribute the proceeds to the international organization, properly pursuant to the agreement.

75. If any organizations distributing the proceeds are established under a larger international organization, the participating parties may incorporate the larger organization's dispute settlement mechanisms into any multilateral agreements in which they enter. The parties to the required multilateral agreements will likely incorporate a dispute settlement provision into the agreement, such as a provision giving jurisdiction to certain international dispute settlement mechanisms over any disputes that arise under the agreements, in order to ensure that they have a means of legal redress if other participating parties do not fulfill their obligations or the tax proceeds are mishandled, *inter alia.*

instability within the currency markets and the battle against poverty and other issues plaguing developing nations. The issues of implementation and enforcement are problematic when considering the Tobin Tax. How will international currency transactions be tracked and measured? Who will track and measure the transactions? Which transactions will be subject to the tax and what institutions will make such decisions? How will an implementing institution collect the tax and ensure that it is distributed as the institution chooses?

The most effective means of implementing the tax would be through a multi-tiered system of tax collection and distribution.[76] On the first tier, national governments, hereinafter "collecting governments," would assess and collect the tax at the domestic level through the use of domestic institutions currently in place. After collection, the collecting governments would reduce the proceeds by the administrative costs they expended in assessing and collecting the tax.[77] The collecting governments would then contribute the proceeds to a commission, which would be responsible for distributing the proceeds to national governments, international organizations, or nongovernmental organizations for use or distribution.[78] Consequently, on the second tier, the commission would determine how the tax proceeds would be spent. As with the first tier, the commission would reduce the tax proceeds by administrative costs, including contributions to a "participation fund," prior to distributing the proceeds to the selected recipients.[79]

The final tier of the system would be administrative. There are two important considerations in implementing this system. First, the contributing governments, the commission, and the recipient governments or organizations must be held accountable for their use of the proceeds. In order to ensure accountability, a separate and independent organization would be responsible for periodically auditing the parties to ensure that contributing

76. While this proposal is entirely original, its basic structure bears some resemblance to other proposals. *See supra* notes 11, 63.

77. The multilateral agreement to which participating countries must be parties should include a definition of "administrative costs." *See infra* note 79 and accompanying text.

78. The commission would likely be an organization operating within a larger international organization, such as the United Nations. The commission would consist of representatives from both developing and industrialized countries. The participation of developing countries in the commission is particularly important because the commission will be responsible for determining where and how the proceeds of the tax will be used. Thus, participation in the commission would enable developing countries to play a greater role in international decision making that affects them directly. *See supra* notes 18-19, 70 and accompanying text.

79. *See supra* note 77. The parties to the multilateral agreement will determine by agreement if the commission may reduce the tax proceeds by the same kind and amount of administrative costs as those which participating countries deduct from the tax proceeds. *See infra* text accompanying note 87.

governments and the commission are only reducing the proceeds by existing administrative costs and passing the entire amount of remaining proceeds to the next tier.[80] In addition, the independent organization would periodically audit the recipient governments and organizations to ensure they are distributing or using the tax proceeds as mandated by the commission. A second consideration is that interested parties must be entitled to enforce the obligations of the contributing governments, the commission, and the recipient governments or organizations.[81] If the commission is established under a larger "umbrella" organization, interested parties may utilize the "umbrella" organization's dispute settlement mechanism.[82]

In order to implement the multi-tiered strategy outlined above, participating countries must enter into a multilateral agreement.[83] The agreement would include several components. It would outline the obligations of collecting countries, including an obligation to assess and collect the tax domestically. It may also explain how countries would go about doing so.[84] Effective implementation of this regime only requires the participation of a small number of industrialized countries.[85] In order to

80. The independent organization's services may be deducted from tax proceeds as "administrative costs" at the first or second tier of the regime, as mandated by the required multilateral agreements. *See supra* note 74.

81. In designing an effective dispute settlement mechanism provision for this agreement, a relatively wide variety of parties must be given standing to sue under the agreement. They must be given standing because some countries may participate in the regime as both collecting governments and members of the commission, potentially giving rise to collusion. For example, if several participating countries that are both collecting countries and prominent members of the commission choose not to fulfill their obligations under the agreement, the commission may not enforce those countries' obligations. If the agreement only entitles participating countries and the commission to enforce obligations under the agreement, recipient organizations and developing countries would be left without legal remedy in the hypothetical situation. By allowing other parties, such as recipient governments or organizations, to have standing to enforce the parties' obligations under the agreement, it is less likely that collusion can or will take place. In addition to the preventative rationale, allowing broad standing would reduce any appearance of impropriety. Given the potentially bountiful tax proceeds, the international community, participating governments, and constituents of national leaders would likely approve of a mechanism that would improve accountability in the regime.

82. The United Nations would be an ideal international organization in which the commission could operate because it contains established and arguably effective dispute settlement mechanisms, such as the International Court of Justice. *See supra* note 75.

83. Actual implementation would likely require a series of agreements.

84. Initial agreements may establish general guidelines on how collecting countries would assess and collect the tax, including giving collecting countries the right to reduce the tax proceeds by administrative costs incurred by the collecting governments. *See supra* note 77. More detailed guidelines would likely be addressed in later negotiations between participating governments or between collecting governments and the commission.

