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International Institutional Performance in Crisis
David Zaring*

The global financial crisis was a challenge to three of the most promising, and seemingly effective, institutions of international law—the World Trade Organization, the International Monetary Fund, and the international network of regulatory agencies—and it was a challenge they failed to meet. This Article reviews the performance of these three institutions in the aftermath of the financial shocks of 2007–08 and finds that they had little to say in response. Those responses that were forthcoming were either ineffective or counterproductive, and only the IMF has emerged from the crisis with its potential burnished. The record appears to vindicate the critics of these international institutions and illustrate the primacy of politics in international crisis response. That primacy has been exemplified by the importance of the G20 in coordinating an international response to the crisis. The G20 is neither law-based nor governance-focused, but can best be characterized as a modern-day Concert of Europe, which appears to be quite unconstrained by law, and is not a regulatory network.

I. INTRODUCTION

What can the global financial crisis tell us about the institutions of international governance? Because the legal versions of those institutions best positioned to respond to the crisis—economic treaties, financial regulatory networks, and the species of international organizations known as international financial institutions—have been ineffective or, at best, marginally useful, critics are likely to raise the age-old charge against international law: that they do not matter. This charge will likely be leveled by those that either do not believe in large swaths of international law, such as the international relations realists in political science departments and their sympathizers in law schools,1 or those

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1 See, for example, Kenneth N. Waltz, Theory of International Politics 88 (Addison Wesley 1979) (stating that “[i]nternational systems are decentralized and anarchic”); John J. Mearsheimer, A RealistReply, 20 Intl Security 82, 82 (1995) (“Realists . . . believe that institutions cannot get states
who believe that legal institutions in general fare poorly in emergencies, as Eric Posner and Adrian Vermeule have argued in a different, domestic context.\(^2\)

The increasingly global production of administrative law has often been thought to offer a response to critics like these, as international administration has appeared in a number of different guises, all of which have contributed their share of oversight to the increasingly interlinked world economy. The World Trade Organization (WTO), a formal treaty, has overseen and encouraged that inter-linkage by enforcing the reduction of trade barriers through a process of adjudication. The World Bank and the International Monetary Fund (IMF) have evolved into standalone providers of development aid, which they have, at least until recently, conditioned on adoption of the "Washington Consensus" on market reform. Perhaps most promisingly, regulators increasingly cooperate with one another. Domestic agencies have turned abroad for the formulation of critical policies, which has been seen to be a victory for international governance and possibly a way forward for a broadly defined view of international law itself.

The initial failure of these administrative institutions is a challenge for internationally minded lawyers. It suggests that the variety of international administrative institutions can fairly be critiqued on their contribution to the legalization of international relations. That legalization, it turns out, has been limited.

Would-be defenders of the potential of these institutions must turn to the less happily quantifiable contributions of the relationships created by networks, treaties, and international organizations as the foundations of political cooperation. Unfortunately, claims that earlier cooperation in other areas of governance ineffably augmented the international cooperation resulting from the crisis verge on the unfalsifiable.\(^3\)

In this Article, I begin by making clear how unhappy international lawyers should be with the performance of their institutions so far, and then propose


\(^{3}\) For the importance of falsifiability, see Karl Popper, *The Logic of Scientific Discovery* 40–43 (Hutchinson 1959) (discussing the importance of falsifiability and empirical verification in determining a theory’s validity). For a popular treatment of Popper’s theories, see David Edmonds, *Wittgenstein’s Poker* (Ecco 2001) (interspersing brief descriptions of Dr. Karl Popper’s theories in a biographical text of Popper and Professor Ludwig Wittgenstein).
ways to evaluate the contributions of those institutions more systematically. In my view, the record of these institutions illustrates the importance of the internalization of compliance by states and other international actors through these cooperative institutions. It may also indicate that these institutions, which have been siloed apart from one another in particular issue areas, need the sort of inter-linkage that organizations like the G20 can provide. The G20’s prominence in the present crisis illustrates the likelihood that the regulatory solutions adopted will be tinged more with politics than with regulatory expertise and technocratic know-how. It also suggests the primacy of politics in international cooperation—at least when it comes to a crisis—for the G20 is not a legal or technocratic institution at all; it is a modern-day Concert of Europe.

Few would have expected in 2007 that a large-scale institutional failure of global administrative law was in the cards. After all, the last four decades had been good ones for international economic regulators. The GATT was embraced during this period and its administrative functions were expanded, and in 1994, the WTO treaty was ratified by most of the large world economies. In 1974, networks of banking supervisors and securities regulations were founded, and the network form of global regulation has expanded ever since. International financial institutions, although they were founded in the Bretton Woods meeting after the Second World War, developed strengths in the last thirty years through project finance and development work. They were also tasked with implementing the Washington Consensus on the value of free markets and lightly regulated domestic industries.

International economic law, in short, looked like law with bite. It was not customary international law, which to this day has critics who doubt its breadth and effectiveness.\(^4\) It had no claim to the regulation of high politics and national security, where international instruments regulating the use of force and human rights have been subject to a number of serious critiques.\(^5\)

Instead, countries great and small have honored their trade obligations, and submitted themselves to the judgment of the WTO.\(^6\) On other critical matters of

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\(^5\) See, for example, Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L J 1935, 1942 (2002) (suggesting that human rights treaties may be both ineffective and even counterproductive); Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 Am J Int'l L 809, 835 (1970) (suggesting that blinkered views of national interest have seriously damaged Article 2(4)).

\(^6\) See, for example, Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minn J Global Trade 1, 16 (1999) ("[T]he volume of cases during the first three years of the WTO disputes procedure is almost 90 percent greater than the highest volume ever achieved by the GATT disputes procedure.").
prosperity, wealthy countries, for better or worse, have been able to coordinate their interests more easily through a variety of international economic legal and semi-legal entities than, say, all of the member nations who actively participate in the UN General Assembly.

But all of this changed during the financial crisis, and the implications for regulation are notable. First, traditional international legal instruments—especially the WTO—are, if they are doing anything at all, preventing governments from responding to the crisis in the way they might prefer. The trade treaty makes two responses by governments—bailouts of banks and auto companies and economic stimuli with a “buy local” requirement attached—look inconsistent with the treaty, at best, and serve as signs that treaty discipline disappears in emergencies, at worst.7

Second, international networks, such as the Basel Committee on Banking Supervision and the International Organization of Securities Commissions (IOSCO), have not been the loci of any serious response to the crisis. Networks are a form of international governance that many people, including me, had held out as particularly promising and actually effective,8 and financial networks had long been thought to be especially so.9 The failure of Basel, IOSCO, and their ilk to do anything to respond to the crisis, and their leaving response coordination to the G20, a political organization, is sobering.

Third, the IMF, unlike the WTO and the networks, has done its bit to respond to the crisis. The IMF, recently in decline and staffed at half its former strength, has provided liquidity to collapsing developing countries (and Iceland).10 It has been the announced recipient of a large and apparently real

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7 See Section III; see also Thomas J. Schoenbaum, The Global Financial Crisis and Its Impact on World Trade and the World Economy, 41 UCC LJ 375, §§ III.D, III.L, III.M (2009) (suggesting that both buy local requirements and bailouts of domestic institutions may run afoul of WTO agreements). The WTO is not the only treaty implicated by the crisis, of course, but it is the most prominent one, and, in my view, a good example of the forces at work on treaty observance. For a view that it is the investment treaties that will present the real check on government action in response to the financial crisis, see Posner and Vermeule, Crisis Governance (cited in note 2).


