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Financial Crises and Civil Society

Claire R. Kelly*

Abstract

International financial law institutions struggle to confront financial crises effectively and flexibly, playing the role of both regulator and rescuer. At the same time, these institutions confront demands for greater legitimacy in light of the public policy implications of their actions. Some might argue that greater participation by civil society may serve to foster greater legitimacy by improving representativeness, transparency, accountability, and reasoned decision-making. But greater civil society access also has costs that can undermine both regulation and rescue efforts. I argue that we should not presume greater civil society participation lends greater legitimacy to international financial institutions. Rather, we should examine various types of civil society contributions at different points in the financial crisis and attempt to identify when and what kind of participation would be most helpful in light of the role played by the different institutions involved. As a general rule subject to certain caveats, civil society groups whose missions are closely related to interests affected by the institutions’ actions can make their greatest contribution to policy-setting institutions while civil society groups with a high degree of expertise should be more involved with institutions when they are performing detailed rule-making functions.

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I. INTRODUCTION

The 2008 financial crisis challenged national and international lawmakers’ capacity and legitimacy to prevent and confront financial crises. The specific challenges involved both preventative regulation and rescue measures. International institutions involved in these efforts faced added legitimacy challenges. This article examines civil society’s involvement in the regulation and rescue efforts involved in financial crises and how that involvement may impact international financial institutions’ legitimacy as well as their efforts.

Any analysis of global systemic crises should distinguish the various opportunities for action as well as the need for coordination. Section II recounts the different roles that international financial institutions play at different stages of a crisis. Section II also explains why countries and institutions should coordinate efforts to prevent, contain, and resolve financial crisis. It concludes by identifying and categorizing those entities, organizations, and networks that might play a role in each phase.

Understanding how society might cope with the potential for systemic failures and global financial crises quickly reveals that the means to address financial crises will likely involve policy choices and priority-setting that implicate a plethora of public concerns. Any effort to prevent, contain, or resolve financial crises will need to balance the costs and benefits of any particular level of risk or remedy in terms of economic efficiency, growth, and fairness. Choices made to prevent, contain, and resolve crises will have linkages to other important societal concerns including, but not limited to, labor, pensions, food security, and health care. Section III highlights some of the policy choices involved in setting regulatory standards to prevent a crisis as well as those involved in containing and resolving the crisis.

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When one considers the type of overarching coordination needed in light of the public policy choices, one must question the legitimacy of any efforts to regulate at each stage of a financial crisis. Legitimacy matters not just from a normative perspective, but also from a practical perspective. That which actors do not perceive as legitimate will be less likely to succeed. Section IV briefly explains how we might assess the legitimacy of global regulatory efforts. Section IV also examines the scope of civil society participation that may be permitted and the costs and benefits of inclusion. Finally, Section IV assesses the value of participation at the different regulatory stages. It does so by categorizing both the institutions that generate norms as well as the civil society organizations that wish to influence them. Generally speaking, civil society groups whose missions closely relate to interests affected by the institutions’ actions should seek to involve themselves with agenda setting institutions or forums at the policy setting stage. Input at the rule-making stage should be limited to those groups that can bring expertise to the task. These rules serve as a general guides with important caveats to prevent capture and abuse. Moreover, the benefits of greater participation likely outweigh the costs at the crisis prevention and crisis resolution stages. However, arguably, the rescue stage cannot sustain the costs of greater participation despite the very real policy choices that must be made during the containment phase.

II. REGULATORS AND RESCUERS

Both regulators and rescuers play a role in financial crises. Crisis prevention and crisis resolution essentially require regulatory action, that is, standard setting. Crisis prevention consists of the regulatory management of private risk.² Crisis resolution, like crisis prevention, involves a long-term effort, setting priorities, and sharing the burdens of the crisis.³ Resolution also involves burden-sharing choices, but in some sense requires priority-setting similar to crisis prevention. It looks forward to see who should insure against future loss.⁴ To different degrees, regulation and rescue involve value judgments about risk, stability, and fairness. Crisis containment involves rescue. Anna Gelpern has explained containment, which she aptly describes as the urgent and brief period where choices are made to "arrest[ ] financial collapse."