85. *See supra* note 54. While participation from many countries, both industrialized and developing, would be ideal, a high level of international participation would be both difficult and impracticable to achieve. The controversial nature of the Tobin Tax suggests that even a small number of countries would have difficulty agreeing on how to implement the tax and distribute or spend its

encourage their participation, the agreement could entitle collecting governments to reduce other foreign aid obligations that would otherwise be payable to countries entitled to distributions of Tobin Tax proceeds.[86]

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proceeds. Consequently, any attempt to implement the tax will likely be more successful if only minimal international cooperation is required. Though it would be unfortunate to exclude developing nations from agreements addressing collection of the tax, developing nations' economic situations indicate that the tax would have little or no direct effect on the economies of developing countries. In fact, limiting participation in initial agreements to the countries with dominant currencies actually benefits developing countries by eliminating the cost of participating in what could be lengthy negotiations. *See supra* notes 18-19. It would likewise be unfortunate to exclude industrialized countries, other than the countries with dominant currencies, or countries with transitional economies from agreements addressing collection of the tax. However, given the difficulty in garnering widespread cooperation, accomplishing implementation would be faster and easier without the cooperation of countries other than the countries with dominant currencies. Despite the limitation on participation in initial decision making, the tax will be effective because the majority of currency transactions will still be taxed and the tax proceeds will still be substantial. *See supra* note 56 (discussing the unlikelihood that most transactions will shift to tax haven countries). Once the tax has been implemented within the countries with dominant currencies, other countries may be allowed to participate in the regime.

86. Given the controversial nature of the tax, an incentive to participate is necessary. The incentive shifts the burden of providing aid to developing countries from collecting countries' governments to private parties. Because the proposed multilateral agreement would relieve industrialized countries of their aid obligations to developing countries that receive financial assistance from the commission, the proposed agreement would be inconsistent with the pre-existing agreements establishing such aid obligations. The "last–in–time" doctrine provides that, when two treaties are inconsistent, the most recently enacted treaty controls. Whitney v. Robinson, 124 U.S. 190, 194 (1888). However, because the last–in–time doctrine only applies to parties to treaties, the proposed multilateral agreement would only affect those countries that ratify it, namely industrialized countries. Because developing countries' legal interests would be unaffected, they could potentially bring legal actions and prevail against industrialized countries for breaching the pre-existing treaties that established the aid obligations. In order to remedy this situation, the commission should require countries that receive tax proceeds to agree to relinquish their legal rights against industrialized countries under pre-existing treaties in order to receive funding from the commission. Such an agreement would likely meet the Vienna Convention's requirement that treaties may only be amended by agreement of the parties. Vienna Convention on the Law of Treaties, May 23, 1969, art. 39, 1155 U.N.T.S. 331. Developing countries could alternatively elect to keep their financial assistance under pre-existing treaties, thereby foregoing funding from the commission. Given the Tobin Tax's revenue-raising potential, most developing countries will likely be entitled to more financial assistance from the commission and would therefore agree to release their rights against industrialized countries in most cases. *See supra* note 35. Consequently, contingent distribution of the tax proceeds to developing countries would ensure that industrialized countries receive the benefit of reduced aid in most cases. Contingent distribution of tax proceeds will have the added effect of maintaining developing countries' sovereignty by allowing them to choose the source of their aid.

The incentive is subject to two main limitations. First, it would only replace financial assistance. Industrialized countries' obligations to provide nonfinancial aid, such as technical assistance, would continue.

Second, in accordance with the commission's contingent distributions, the incentive would only operate to reduce or eliminate collecting countries' foreign aid obligations to countries that would directly or indirectly receive tax proceeds from the commission. As indicated in Part II, the idea of imposing a tax, particularly the Tobin Tax, on international business transactions is highly controversial and much maligned by some commentators. Consequently, national leaders of countries with dominant currencies, especially those of the United States, may have difficulty garnering

The agreement would also establish the commission and outline its duties and obligations. The participation of developing countries in the commission is essential because the commission would be addressing and seeking to resolve issues directly affecting developing countries. In order to ensure that developing countries can participate in the commission, the agreement would establish a "participation fund" to reduce the financial burden on developing countries for such participation. The participation fund would be funded by tax proceeds and would be used to pay expenses incurred by developing countries in order to participate in the commission.[87]

Implementation at the domestic level would be the most effective solution, but would lack the power of a large international organization and the availability of international dispute mechanisms that implementation at the international level could provide. Only a multi-tiered regime could combine the efficient, low-cost benefits of domestic implementation with the advantages of international implementation. With the addition of accountability and dispute settlement mechanisms, the multi-tiered regime becomes a practical and effective means of implementing the Tobin Tax. Finally, the most prominent industrialized countries will be enticed to participate in the regime in order to utilize its foreign aid incentive, and developing countries will have the financial capacity to fully and actively participate in the commission's distribution of tax proceeds.

V. CONCLUSION

Globalization and the unrestricted free-floating currency system have become a lethal combination for the economies of developing countries. The renowned economist James Tobin's proposal for international monetary reform through a tax on international currency transactions offers a unique and potentially effective solution to the dual problems of economic instability caused by currency speculation and the financial needs of developing countries. Because it would be assessed at such a low rate and would only affect a specific type of international financial transaction, the Tobin Tax would benefit the global economy and favor the needs of developing

sufficient support within their borders for their countries to adopt the Tobin Tax at all, much less implement it under the proposed regime. The incentive allows national leaders to demonstrate to their constituents that the tax may benefit industrialized countries as well as developing ones by reducing collecting governments' financial obligations to developing countries while penalizing the private parties that benefit from instability in the international currency market.

87. *See supra* notes 18-19. Thus, this proposal relieves developing countries of the financial burdens involved in negotiating the multilateral agreement, participating on the commission, and implementing the tax within their borders if they so choose. *See supra* notes 20-22, 85.

countries while having little or no impact on long-term currency transactions. In order to implement the tax in the most effective, efficient, and least costly manner, a multi-tiered regime should be established wherein national governments assess and collect the tax at the domestic level. The national governments would then contribute the proceeds to an international organization for distribution to developing countries. If negotiated and implemented properly, a multi-tiered regime could reduce industrialized countries' foreign aid obligations while allowing developing countries to both benefit from and participate in international decision making.

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