10 Matthew Saltmarsh, A Push to Free Capital for Emerging Markets, NY Times (Feb 5, 2009), online at http://www.nytimes.com/2009/02/05/business/worldbusiness/05euro.html (visited Nov 21, 2009) (mentioning how the IMF lends money to Iceland, Eastern European nations, and possibly
infusion of $750 billion by the members of the G20. But its contribution—as a conduit through which wealthy countries bail out poor ones—simply underscores how much the International Financial Institutions (IFIs) have become development agencies, rather than sources of global governance and lenders of last resort for the powerful and powerless alike. Moreover, the World Bank (or, for that matter, the UN) has not matched the IMF’s contributions.

In what follows, I explore the contributions of networks, the WTO, and the IMF in greater detail. I then turn to the G20, which is the new institutional focus of the global effort to respond to the crisis. And I evaluate what this effort means for administrative law, which, in either its harder treaty form or softer network form, has given way to governance through politics.

II. NETWORKS

Anne-Marie Slaughter wrote that international networks exhibit “pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere. . . .” In the early years of network analysis, scholars—including myself—were impressed at how widespread and vibrant this tool of international governance appeared to be. Networks of regulatory agencies (and not foreign relations diplomats) were popping up everywhere, not only in financial regulation, but also in transportation, antitrust, and other areas where there were global spillovers and externalities but no organized global response. These agencies promised technical and apolitical coordination that, in many ways, was more achievable than that offered by multilateral treaties or great power summits.

Moreover, these international networks, which began as ways to organize financial and other sorts of regulators of like mind but with little attentiveness to procedure, have often evolved into something that increasingly requires notice, comment, and opportunity to respond. A remarkable example of this lies in the contrast between the first Basel Accord on capital adequacy (establishing the minimum levels of capital that banks supervised by members of the committee...
had to hold on hand in their reserves), which was concluded in secret by the Basel Committee in 1988 and released in a twelve-page document, and the second Basel Capital Accord (Basel II), which was put through five years’ worth of comments by hundreds of interested individuals and institutions and resulted in a correspondingly long and detailed regulatory product.14 IOSCO has similarly opened its deliberations to this sort of ventilation by interested and affected parties; so have other networks. The resulting process in these cases is one that would be familiar to American lawyers accustomed to domestic rulemaking.

For example, consider the evolution of the Basel Committee. Prompted by three large international bank failures in 1974,15 the central bank governors of the Group of Ten Countries (G10), along with Luxembourg, agreed to establish the Basel Committee (Committee) that year.16 The members declared, via a press release, that the primary purpose of the Committee would be to provide its members with a regular forum for airing cooperative approaches to the supervision of multinational banks.17 Since its founding, the Committee, pursuant to this mandate, has served both as the venue for the exchange of information about supervisory practices and as the mechanism for the promulgation of hard standards to which all members of the committee must subscribe. It rotates its chairmanship and operates through consensus.18

15 On June 26, 1974, German regulators forced Bank Herstatt into liquidation. This left without remedy a number of banks that had released payment of marks to Herstatt in Frankfurt in exchange for dollars that were to be delivered in New York. See Risk Glossary, Basel Committee on Banking Supervision, online at http://www.riskglossary.com/articles/basel_committee.htm (visited Nov 21, 2009). British-Israel Bank, based in the UK, and Franklin National Bank, based in the US, also failed. See Ethan B. Kapstein, Supervising International Banks: Origins and Implications of the Basel Accord 4–5 (Princeton 1991) (discussing the history surrounding the establishment of the Basel Committee).
16 The Committee’s original members came from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the UK and the US. See Bank for International Settlements (“BIS”), History of the Basel Committee and its Membership, online at http://www.bis.org/bcbs/history.htm (visited Nov 21, 2009); Michael S. Barr & Geoffrey P. Miller, Global Administrative Law: The View From Basel, 17 Eur J Intl L 15, 16 (2006) (describing the creation of the Basel Committee).
17 See BIS, Press Communiqué 1 (Feb 12, 1975) (“The committee is designed to assist the Governors in their continuing work of surveillance and exchange of information.”); Joseph J. Norton, Trends in International Bank Supervision and the Basel Committee on Banking Supervision, 48 Consumer Fin L Q 415, 415 n 1 (1994) (stating that the founding mandate for the Committee is found in the Feb 12, 1975 press release).
18 Joseph J. Norton, Privatization of Public Pension Systems in Developing Nations: A Call for International Standards, 64 Brooklyn L Rev 817, 857 (1998) (mentioning that the Basel Committee’s uses of consensus methods has had some positive results); Tony Porter, States, Markets, and Regimes in
Committee has held a number of comment periods for matters related to the revision of its capital accord, which it concluded could “be helpful to the Committee as it makes the final modifications to its proposal for a new capital adequacy framework.”

IOSCO is another example. A network regulator for the securities markets, it developed in 1984 out of the Interamerican Association of Securities Commissions and Similar Agencies. The members of that body passed bylaws transforming it from a regional group founded a decade earlier (again, to deal with problems of international systemic risk and enforcement loopholes) into a global collection of securities regulators. IOSCO started as a private bill in the Quebec provincial legislature, and since then it has developed bylaws under which its members have agreed to cooperate together to “establish standards and an effective surveillance of international securities transactions” and to “provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.”

IOSCO is a much less selective organization than the Basel Committee—it claims 174 members, overseeing almost all of the world’s capital markets. However, in other matters of form, the two organizations are very similar. As with the Basel Committee, IOSCO operates on an informal structure, its pronouncements do not rise to the level of law, and it practices internal opacity. Also, like the Basel Committee, IOSCO now provides a lot of material on its website and has opened itself up for comment. In 2002, for example, it issued

Global Finance 66–67 (St Martin’s Press 1993) (stating that while the process of the Basel Committee is clouded in secrecy, it does rely on consensus).

19 See BIS, Basel II: The New Basel Capital Accord—Third Consultative Paper (Apr 2003), online at http://www.bis.org/bcbs/bcbsccp3.htm (visited Nov 21, 2009); see also BIS, Press Release—Update on the New Basel Capital Accord (June 25, 2001), online at http://www.bis.org/press/p010625.htm (visited Nov 21, 2009) (“The Committee intends to continue promoting an open dialogue as its work continues and believes that such efforts will help to ensure that the new Accord meets its objectives.”).


fifteen public documents, including reports on sound practices and statements of principles of supervision. It also issues an annual report, sells records of some of the sessions of its annual conference, and catalogs press releases, memoranda of understanding, and IOSCO resolutions in its online library.

Most of these principles were developed in IOSCO’s Technical Committee, which is where the sort of regulatory action most comparable to that of the Basel Committee may be found. Like the Basel Committee, the Technical Committee is limited in membership to financial regulators of the world’s most advanced financial systems.

Moreover, some of these networks really appeared to matter—particularly those involved in the financial crisis. Although the Basel Committee avows that it “does not possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force,” creations such as the second Basel Capital Accord functioned as though they had great weight. Observers have contended that despite its informal legal status, the Committee’s agreements are “considered to be binding on its members.” IOSCO has made similar claims about its big achievement, the Memorandum of


24 See OICV-IOSCO, Library of Public Documents, online at http://www.iosco.org/library/index.cfm?whereami=library (visited Nov 21, 2009). As of this writing, the organization lists approximately twenty-five resolutions and 300 other public documents in its online library.