² Anna Gelpern, Financial Crisis Containment, 41 Conn L Rev 1051, 1064 (2009).
³ Gelpern, 41 Conn L Rev at 1067 (cited in note 2).
⁴ See, for example, David M. Herszenhorn, Democrats Tweak Bank Bill to Preclude Bailouts, NY Times B6 (Apr 30, 2010) (discussing a potential fund for future bank bailouts paid for by major financial institutions).
⁵ Gelpern, 41 Conn L Rev at 1064 (cited in note 2).
Both regulation and rescue require global coordination of a fragmented regulatory structure spread throughout different organizations, entities and national authorities. Yet, one country’s regulatory failure can easily infect another country’s economy. Some entities are poised (or could be) to regulate prospectively to help avert systemic failures. Other entities are best able to contain or resolve crises, while others are able to effectively contribute at all stages. Among the possible entities that could be utilized are the G-20, the Financial Stability Board (FSB), the International Monetary Fund (IMF), the World Bank, the Organization for Economic Co-Operation and Development (OECD), the Basel Committee on Banking Supervision (Basel Committee), the International Organization of Securities Commissions (IOSCO), the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), and private law institutions such as the United Nations Commission on International Trade Law (UNCITRAL). The extent to which all of these entities deliberate internally, with each other, and with civil society more broadly affects not only the legitimacy of these institutions and the actions they take but their effectiveness as well.

A. Regulation: Crisis Prevention and Resolution

Crisis prevention and resolution both require coordinated prudential regulation and monitoring. Prudential regulation compares the benefits of risk taking against the likelihood and costs of a failure. Monitoring involves the

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8 This list is not exhaustive. For example, one might include the IFRS and its independent standard-setting body, the International Accounting Standards Board (“IASB”), online at http://www.ifrs.org/The+organisation/IASC+F+and+IASB.htm (visited Oct 20, 2010).


sharing of data that informs regulators of potential crisis triggers.\textsuperscript{11} Resolution also involves burden sharing, that is, dividing up the cost of failure.

Crisis prevention entails regulating to avoid risk of a systemic failure. Yet crisis prevention is in tension with the fact that risk spurs economic activity.\textsuperscript{12} Actors want to take risks because they perceive that as a result they will benefit from gains.\textsuperscript{13} The more risk actors incur, the greater their potential gains. Society may wish to rein in risk takers through regulation because their behavior may pose risks to society.\textsuperscript{14} Policy makers must decide how much risk society should take in light of the potential gains to society that may be achieved from those risks.\textsuperscript{15}

Markets face different types of risks, some of which can be managed by market participants who can diversify to hedge against losses.\textsuperscript{16} Market participants can manage business risks, market risks, liquidity risks, and credit risk, to some extent, through diversification. Even if market participants can (and would) manage risk in some cases, they will be unable to do so in cases of systemic risk. Systemic risk involves risk to the system itself such that diversification would not be able to afford protection.\textsuperscript{17} Steven Schwarcz defines systemic risk as:

\begin{quote}
The risk that (i) an economic shock such as market or institutional failure triggers (through a panic or otherwise) either (X) the failure of a chain of markets or institutions or (Y) a chain of significant losses to financial
\end{quote}


\textsuperscript{13} Jackson, 77 Wash U L Q at 333 (cited in note 12).


\textsuperscript{17} See id at 139.
institutions, (ii) resulting in increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility.¹⁸

As Schwarcz explains, market participants face a tragedy of the commons with respect to risk, and therefore, we must rely upon regulation to avoid it.¹⁹ This tragedy of the commons phenomenon supports the need for global coordination as well as regulation, generally.