25 A.A. Somer, for example, interviewed a number of leading officials in the SEC, and concluded that “[t]he committee which might be said to do the ‘grunt work’ with respect to the most developed markets is the Technical Committee.” A.A. Somer, Jr, IOSCO: Its Mission and Achievement, 17 NWJ Intl L & Bus 15, 18 (1995).

26 IOSCO’s Technical Committee has nineteen members, while the Basel Committee was, until recently, limited to regulators from twelve countries; the membership has just been expanded to include members from all countries of the G20, plus those from several other major economies. IOSCO, Members of the Technical Committee (2009), online at http://www.iosco.org/lists/display_committees.cfm?cmtid=3 (visited Nov 21, 2009); BIS, History of the Basel Committee (cited in note 16).

27 See BIS, History of the Basel Committee (cited in note 16). Instead, it “reports to the central bank Governors of the Group of Ten countries and Heads of Supervision of its member countries . . . . It seeks their endorsement for its major initiatives.”

28 Charles Freeland, The Work of the Basel Committee, in Robert C. Effros, ed, 2 Current Legal Issues Affecting Central Banks 231, 233 (IMF May 1994). Former Basel Committee member Andrew Crockett, General Manager of the BIS and Chairman of the Financial Stability Forum, similarly concluded that even though Basel Committee recommendations “have no legal force,” they have been “applied in all countries represented on the Committee” and “almost universally applied in non-member countries.” Andrew Crockett, International Standard Setting in Financial Supervision, Lecture at the Cass Business School, City University, London (Feb 5, 2003), online at http://www.bis.org/speeches/sp030205.htm (visited Nov 21, 2009).
Understanding on Enforcement (MOU), described as "the first global multilateral information-sharing arrangement among securities regulators," which "sets a new international benchmark for cooperation critical to combating violations of securities and derivatives laws." In 2005, IOSCO resolved "to require all members to become signatories to the IOSCO MOU, or to commit to doing so, by 1 January 2010," and has continually worked towards this goal. IOSCO states that its mandatory participation requirements "reflect the belief that the IOSCO MOU is critically important."

One of the testaments to the effectiveness of the Basel Committee lies in the blame that is being laid at the feet of its second capital accord. The first financial institutions to fail in the crisis were, at least in the view of the SEC, adequately capitalized under Basel II up to the moment they failed. This was the case for both Bear Stearns, which collapsed in the spring of 2008, and Lehman Brothers, which fell that autumn. There is no question that Basel II will be reevaluated sooner than later, but perhaps one lesson of the crisis is not that a regulatory network failed, but rather that a regulatory network made a difference. It was the Basel Committee that set the standards that Bear Stearns, Lehman Brothers, and the big European banks met in practice, and it was Basel II that did not, in the end, sufficiently keep the banks solvent.

Basel’s role in felling America’s big five investment banks may suggest that international regulatory networks are important, but the current crisis has raised real questions about their (and Basel’s) usefulness. We might expect that these global processes would be the situs of a global response to the capital

31 "The organisation considered recent developments among the membership in taking up the MOU including the progress being made as IOSCO seeks to meet the 2010 deadline by which members are required to become signatories." IOSCO Update: Issue 6, May 2007 at 1, online at http://www.iosco.org/library/newsletters/pdf/IOSCO_Update_May_2007.pdf (visited Nov 21, 2009).
inadequacy of banks, or the freezing up of various credit markets. They were, after all, begun in the wake of financial crises. Both Basel and IOSCO have devised principles of regulatory supervision and processes of cooperation among supervisors designed to interdict global panics before they start.

But networks have had little to say about the current crisis. Indeed, they have not even been responsible for the few coordinated international legal responses by domestic financial regulators that we have seen. For example, during the crisis the SEC implemented a short-lived ban on the shorting of financial stocks. It coordinated that ban with the securities regimes of other countries, including Great Britain, Australia, Taiwan, and Pakistan. But IOSCO was not the vehicle for the shorting ban. The organization has had little to say about the financial crisis in any respect, other than a May 2008 suggestion that its members peruse some recommendations about the subprime mortgage crisis, the precursor to the market crashes.

As for the Basel Committee, its efforts to solve the increasing internationalization of the banking crisis have not sent every central banker bolting to Switzerland (at least not as far as we know—the Committee operates in secret). It, like IOSCO, has so far responded to the crisis with small beer, such as a speech by the committee chair on “The Importance of Banking Supervision in Financial Stability.” And the coordinated injections of funds into the monetary supply by the central banks beginning in the fall of 2008—which was at least an example of regulatory cooperation—is not obviously

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35 See, for example, Canadian Regulators Implement Short-Selling Ban, Reuters (Sep 21, 2008), online at http://www.reuters.com/article/governmentFilingsNews/idUSN1925996220080919 (visited Nov 21, 2009) (stating that Canada would follow the United States, Britain, and other countries, and temporarily ban the short-selling of certain financial stocks).


37 See Joseph Jude Norton, Devising International Bank Supervisory Standards 177 (Graham & Trotman 1995) (noting the Basel Committee has tried to maintain a low profile); Huib J. Muller, Address to the 5th International Conference of Bank Supervisors (May 16, 1988), quoted in Porter, States, Markets, and Regimes at 66 (cited in note 18) (discussing the hidden nature of Basel supervision).

linked to the Basel, even though Basel, with its regular meetings, seems a likely outlet for such coordination.\(^3\)

Any defense of networks like IOSCO and the Basel Committee accordingly turns on their admittedly less quantifiable contributions. Both organizations were founded in 1974, and it is possible that over three decades of cooperation among central bankers and securities regulators has contributed to the capacity for the coordinated response that we have seen, to the degree that we have seen it. Indeed it is rumored to be so. It may be, for example, that the SEC coordinated its shorting ban with its international counterparts at an IOSCO meeting, even though the coordination was done in the hallways rather than during the official session. And it could be that the coordination of the injections of capital by the world’s central bankers was facilitated by their already extant supervisory cooperation. In other words, perhaps regulatory networks created the relationships that have facilitated the international responses to the crisis.

But perhaps the size and scope of the crisis reveals the weakness of networks rather than their hidden contributions. The international governance mechanism that appears to be making policy is the G20, and such policymaking is the opposite of international law. The G20 is better understood as a Concert of Europe for a new era. Like the Concert, it embodies the classic international relations paradigm of heads of state making international policy for their subjects, and it is somewhat antithetical to the technocratic expertise that networks try to represent. Moreover, it appears that networks are working for the G20, rather than guiding it or offering a de-politicized alternative—task-specific, technocratic harmonization by experts.

For example, the G20 just renamed and promised to reform the Financial Stability Forum (FSF), a body meant to coordinate the work of IOSCO and the Basel Committee.\(^4\) The FSF was designed "to ensure that national and international authorities and relevant international supervisory bodies and expert

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39 See, for example, Matthew Saltmarsh and Keith Bradsher, Fed Offers $180 Billion for Ailing Money Markets, NY Times A1 (Sept 18, 2008) (stating that the Federal Reserve and other central banks were making money available to their financial systems).

groupings can more effectively foster and coordinate their respective responsibilities to promote international financial stability, improve the functioning of the markets and reduce systemic risk.\textsuperscript{41} It meets biannually and currently consists of twenty-six national regulatory agencies, including the networks of banking supervisors and securities regulators (the Basel Committee and IOSCO).\textsuperscript{42} The FSF has been run by the General Manager of the Bank for International Settlements, who was appointed Chairman of the FSF in a personal capacity.\textsuperscript{43}

The G20 recently enlarged the FSF, renamed it the Financial Stability Board (FSB), and called for it to be remade as a stronger, better consolidated entity. Time will tell if a network—even a network of networks—is even capable of playing that role effectively. But the events surrounding the expansion are significant. At the G20's behest, the Basel Committee has expanded its membership to include the G20 members. This expansion had long been sought by countries of the developing world, and Basel had always resisted. So perhaps it is indicative of the network's crisis response to note that the chief accomplishment of Basel during the crisis has been to look more like the G20, at the instigation of the G20.