While regulation can reduce certain risks, it will not eliminate risk. Thus, crisis prevention also requires warning systems.²⁰ Economists and others who monitor the financial sector need to have access to data. A warning system requires transparency.²¹ As one economist points out, “[W]hile housing and balance of payments data is widely available, few economists knew that financial firms had become so leveraged or comprehended the nature of the real-estate-backed assets that these firms held.”²² Thus, in order for any monitoring system to work, not only must national authorities share information, monitors must understand the implications of that data. Thus, crisis prevention requires both regulation and monitoring.

¹⁸ Steven L. Schwarcz, Systemic Risk, 97 Geo L J 193, 204 (2008). Attention had been focused on capital markets as the center for concerns over systemic risk. Id at 200. See also Mary Schapiro, Testimony Concerning Regulations of Systemic Risk, in Institute on Securities Regulation (41st Annual) 1773 PLI/Corp 233 (Nov 2009). Chairman Schapiro explains that there are actually two kinds of systemic risk. First there is the risk from sudden shocks that might cause systemic or cascading seizures. There is also the “longer-term risk that our system will unintentionally favor large systemically important institutions over smaller, more nimble competitors, reducing the system’s ability to innovate and adapt to change.” Id at 235. The Financial Stability Board has defined “systemic risk as a risk of disruption to financial services that is (i) caused by an impairment of all or parts of the financial system and (ii) has the potential to have serious negative consequences for the real economy.” IMF, Bank for International Settlements (“BIS”) and FSB, Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations 5 (Oct 2009), online at http://www.financialstabilityboard.org/publications/r_091107c.pdf (visited Sept 14, 2010).

¹⁹ Schwarcz, 97 Geo L J at 206 (cited in note 18).


²¹ See generally Anne Sibert, A Systemic Risk Warning System (VoxEU Jan 16, 2010), online at http://www.voxeu.org/index.php?q=node/4495 (visited Sept 16, 2010) (arguing that if the economists had been able to “collect, organise, analyse, store, and protect data on the market prices of the on- and off-balance sheet assets and liabilities,” it would enable them to assess the impact of leverage and liquidity, assess correlation of asset prices and “estimate portfolios’ sensitivity to changes in economic conditions” before the advent of financial crisis). See IMF, BIS, and FSB, Guidance to Assess at 23 (cited in note 18).

²² Sibert, A Systemic Risk (cited in note 21).
Crisis resolution involves the same types of regulatory choices discussed in crisis prevention, although it occurs in the shadow of the most recent crisis. Thus, for example, after a G-20 Workshop on Securing Sustainable Economic Recovery, the Chair issued a statement recognizing "that in relation to the post-crisis management, [the] relationship between macroprudential policy and monetary policy would likely to be one of the important issues to be discussed within G-20."25

Crisis resolution also involves sharing the burdens of a past failure and insuring against the burden of failure going forward.26 Regulators will determine who should pay for the costs of insuring the system both as a means of regulating conduct—for example, by placing the cost on the least cost avoider—and as an equitable matter in light of past conduct in the most recent crisis.

Finally, resolution also involves exit from the emergency measures implemented to contain risk. Removing temporary support can toss the financial sector back into disarray, can have serious effects on the real economy, and can have cross-border effects.27 Therefore, the withdrawal of emergency measures must be managed so that the markets have clear expectations as to what will happen.28

B. Rescue: Crisis Containment

Regulation that might avoid systemic risk, though, differs from regulations or other action needed to confront the effects of systemic failure.29 Authorities must react and respond to systemic failure in ways that contain the crisis.30 This mandate falls first on national governments faced with domestic concerns such as insolvency, foreclosure, unemployment, and losses in the markets. Thus, for example, both the US government and the European Commission enacted spending measures to confront the crisis.31 Anna Gelpern suggests that ensuring

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23 See notes 11–22 and accompanying text.
25 G-20, G-20 Workshop: Chair’s Statement ¶ 23 (cited in note 1).
26 See Matthews, 10 Chi J Intl L at 558–61 (cited in note 20).
27 Id.
28 See FSB, Exit (cited in note 6).
29 Gelpern, 41 Conn L Rev at 1064 (cited in note 2).
30 Id.
31 See BBC.com, U.S. Congress Passes Stimulus Plan (Feb 19, 2009), online at http://news.bbc.co.uk/2/hi/business/7889897.stm (visited Sept 16, 2010); CARS.gov, online at http://www.cars.gov/ (visited Sept 17, 2010) (cash for clunkers program); European
survival of a financial system can involve a series of decisions to suspend regulations or rescue failing financial institutions. Thus, most recently we saw US national authorities “bailing out” businesses, like American International Group (AIG), because of the fear that the failure to do so would push otherwise solvent entities into insolvency. We also saw bailouts that were not necessarily tied to the risk of systemic failure, such as the US bailout of General Motors. These are distributive choices. They impose the burden of the regulatory failure on some and take that burden off others. During the containment phase, burden sharing may involve dividing burdens between creditors and debtors, shareholders and bondholders, and individual entities or the taxpaying public.

Looking forward from a prudential standpoint, bailing out entities and allowing them to start with a somewhat clean slate creates moral hazard. In other words, alleviating the post transaction cost of risky behavior only encourages future risky behavior. The G-20 Workshop on Securing Sustainable Economic Recovery addressed different approaches to the moral hazard problem:

24. Participants were provided with information about the Financial Stability Board’s (FSB’s) work program on reducing moral hazard posed by systemically important financial institutions (SIFIs).

32 Gelpern, 41 Conn L Rev at 1055 (cited in note 2). As Gelpern notes, these decisions contain a political element. Id at 1067.


35 See Gelpern, 41 Conn L Rev at 1076 (cited in note 2) (discussing government bailout as shifting losses to the public). The parties relieved of the burdens could be “local pension funds . . ., foreign municipalities that count on the income to maintain vital services, . . . retirees, . . . hedge funds, . . . Wall Street investment banks . . . poor homeowners or wealthy corporations.” Id.

36 See id.

37 See id; G-20, G-20 Workshop: Chair’s Statement ¶¶ 24–29 (cited in note 1).

25. There are broadly two approaches in tackling moral hazard posed by SIFIs: One approach is to acknowledge the existence of SIFIs and find ways to reduce probability and impact of a SIFI's failure. The other approach is to ensure there can be no SIFIs. While the FSB has adopted the first approach to date, there are others who prefer the second approach.

26. Currently, FSB is focusing their work on three areas:

- reduce the probability and impact of failure of SIFIs.
- improve resolution capabilities
- strengthen market discipline and market infrastructure to deal with a SIFI failure

While the prospect of creating moral hazard is undesirable, bailing out failed entities and shifting their losses onto others, such as taxpayers, may stave off further failures, even though it may be unfair to impose such a burden on taxpayers. The G20 Workshop acknowledges that systematically important financial institutions might fail again.

In addition to whether States will support at-risk entities, how they do so also matters. For example, a State may desire to support at-risk entities through subsidies or trade restrictions that would implicate trading rules and might spread risk to other countries. The State may go into debt and as a result limit its ability to address other issues of concern. Likewise, it may pay for losses through higher taxes or cuts in services. These distributive choices may be revisited and revised when it comes time to regulate in the resolution phase.

Finally, crisis containment requires a great deal of leadership. The public and the regulatory targets need to trust the leadership to ensure stability and confidence in the markets.

39 G-20, G-20 Workshop: Chair’s Statement ¶ 24–26 (cited in note 1).
40 See Gelpem, 41 Conn L Rev at 1057 (cited in note 2).
C. The Need for Coordinated Efforts

Avoiding the risk of systemic failure requires cross border coordination.\textsuperscript{44} National authorities have limited capabilities, conflicting policy incentives, and unique priorities.\textsuperscript{45} Moreover, the size of financial conglomerates makes a global financial crisis difficult for any one country to handle.\textsuperscript{46} No matter what the efforts of one country, financial failures spread from country to country.\textsuperscript{47} Some possibilities for coordination include an international risk regulator,\textsuperscript{48} coordination of existing regulators,\textsuperscript{49} or a risk monitor.\textsuperscript{50} This article does not advocate a coordination model; instead it focuses on how any model might account for the views of civil society.