III. TREATIES

If the informal instruments of international law have disappointed during the crisis, they have not, however, actively countermanded efforts to respond to it. The WTO—conventionally thought to be an effective treaty-created international organization and one with a claim on financial regulation\textsuperscript{44}—arguably has. The WTO has had, at its core, an effective, complied-with adjudication process. During the five year period between 1995 and 2000, defendants who lost before the WTO "complied fully 73% of the time and complied either fully or partially 88% of the time," according to Eric Posner and

\textsuperscript{41} See Financial Action Task Force, Communiqué (cited in note 40) (reciting the purpose of the FSF).

\textsuperscript{42} Financial Stability Board, Mandate (cited in note 40).

\textsuperscript{43} Hans Tietmeyer, International Cooperation and Coordination in the Area of Financial Market Supervision and Surveillance 7 (Feb 11, 1999), online at http://www.financialstabilityboard.org/publications/r_9902.pdf (visited Nov 21, 2009) (advising that "[t]he chairperson [of the FSF] should be appointed in a personal capacity for a period of time which is adequate to ensure continuity in the work of the Forum" and recommending Andrew Crockett, General Manager of the BIS to the position).

\textsuperscript{44} The WTO was founded as part of a system meant to ensure stability both in trade and in finance, and the General Agreement on Trade in Services, ratified in 1994, makes provision for trade in financial services.
John Yoo.\textsuperscript{45} Other scholars have included the WTO Appellate Body as a prime example of the potential effectiveness of international tribunals.\textsuperscript{46} But it also has the institution of the Secretariat and the ambassadors to the organizations, who meet regularly to devise standards for trade relations and to take a forward-looking view of the international economy.

It is accordingly unfortunate that the treaty will either prevent countries from reaching the political compromises necessary to stimulate their economies, or that it will be ignored. At best, the WTO will find its performance during the early part of the crisis a lost opportunity to further the collaboration that, in addition to workable dispute resolution, has been one of its signal achievements. At worst, its disciplines will be undercut by countries that ignore it as they attempt to stimulate their economies.

It is worth noting that the WTO was created, at least initially, in the Bretton Woods process designed to stabilize the global economy. As such, the WTO may seem like the natural institutional choice for economic intervention. It began as the General Agreement on Tariffs and Trade (GATT), but in 1994 the General Agreement on Trade in Services (GATS) was ratified, and that treaty includes provisions to regulate services, including financial services. Moreover, the WTO has the administrative capacity to respond to economic crisis. Ambassadors of every country that have joined the treaty (including the vast majority of the world's countries and most of its economic production) are available in Geneva to negotiate and coordinate responses to shocks. In short, it was not impossible for the WTO to contribute to a global response to the financial crisis. It had the capacity to coordinate one.

Unfortunately, the WTO has done none of those things. Instead, the WTO stands as a barrier to the approaches most countries have adopted in response to the crisis and, as far as can be discerned, has not even been considered a vehicle for a proactive response to the crisis. The failure of the WTO to offer a vehicle to respond to the crisis illustrates, I suspect, the failure of the Bretton Woods vision of global administrative processes capable of responding to macroeconomic shocks.

For example, consider the various bailouts of the banking and automobile industries. They have formed the principal response of every prosperous nation to the crisis. But they probably violate the Agreement on Subsidies and


\textsuperscript{46} See, for example, William Davey, \textit{The WTO: Looking Forwards}, 9 J Intl Econ L 3, 20 (2006) ("[T]he WTO dispute settlement system stands as an example of an effective international tribunal with independent adjudicators.").
Countervailing Measures (SCM Agreement), an annex to the WTO agreement.\textsuperscript{47} The other common response in developed nations, a Keynesian stimulus, at least as enacted in the US, contains a “buy local” provision which while likely politically necessary is flatly inconsistent with the SCM Agreement.\textsuperscript{48}

The legal analysis is straightforward. The WTO law on subsidies governs any “financial contribution,” made “by or at the direction of a government or any public body within the territory of a Member.”\textsuperscript{49} Loans and guarantees for the auto industry and banks, which come, at least in the case of the US, from congressional appropriations administered by the Treasury Department, meet this definition. The financial contribution must “confer a benefit” to the domestic recipients, and here, because the market would not provide the money the government has offered to the recipients at the interest rate offered by the government, this test is met.\textsuperscript{50} Also, the contribution must be to a defined group under Article 2 of the SCM Agreement. This is designed to prevent universal health care or primary education from being characterized as an illegal subsidy. The industry sectors receiving bailouts do appear to be defined narrowly—at least in comparison to universal health care. They are particular financial institutions and auto companies, identified on a company-by-company basis.

The subsidies must present “a threat of serious prejudice” to the expectations of other members of the WTO, pursuant to Article 6.2 of the SCM Agreement.\textsuperscript{51} “Serious prejudice” is a slippery term, but it is certainly plausible that a subsidy designed to allow domestic firms to charge below cost prices and yet remain afloat would be deemed to meet this test. Nor is it a defense to argue, as the auto industry did, that “everyone is subsidizing.”\textsuperscript{52} It is true that some of the money given to domestic financial institutions has been passed along to foreign financial institutions. This has been the case with AIG, the failed insurance company, which has posted much of the funding it has received from


\textsuperscript{48} Other countries have instituted their own “buy local” provisions, so the issue is not solely one for American trade lawyers to worry about.

\textsuperscript{49} SCM Agreement, Art 1.1 (cited in note 47).

\textsuperscript{50} Id. Perhaps one saving grace for the financial industry bailouts is that, although the money first went to the balance sheets of a variety of domestic institutions, it has frequently since been passed on to foreign financial institutions.

\textsuperscript{51} SCM Agreement, Art 6.2 (cited in note 47).

\textsuperscript{52} Claire Brunel and Gary Clyde Hufbauer, \textit{Money for the Auto Industry: Consistent with the WTO Rules?} at 7 (Peterson Inst for Intl Econ Feb 2009), online at http://www.iie.com/publications/pb/pb09-4.pdf (visited Nov 21, 2009) (“If a WTO member that exports cars to the United States brings a case, it will be no defense, in legal terms, for the United States to assert that the member state in question also subsidizes its auto industry.”).

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the government as collateral for credit default swap contracts, many of which have been concluded with foreign banks.

The stimulus package, at least in its American variant, presents an even more flatly inconsistent contrast with the disciplines of the SCM Agreement, at least if not waived. Section 1605 of the American Recovery and Reinvestment Act of 2009 (ARRA), unless waived, requires that all of the iron, steel and "manufactured goods" used in ARRA-funded projects for construction, alteration, maintenance or repair of "a public building or public work" be "produced in the United States." 53 Article 3 of the SCM Agreement provides that domestic sourcing requirements as a condition of receipt of a subsidy are per se illegal. 54 Despite these problems, countries have continued to subsidize their banks and auto industries. As of this writing, no case disputing the subsidy has been filed before the WTO.