Several entities might play a role in regulating or monitoring systemic risk including the G-20, the FSB, the IMF, the World Bank, the OECD, the Basel Committee, IOSCO, the WTO, UNCTAD, and private law institutions (UNCITRAL, UNIDROIT and the Hague). One way of analyzing how these various institutions may coordinate their regulatory and monitoring efforts is to loosely classify them by different governing roles: the Executive, the Coordinating Regulator, Information and Implementation Bodies, and Standard

\textsuperscript{44} See Omarova, 13 NC Bank Inst at 160 (cited in note 6) (discussing the college of supervisors).


\textsuperscript{46} Omarova, 13 NC Bank Inst at 159 (cited in note 6).

\textsuperscript{47} See, for example, Gelpem, 41 Conn L Rev at 1059 (cited in note 2) (discussing national systems and how failure travels from entity to entity). G-20, \textit{Meeting of Finance Ministers and Central Bank Governors, London: Declaration on Further Steps to Strengthen the Financial System} ¶ 4 (Sept 4–5, 2009), online at http://www.g20.org/Documents/FM_CBG_Declaration__Final.pdf (Sept 14, 2010) (stating the need to tackle “non-cooperative jurisdictions”) (hereinafter “Meeting of Fin Mins”).


\textsuperscript{49} See \textit{Regulating and Resolving Institutions Considered “Too Big To Fail"}, Hearing before the Senate Comm on Banking, Housing and Urban Affairs, 111th Cong 100 (May 6, 2009) (statement of Sheila C. Bair, Chairman, FDIC), online at http://www.gpo.gov/fdsys/pkg/CHRG-111shrg179/pdf (visited Sept 18, 2010) (discussing the proposed Council of Regulators).

Setting Bodies. Some entities could be classified as falling into more than one category.


If one were to think of the various international entities as agencies of a sort, the G-20 might be considered akin to the Executive. The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 after the Asian Financial Crisis “to bring together systemically important industrialized and developing economies to discuss key issues in the global economy.” As a center of discussion and coordination, the G-20 already coordinates with the IMF and World Bank and established the FSB as the successor to the Financial Stability Forum (FSF). Although the G-20 aims to foster standard setting it deems desirable, it does not set standards and it does not maintain a secretariat or staff. Still, it turns politics into law through its use of International Organizations (IOs) and trans-governmental networks. As Barbara Matthews notes:

Importantly, the G20 is creating a process by which standards articulated by informal groups . . . are recognized and applied, if not “ratified,” by formal, treaty-based international organizations (IMF; BIS) and political groups (G20). This adds a layer of legitimacy to the informal global normative process and provides positive evidence of the intent to rely on the standards generated by the global policy groups as binding international law.

Thus, the G20 facilitates both norm generation and norm adoption.

51 In fact the G20 infused the IMF with $750 billion in cash to respond to the crisis. David Zaring, *International Institutional Performance in Crisis*, 10 Chi J Ind L 475, 478–79 (2010). This action seems to parallel what an executive might do on a national basis.

52 The finance ministers and central bank governors of Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea, Turkey, United Kingdom, United States of America and The European Union (represented by the rotating Council presidency and the European Central Bank) make up the G-20. G-20, *About G20*, online at http://www.g20.org/about_what_is_g20.aspx (visited Sept 14, 2010).

53 See id.

54 See FSB, *History*, online at http://www.financialstabilityboard.org/about/history.htm (visited Sept 17, 2010).

55 Matthews, 10 Chi J Ind L at 555 (cited in note 20).
The G-20 acted at several key points in the most recent crisis by convening summits of the G-20 Leaders: Washington, London, Pittsburgh, and Toronto. As it worked through these summits, the G-20 has evolved from a short-term crisis manager to long-term policy planner and the premier international economic coordination forum. It has directed the FSB to coordinate with other international financial institutions as well as with other non-financial international institutions to address the linkages between financial regulations and other areas of public concern.

2. Coordinating regulator: The FSB.

The Financial Stability Board aims “to enhance cooperation among the various national and international supervisory bodies and international financial institutions so as to promote stability in the international financial system.” The FSB has been identified by Douglas Arner and Michael Taylor as a potential lead entity for coordination. They suggest that “standard-setting would continue to rest with individual standard-setting organizations such as the Basel Committee, IOSCO and the like, with coordination through the FSB.” These standard-setting entities are now members of the FSB as a result of the G-20’s

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58 See, for example, G-20, Leader’s Statement 12 (cited in note 20).


60 Arner and Taylor, 32 U New S Wales L J 488, 512 (cited in note 45). They argue that the FSB could work well for crisis prevention. Id.
expansion of both the FSB's membership and mandate in 2009. The FSB has issued several reports dealing with the most recent crisis and has coordinated and reported on the activities of several key institutions.

3. Information and implementation bodies: IMF, World Bank, and the OECD.

   a) The IMF. The IMF facilitates global monetary cooperation using three tools: economic surveillance; technical assistance; and lending. First, the IMF monitors the economic health of member countries, which alerts them to potential risks. Through its system of "multilateral and bilateral surveillance," it annually evaluates all 186 of its member countries and then discusses with each country "whether there are risks to the economy's domestic and external stability that would argue for adjustments in economic or financial policies." The IMF may also engage in multilateral consultations involving global stability issues. Its technical assistance focuses on a variety of topics including "fiscal policy, monetary and exchange rate policies, banking and financial system supervision and regulation, and statistics." It also lends to countries in financial crisis. For example, the IMF recently loaned the Ukraine $16 billion to aid its banking industry.

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68 IMF, How We Do It (cited in note 66).
have suggested that it should. It could possibly use its monitoring capabilities to sound the alarm so to speak. Nonetheless, in the most recent crisis, it played little to no role in crisis prevention. It has, however, emerged as a force in the containment of the crisis with respect to Greece. In terms of crisis resolution, it has assisted the G-20 with its Framework for Strong, Sustainable and Balanced Growth. It has also coordinated with the FSB to explore gaps in data collection at the direction of the G-20. When it provides resources, as in the Greek bailout, it also enforces principles and standards in conjunction with providing those resources.

b) The World Bank. The World Bank consists of five institutions. It provides loans to developing countries fostering economic and social

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Matthews, 10 Chi J Intl L at 579 (cited in note 20); Amer and Taylor 32 U New S Wales L J at 20 (cited in note 45) (identifying the IMF as a potential “institutional home for international financial regulation” although it is reluctant, in part, because taking on such a role would require it to shift from its traditional focus).


See IMF and FSB, Fin Crisis and Info Gaps (cited in note 72).


development. Member countries fund the World Bank through the purchase of capital stock. As the Bank itself states, it provides resources for the benefit of "education, health, public administration, infrastructure, financial and private sector development, agriculture and environmental and natural resource management." In the last crisis, it played little to no role in either prevention or containment. To be fair, however, one could describe the Bank's assistance throughout the crisis as critical for alleviating suffering during the crisis. It also assisted the G-20 with its Framework for Strong, Sustainable and Balanced Growth. Also, like the IMF, where the World Bank provides resources, it also enforces principles and standards in conjunction with providing those resources.

c) The OECD. The OECD emerged from the previously formed Organization or European Cooperation. As James Salzman notes, after the creation of the European Economic Community in 1957, it reconstituted itself

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80 See Stiglitz, Globalization at 75 (cited in note 76).