The result is that since the advent of the financial crisis, two things have not happened, both of which do not reflect well on the WTO’s agency capability to respond to emergencies. First, there has been no hint of a proactive role in contributing to the crisis response from the organization. Second, the contribution it could make (a debatable contribution, but one that would presumably strengthen international governance), that is, forbidding countries from violating their trade obligations, also does not yet appear to be happening (though it is early for a final judgment).

To be sure, the WTO process itself has some provisions that permit exceptions to the discipline of trade law. For example, there is the rarely successful invocation of safeguards pursuant to Article XIX of the GATT, which permits countries to suspend their trade obligations where imports unexpectedly "cause or threaten serious injury to domestic producers in that territory of like or directly competitive products." 55 And there is no requirement that countries bring claims before the WTO, even when there are claims that are easy to make. Indeed, there is some history of countries explicitly deciding not to challenge some trade restrictions through informal agreements throughout the course of the GATT.

However, unenforced legal obligations at some point cease being law, and start being something else. The WTO’s failure to matter, either as a constructive solution or as a trade discipline, may mean that, at truly crucial turns for the

54 SCM Agreement, Art 3 (cited in note 49).
global economy, it devolves into a treaty observed in the breach, instead of an asset that could facilitate a global response.

IV. INTERNATIONAL FINANCIAL INSTITUTIONS

International financial institutions have never fulfilled the more optimistic hopes vested in them after the Bretton Woods process following the Second World War. They have, however, evolved to be principal vehicles for developed countries to provide funds to developing countries and principal vehicles for those countries to impose the so-called Washington Consensus of relatively free internal markets, privatization, and investor protection on the rest of the world.

It is in this role that the IMF, in particular, has prospered during the crisis. The commitments made by the G20 suggest that the IMF is to be the lender of last resort to developing countries that run into financial problems, even if the crises originate in developed countries and infect internationally from a locus of prosperity. This firmed-up new role as lender of last resort, and thus, arguably, as central banker to the developing world, is important—especially if it lasts. But it is a modest accomplishment, and arguably a smaller one than its founders had in mind.

The IMF, which has always been managed by a European and chaired by an American, is in theory a specialized agency of the UN, though it has its own charter, finances, and governing structure. It is funded by quotas from its members, who receive voting rights commensurate with their contributions. This makes the US, the largest contributor to the IMF, its largest vote-holder with 17.09 percent of the electorate.

The IMF has described its work as threefold. First, it is supposed to perform a surveillance function—to watch and warn about potential shocks that could be confronted by the global economy or any of its members. As Joseph Norton has put it, this surveillance role has expanded from one that “under its Bretton Woods I mandate pursuant to Article IV of the IMF’s articles was rather narrow and limited to macroeconomic matters and monetary matters, such as balance of payments and exchange rate issues” to one that “has expanded into the financial sector and financial crisis prevention areas.”

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The IMF’s other two activities are to provide technical assistance for developing countries and to lend to those countries that, as the IMF puts it, “have trouble meeting their international payments and cannot otherwise find sufficient financing on affordable terms.” However, these loans come at a cost—borrower countries must meet IMF conditions, which have become known as the Washington Consensus. That consensus tends to require adoption of open markets, liberalization of capital flows, and governance reforms. In short, “[t]he fund pools the financial resources of richer nations to provide short-term assistance to countries that cannot pay their debts. In return for their loans, borrowers promise to take corrective actions that can cause economic pain,” as the New York Times observed in 1996. Although the Fund now suggests that it does not follow the Consensus slavishly, it has conditioned its assistance on the acceptance and adoption of standards of codes of good practice in governance that would seem to mirror the Consensus. This includes the adoption of such codes as the OECD’s Principles of Corporate Governance and IOSCO’s Objectives and Principles of Securities Regulation, both of which have been embraced by the IMF as “important for [its] work.”

These development goals are limited ones. Since its founding, the IMF has assisted with reconstruction and development, but there were also intimations that it might do something more. Indeed, the IMF was created with the potential

59 IMF, Our Work, online at http://www.imf.org/external/about/ourwork.htm (visited Nov 21, 2009) (providing an overview of the IMF’s work). It has been said of this that “[t]he bulk of IMF analysis has always been mainstream and centrist, viewed from the perspective of the dominant strain of Anglo-Saxon economics. The leading universities of North America, the UK, and Australia have been the main training grounds for much of its professional staff.” James M. Boughton, The IMF and the Force of History: Ten Events and Ten Ideas That Have Shaped the Institution, IMF Working Paper No WP/04/75 at 9 (2004), online at http://ssrn.com/abstract=878898 (visited Nov 21, 2009) (looking at the effect the Cold War had on the IMF).


61 Jeff Gerth and Elaine Sciolino, I.M.F. Head: He Speaks, and Money Talks, NY Times A1 (Apr 2, 1996). The policies have come in for a great deal of criticism. See, for example, Joseph E. Stiglitz, Failure of the Fund: Rethinking the IMF Response, 23 Harv Int'l Rev 14, 14 (2001) (arguing that the IMF “actually contributed to instability,” because its call for “capital and financial market liberalization throughout the developing world” was “a central factor not only behind the most recent set of crises but also behind the instability that has characterized the global market over the past quarter century”).

62 The OECD’s principles are available online at http://www.oecd.org/department/0,3355,en_2649_34813_1_1_1_1_1,00.html (visited Nov 21, 2009).

63 Consider IOSCO, Objectives and Principles of Securities Regulation (cited in note 21).

to serve as the world's central bank, the lender of last resort to bankrupt sovereigns of any size. The IMF's articles of incorporation provide that one of its purposes is "[t]o give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards." It has, throughout its existence, performed some of the more minor macroeconomic research duties of a central bank, such as monitoring global exchange rates and capital flows.

But the IMF has never had the resources to deal with a truly global crisis that might affect one of its wealthy members. Instead, its last resort lending has gone to developing countries like Thailand, Indonesia, Mexico, and Russia. Moreover, its capacity to deal with these crises has only declined over time. During the last decade, dissatisfaction with the IMF led large borrowers, like Brazil and Argentina, to pay off their IMF obligations in full. The result, as Mitu Gulati and George Triantis have observed, was to "thereby, in effect, cut off the assurance that these programs might have provided to investors that the IMF would be involved" in dealing with their debt, suggesting both that borrowers had become fed up with the IMF's involvement and also that lenders were no longer willing to insist on it. As a result, Anna Gelpern has argued, "[t]he old official creditors . . . such as the IMF . . . are receding in importance, thanks to prepayments by middle-income countries and debt relief for the poorest."

To be clear, the IMF's achievements are a bright spot in a bad half-decade for the institution. IMF lending peaked in 2003; its credit outstanding reached $110.29 billion. By September 30, 2008, outstanding IMF loans had decreased to $17.72 billion. The decrease in demand for IMF's lending (and the consequential decrease the interest the IMF received) led to a 2007 budget deficit and drove the outfit to seek authorization from national legislatures to

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66 See Kirchner and Lula: Different Ways to Give the Fund the Kiss Off, Economist 49 (Dec 24, 2005).
70 Id.
use its gold reserves to finance the institution. It appears to have been granted that authority by the G20 meeting in April 2009.\textsuperscript{71}

It is hard to know exactly what to make of the recent entrustment of $750 billion by the G20 to the fund, but it underscores how the IMF, rather than being an important standalone form of global governance, now has become a conduit for aid from prosperous countries to poor ones. It also emphasizes the primacy of the G20 in setting the policy agenda and the very capacity of the IMF.

Amid all the good news, it is worth noting that the role the G20 envisions for the IMF—a role where it provides bailout money for developing countries infected by financial crises—is a narrow one. Moreover, it is a role different than the one envisioned for the IMF when it was founded after the Second World War. Then, the IMF was supposed to more broadly serve as something like a central banker to the world, both developed and developing. It was designed to provide international market stability as well as to backstop governments that found themselves in macroeconomic or budgetary crises.

Even with its new resources, there is no prospect that the IMF could come to the aid of more than one member of the G20 (with the possible exception of, say, South Africa and Argentina, whose very membership in the G20 is somewhat controversial), were such a member in crisis. The IMF cannot bail out Europe, it cannot bail out the US, and it cannot bail out Japan or China. So rather than being part of the architecture of global finance, perhaps the IMF is better thought of as a sentry before the architecture, and a part of a different construction: the architecture of global development.

V. THE G20

The G20 did not begin as a Concert of Europe. Its ambitions were mild and focused on either simple networking, or perhaps on preventing financial crises such as the one in 1974 that prompted the formation of the Basel Committee and IOSCO. But over the course of the crisis, it—a purely political and not at all legal or technocratic institution—has come to be the basis of the initial policymaking response to the crisis that we have seen at a global level. The increasing importance of the G20 is something of a rebuke to the capacity of international legal institutions, rather than a complement to them. A detailed discussion of the G-level process is illustrative of this.

\textsuperscript{71} G20, Declaration on Delivering Resources at 1 (cited in note 11) (allowing sale of IMF gold for further lending).
The original participants in the G-level process included the six largest economies in the non-communist world—the US, Japan, Germany, France, the UK, and Italy. Founded in 1975, when French President Valéry Giscard d'Estaing invited leaders of these countries to a so-called “Rambouillet Summit,” the initial goal of the G-level meetings was to create an environment in which leaders could meet, but at which national security would not be discussed. Canada joined as the seventh member in 1976, at the group’s Puerto Rico meeting.

G-level summits followed regularly, but much of the work for these summits appeared to be done by the Treasury ministries and banking supervisors below the G7 level. By contrast, the heads of state spent time, at least as Peter Hajnal and John J. Kirton report, on getting to know one another and creating relations designed to withstand international crises. The G7’s initial accomplishments were unexciting in a typical international fashion: there were agreements on closer cooperation, paean to democratization, and nostrums supporting the expansion of multilateral trade in an effort to restore economic and financial stability. Notably missing were agreements on macroeconomic policies, and the difficult work of preventing global banking or stock market panics were delegated to the network regulators.

Nonetheless, Hajnal and Kirton see the story of the G-level meetings as one of ever increasing momentum. The meetings expanded to deal with more and more issues, beginning with macroeconomic policy, trade, and monetary policy, and expanding in the 1980s to address highly political issues including Israel and arms control. After the fall of the Berlin Wall and the Soviet Union,

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72 G8 Information Centre, What is the G8?, online at http://www.g8.utoronto.ca/what_is_g8.html (visited Nov 21, 2009).

73 See Declaration of Rambouillet 1, ¶2 (Nov 21, 1975), online at http://www.g8.utoronto.ca/summit/1975rambouillet/communique.html (visited Nov 21, 2009) (declaring that the purpose of the Rambouillet Summit was to assure the “prosperity of a major industrial economy,” reasoning that the growth and stability of the participating countries’ economies would be the key to helping the entire developing and developed world prosper).

74 The G8, Background to the G8, online at http://www.g8.fr/evian/english/navigation/the_g8/background_to_the_g8.html (Nov 21, 2009).

75 Peter I. Hajnal and John J. Kirton, The Evolving Role and Agenda of the G7/G8: a North American Perspective, 7 NIRA Rev 5, 6 (2000), online at http://www.g7.utoronto.ca/scholar/hajnal_nira.pdf (visited Nov 21, 2009) (explaining that “[t]he opportunities that summits provide for leaders to get to know one another well and understand one another’s domestic, economic, and political positions and constraints has been a useful role of the G7/G8 from the beginning”).

the G7 added China and Russia policy to its mix. Later in the 1990s it decided to invite Russia as a member, creating the G8.\textsuperscript{77}

The summit remit mandates over this period tell the story of politicization and, at the same time, suggest its limits. "We will continue our dialogue with our African partners. At our next Summit, we will review progress on the implementation of the G8 Africa Action Plan on the basis of a final report from our Personal Representatives for Africa," announced the chair at the end of one summit.\textsuperscript{78} In another remit mandate, the members committed themselves to a nuclear safety program: "With respect to nuclear safety and security, the partners agreed to establish a new G8 Nuclear Safety and Security Group by the time of our next Summit."\textsuperscript{79} But the G-level groups have never done much since to deal with nonproliferation. The number of these mandates appeared to increase,\textsuperscript{80} but their value was much less obvious.

It was never clear how much work the G-level process was doing on these matters of high politics. With the emergence of a hegemonic system at the end of the twentieth century, where the US perceived little value in high level international consultation, the political and military efforts of the organization began to make it look more like a mere talking shop. Accordingly, the organization foundered during the decade as the US began to see it as less critical, but with the Asian and Russian financial crises, its original, non-security raison d'etre came back to the fore.\textsuperscript{81} It also expanded its membership to include the twenty countries that are part of it today.

In 1997, the summit founded the FSF, which was designed to coordinate the work of the Basel Committee and its corollaries in insurance and securities regulation, and included the IMF and World Bank as members. As financial shocks to the global economy began to come from non-western locales, the members of the G8 saw the expansion of the membership to include countries that could represent the interests of the developing world as essential.\textsuperscript{82} Hence the expansion to twenty members. (It has never been clear why Argentina and Australia were entitled to membership, but both were invited, perhaps because

\textsuperscript{77} Hajnal and Kirton at 9 (cited in note 75). The G7 still meet separately three times a year. Id at 12.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Sobel and Stedman, \textit{The Evolution of the G7} at 6–7 (cited in note 76).
American regulators thought they might be supportive votes.) Although the expansion was done rather casually, the implications of the expansion were far-reaching. Since expansion, the G20 has met annually, always reported some progress, and, if measured by commitments announced at the conclusion of the summits, has had two important meetings (Ottawa in 2001 and Berlin in 2004) and five minor ones. Berlin 2004 and Ottawa comprised sixty-six of the organization’s ninety-four total commitments, some verging on the anodyne, others less so, between 1999 and 2005.

However, the development of the G20 has had little to do with law. Throughout this period, the enterprise has had no legal status; it was never formalized by a treaty, and the group has never promulgated or announced bylaws or rules for decision making. It has no administrative agency and has not created a secretariat or bureaucracy. Rather, it has remained a politicized organization of heads of states representing their countries’ interests in an at-will, discretionary environment. The G8 (and G20) has identified itself as a “consultation procedure” and not as an “international organization.” As the G8 said in its 2003 summit website, “[T]he G8 is just one club for discussion and co-operation among many others.” Thus, “[t]he G8’s powers and uniqueness should not be overestimated.”

In short, although the G20 may be a regime, in that it arranges “sets of governing arrangements” that include “networks of rules, norms, and procedures that regularize behavior and control its effects,” it was never a regime invested with any of the trappings of legal formality, or even quasi-legal network-like status. Instead, it represented international cooperation in its most realist manifestation—heads of states collaborating on behalf of their countries, untrammeled by process. The heads of state have entertained contributions from outsiders on occasion, but that has also been an at-will process, and the contributions have not come from technocratic experts.

For example, sometimes the G20 has entertained advice from the OECD meetings conducted before the summits, which has permitted other wealthy countries to play a role. The G20 has heard reports from subordinate

83 Ella Kokotsis, G20 Commitments 1999–2005 1, online at http://www.g8.utoronto.ca/g20/analysis/g20commitments.pdf (visited Nov 21, 2009) (counting the number of commitments each meeting and listing the commitments).
84 See id.
85 The G8, Questions about the G8, online at http://www.g8.fr/evian/english/navigation/the_g8/questions_about_the_g8.html (visited Nov 21, 2009).
86 Id (answering whether the G-8 is the world’s management board).
mechanisms like the FSF/FSB, finance ministries, and central banks. But it has never obligated itself to those recommendations, and many have concluded that the FSF played at best a small role in formulating what little G20 procedure has been relevant in globalizing financial regulation. In the 2000 meeting and thereafter, NGOs and international businesses have been invited to attend, in a limited way, the meetings.

Nicolas Bayne has tried to organize this essentially ad hoc process through the language of Weberian bureaucratic rationality, where the discretion of the organization has been cabined by a series of pre-meetings and low-level contacts. Whether the G20 deliberation process is bureaucratic or diplomatic in character is mostly a matter of emphasis, in light of the ad hoc, non-institutionalized nature of the G-level process. Still, it is always worth noting just how constrained mere international politics are. As with other purely political summits, much of the spade work before the G20 is not done by diplomats, but rather by bureaucrats.

The G20 meetings, after all, do not include finance ministers. Within the finance ministries, “sherpas” have guided the G20 agenda through a series of pre-meetings and, in the time-honored format of international summits, a good part of the agenda is all but completed by the time the heads of state meet. This means that an important part of what heads of state do is to put their imprimatur on the process and establish to their own and their observers’ satisfaction that the meeting was worth having.

The extra-legal nature of the G20 is also reflected in the way that it has institutionalized enforcement of its communiqués. It has created no such mechanism. As Guido Garavoglia and Pier Carolo Padoan have concluded, the inability of the organization to coerce its members to implement any coordinated policy means that those policies depend on “credible” mutual commitments. In their view, the G20 is at its most effective when it is

89 Financial Stability Board, Member Institutions, online at http://www.financialstabilityboard.org/members/links.htm (visited Nov 21, 2009) (listing members of the FSB).


91 Consider id.

92 The “sherpa” term is Bayne’s. See id at 2. See also G8 Research Group, The Documentation of G7/G8 System, online at http://www.g7.utoronto.ca/governance/gov4/1.html#a (visited Nov 21, 2009) (discussing the role of the sherpas in creating the communiqué).

establishing institutions such as the European Bank of Reconstruction, since such long-term investment makes their policy commitments more credible.  

All of this is meant to suggest that the G-level process is, and has always been, a non-legal and not-very-administrative form of governance. And so the prominent role the G20 has played in formalizing a response to the crisis has been indicative of the limits of global bureaucratization. While institutions like the WTO, the Basel Committee, and IOSCO have remained silent, the G20 has actually contributed to a response. But because of the way the organization works, it is difficult to characterize this response as administrative, or even indicative of a global administrative law.

The G-level and ad hoc response to the crisis was outlined as the principals from the G20 group of countries met to discuss the crisis in November, 2008. At the conclusion of that meeting, they released a statement of relatively low specificity, but one that nonetheless underscored the global character of the crisis:

We pledge to strengthen our regulatory regimes, prudential oversight, and risk management, and ensure that all financial markets, products and participants are regulated or subject to oversight, as appropriate to their circumstances. We will exercise strong oversight over credit rating agencies, consistent with the agreed and strengthened international code of conduct. We will also make regulatory regimes more effective over the economic cycle, while ensuring that regulation is efficient, does not stifle innovation, and encourages expanded trade in financial products and services. We commit to transparent assessments of our national regulatory systems.

The statement's relatively vague quality is par for the course, but it clearly indicates that the G20 intends to formulate a policy response to the financial crisis. In this way the statement is notable for the signal it sent about the global nature of the crisis rather than for specific regulatory reforms agreed to. Moreover, the action plan that followed the agreement on principles was more substantive in some cases. The G20 recommended to the IMF what was

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94 See id.

95 Indeed, one way to think about international regulatory harmonization is as a three-stage process. First, domestic regulators agree to share information with their foreign counterparts. This doesn’t harmonize regulation, but solves some globalization problems (at least from the regulator’s perspective). Second, the mechanism used for international information exchanges becomes the forum to generate principles of regulation commanding assent. These tend to be gauzy, short, and vague, and it isn’t clear that they amount to much. Third, some of these institutions actually develop their own set of hard rules, as the Basel Committee on Banking Supervision did with its capital adequacy accord. See David Zaring, Three Challenges for Regulatory Networks, 43 Ind Law 21, 214 (2009) (describing the second and third stages).

essentially a to-do list, which looked like an agreement on credit default swap regulation:

Supervisors and regulators, building on the imminent launch of central counterparty services for credit default swaps (CDS) in some countries, should: speed efforts to reduce the systemic risks of CDS and over-the-counter (OTC) derivatives transactions; insist that market participants support exchange traded or electronic trading platforms for CDS contracts; expand OTC derivatives market transparency; and ensure that the infrastructure for OTC derivatives can support growing volumes. In April, the G20 met again, assessed its performance since the November meeting, and announced an army of new initiatives. It announced that it would strengthen the IMF, and give the FSF, which it broadened and claimed would get more teeth as the FSB, a broader mandate to consider global systemic stability.

VI. CONCLUSION AND ANALYSIS

What should we make of the failure of the non-G20 international institutions? What does the response of these international institutions tell us about governance in an emergency? Eric Posner and Adrian Vermeule are presumably unsurprised; they believe that law gives way to emergency. They invoke Carl Schmitt—the Weimar philosopher who believed that the explanation for legislative and democratic failure lies in emergencies—where commanding executives take control and respond to the crisis in an ever more democracy-threatening way. As I have noted, disbelievers in the hard and soft variants of international law are unlikely to revisit their skepticism now. Alternatively, it could be that international law may discipline, as the WTO has done with trade barriers and the Basel Committee has done with capital adequacy, better than it encourages coordination and creative response or induce compliance with discipline during crises.

Despite the failures of global administration, it is not clear that the Schmittian analysis makes sense in every context. During both 9/11 and the financial crisis, the executive branch of the US government announced a number of controversial new programs. For the most part, Congress got out of the way,
providing broad authorizations for executive response replete with discretion and limitations on oversight. Posner and Vermeule, would put this down to the Schmittian inevitability of executive decisiveness overruling legislative indecision in emergencies.  

In fact, the principal vehicles of the domestic response to the financial crisis so far—the Treasury and the Federal Reserve—played those roles partly because of the flexible legal authority both enjoyed which other institutions did not. And while the bailout, as done by Congress, certainly bequeathed an awesome amount of power on the government, the details of the grant changed substantially between the initial three-page proposal by the government and the 412-page bill that passed the legislature.

The international cognate appears to be similar to the American response but with more dire consequences for those committed to the prospect of international governance. The international institution most flexibly positioned to respond to the crisis, as I have said, appears to be the G20, and it is something of a mystery that the network—which enjoys no limits on the ambit of its authority and yet has specifically been charged with responding to financial crises and panics—did not play a role in the response.

The financial crisis has more implications for global administrative law, in that it presents something of a challenge to the very project. Bureaucratization has had little to say about the crisis. It has not provided a response through the usual international vehicles, and the cosmopolitan comparative (and, of course, harmonizing) mission of the networks has been found to be wanting. Instead, the response to that crisis has been politicized through the G20, and although there may be hope for more law-like institutionalization (and indeed, there may be a Bretton Woods 3 if the French president has his way), that institutionalization has neither happened nor offered a response to the crisis.

Even those skeptical of market interventions by governments should hesitate to embrace their failure here. For one thing, before the crisis governments appeared to be attracted to the coordination of financial regulation. In a testament to David Mitrany’s classical view that international cooperation would lead to international enmeshment, American regulators have participated

100 See Posner and Vermeule, Crisis Governance at 46–47 (cited in note 2) (concluding that the Schmittian view of emergency politics has explanatory value).

101 In fact, the details had changed so substantially that the equity injections settled on by the government in response to the crisis would not have been possible unless Congress had legislated the way it did.

in international regulatory networks and in treaties like the WTO, vigorously and increasingly.

Much of this was driven by seeming need. To take just one example, American gross trading activity in foreign securities is 7.5 trillion dollars, up from 53 billion dollars three decades ago. 103 Approximately two-thirds of American investors own securities of non-US companies—a 30 percent increase from just five years ago. 104 And foreign trading activity in US securities now amounts to over 33 trillion dollars. 105 Recently, globalization has been blamed for the exposure of a number of European financial institutions to securitized American subprime mortgages and for a variety of American banks that failed because they retained those mortgages on their balance sheets.

For these reasons, the SEC’s international affairs office has quickly become a central outfit for the formulation of regulatory policy. 106 Its employees spend thirty percent of their time on what SEC Director Ethiopis Tafarris calls “international regulatory policy,” or, in other words, “representing [the] agency in international organizations that are developing principles, standards, papers, best practices intended to have some application in the securities market,” and “looking at the impact of SEC rulemaking beyond the borders of the United States and informing and advising the Commission and staff of that impact, identifying areas where we might be creating some conflict of law, and identifying ways to mitigate conflict if at all possible.” 107

The impact of this globalization on the regulators who oversee American markets has been enormous. Again, consider the SEC. Instead of exclusively spending their time in the US, in 2007, the SEC commissioners gave speeches in Sydney, Madrid, Mumbai, London (four times); Dublin, Berlin, Frankfurt, Paris (three times); Munich, Luxembourg, Cape Town, Vancouver, Brisbane, and

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104 See id at 2–3.

105 See id at 3.

106 See Peter E. Millspaugh, Global Securities Trading: The Question of a Watchdog, 26 GW J L & Econ 355, 363–64 (1992) (stating that the SEC has signed Memoranda of Understanding with several counterparts in other countries, in an effort to facilitate cross-border enforcement cooperation); see also Michael D. Mann and William P. Barry, Developments in the Internalization of Securities Enforcement, 39 Intl Law 667, 669–70 (2005) (reporting that securities regulators around the world have modeled their transnational cooperative arrangements after the SEC’s arrangements).

Tokyo (three times). Former SEC Chairman Christopher Cox reports that international work “comprise[d] over half of [his] time and responsibilities.” In his view, “it is no longer possible for the SEC to do its work in the United States without a truly global strategy . . . [W]hat goes on in other markets and jurisdictions is now intimately bound up with what happens here.”

In light of this, some scholars have called for a “New International Financial Architecture,” composed of “international bodies that have their own mandates,” like the IMF, World Bank, OECD, and standard setters like IOSCO and the Basel Committee. Douglas Arner and Rolf Weber think that this disparate financial architecture might be organized around its sole goal—to ensure the stability of the international financial system.

So what should we make of the seeming failure of that architecture? Of course, we should not write off institutions that fail to perform perfectly in particularly challenging environments. But we might wonder whether the world has turned away from law and towards politics as the crisis has globalized. What could make more law-like institutions work better? I suggest that an improvement in the performance of the international financial regulatory architecture will require an internalization process, which in turn requires an increasing degree of confidence in these institutions.

This might only be a partial development at best. As international governance increasingly is delegated to the particularly informal international institutions, the problem of enforcement grows even more critical. The international system is anarchic, meaning that the rules of international administrative bodies are not easily enforced. The WTO has a dispute

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108 The analysis was concluded by visiting the agency’s website, which admirably keeps track of every speech by SEC Commissioners. See Commission Speeches and Public Statements (2009), online at http://www.sec.gov/news/speech.shtml (visited Nov 21, 2009).

109 Cox, Address to the American Institute of Certified Public Accountants’ International Issues Conference at 1 (cited in note 103).


113 Waltz, Theory of International Politics at 88 (cited in note 1) (stating that “[i]nternational systems are decentralized and anarchic”); consider Adamson Hoebel, The Law of Primitive Man 67–99, 331 (Harvard 1967) (likening international law to, for instance, Eskimo law, with weak enforcement, self-help, and a lack of delegation to officials with authority).
resolution system generally regarded as successful, but the other putative administrators of global economic regulation do not. Moreover, it may be that the WTO's enforcement discipline ends up being ignored in the context of the crisis, and the lack of enforceability could be correlated across institutional forms.

It may seem overly constructivistic to say so, but difficult-to-enforce international norms have always required an internationalization of those norms by domestic administrative agencies charged with giving teeth to these agreements and accords of international regulators. And that in turn probably requires some confidence in the effectiveness and wisdom of the international legal institution. The inability of these institutions to offer solutions to the crisis will do nothing to develop this process of international norms through confidence.

Perhaps this confidence might be built through a procedural device: inter-linkage. The various networks, IFIs, and the WTO failed to respond to the systemic risks because they only looked at part of the problem. Perhaps if their efforts were more coordinated, these problems would have been alleviated. Although the idea of perfect regulatory anticipation is unlikely, inter-linkage might make for more effective international governance.

The G20 appears to agree that inter-linkage is important (or it agrees that purely symbolic measures are the only measures that it can take to deal with future problems). Hence, it invested in the FSF, now remade as the FSB, with more members, more powers, and, above all, more coordination.

My argument has been that political, not legal or expert institutions, have been leading the response to the crisis. Accordingly, in the context of regulatory reform, which will surely follow the crisis, we might predict that political responses will take precedence over technocratic or legal ones. The search for blame is likely to affect international regulatory form. Politicians may focus on executive compensation and criminal penalties. This focus is in turn likely to guide global administrative cooperation towards a coordination of enforcement activities before it leads to cooperation in other areas.

These predictions are not meant to obscure the conclusions drawn here, which is that international legal institutions have not performed well in the financial crisis of the past year and that purely political institutions have taken over the task of coordinating the response. It may be acceptable that a club of democratically elected, relatively prosperous leaders have assumed this role. But the response to the crisis is not a vindication of the increasingly elaborate
institutions designed to deal with the global economy, and, perhaps, preclude pure politics from stooping to govern the global economy.