82 G-20, Communiqué: Meeting of Fin Mins ¶ 3 (cited in note 47). It has also partnered in the G20 Pittsburgh summit commitment to reduce fossil fuel energy subsidies. G-20, Leader's Statement ¶ 30 (cited in note 20).

as the OECD partially in response to the Cold War. There are thirty three countries that are members of the OECD. The OECD fosters trade, commerce and economic development. It provides a forum where governments can share information regarding good practices for responding to the economic, social, and governance challenges of globalization. In response to the crisis, the OECD set forth key principles for financial regulation and issued several reports on the crisis.


a) The Basel Committee on Banking Supervision. The Basel Committee on Banking Supervision in partnership with the Bank for International Settlements is a transgovernmental network that “generates global public goods of information and expertise.” Its framers proposed that it would serve as a forum for multinational bank supervision. One way to avoid risk might be to confront the danger of bank failure that could set off a chain of losses. The Basel Committee’s efforts to set capital-adequacy standards addressed this concern. Technically, the Basel Committee has no legal standing to force anyone to do anything. It simply develops best practices. As David Zaring has

86 Id.
87 OECD, Members and Partners, online at http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1_1,00.html (visited Sept 17, 2010).
88 OECD’s Convention, online at: http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1_1,00.html (visited November 23, 2010)
92 Barr and Miller, 17 Eur J Intl L at 22 (cited in note 15).
93 Zaring, 10 Chi J Intl L at 480 (cited in note 51). See notes 17-19 and accompanying text. See also Matthews, 10 Chi J Intl L at 546 (cited in note 20).
94 Schwarzc, 97 Geo L at 210-11 (cited in note 18).
95 See Barr and Miller, 17 Eur J Intl L at 17-18, 41 (cited in note 15) (discussing Basel’s functions and noting that “[t]he Basel standards, while voluntary in principle, are effectively embedded in a
already noted, it initially failed to offer any meaningful response to the most recent crisis, and indeed has taken some of the blame for it. The G-20 has continuously expressed its support of the Basel Committee, commending it for progress and innovation.

b) IOSCO. Some observers might look to securities commissions to avoid systemic risk and thus seek guidance from IOSCO. IOSCO is a transgovernmental network of securities regulators that has tremendous influence on the development of securities norms across the globe. One might think that expecting IOSCO to prevent a crisis would be reasonable given that its members formed the organization to:

Cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets; to exchange information on their respective experiences in order to promote the development of domestic markets; to unite their efforts 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.

Moreover, IOSCO bases its Objectives and Principles of Securities Regulation (OPSR) upon three objectives: “(1) the protection of investors; (2) ensuring that

range of other policies and market practices that make adoption in some form or another difficult to resist for developing nations[7]."

Zaring, 10 Chi J Intl L at 478 (cited in note 51).


See G-20, About G-20, online at http://www.g20.org/about_what_is_g20.aspx (visited Nov 19, 2010) (G20 actively cooperates with international organizations, including the Basel Committee); G20, Declaration, Washington DC Summit on Financial Markets and the World Economy, Risk Management (Nov 15, 2008), online at http://www.g20.utoronto.ca/2008/2008declaration1115.html (visited Nov 25, 2010) (asking Basel Committee to study the need for stress tests); G-20, Leaders’ Statement (cited in note 20) (welcoming Basel Committee’s actions and encouraging adoption of its standards); G20, Toronto Summit Declaration, Financial Sector Reform (June 27, 2010), online at http://www.g20.utoronto.ca/2010/to-communique.html (visited Nov 25, 2010) (commending its progress and expressing support for Basel Committee and noting that G20 members will adopt the Committee’s standards).


markets are fair, efficient, and transparent; and (3) the reduction of systemic risk. Yet, at least in the US, the focus of securities laws has not been prudential regulation to avoid risk but rather disclosure. IOSCO has engaged in some prudential regulation of broker/dealers, but without startling success. In response to the crisis, it has come out with several reports dealing with the regulation of hedge funds and other important issues. But like the Basel Committee, IOSCO failed to offer a forum for a serious response to the most recent crisis.

c) The WTO. The WTO operates as a trade-liberalizing institution and moves much too slowly to be expected to respond to crises in a proactive way. Instead it operates in a prophylactic capacity. The WTO has 153 members. It administers the international trade rules. Since its inception as the General Agreement on Tariffs and Trade (GATT) in 1948, it has gone through a series of negotiations known as rounds, provided for increasingly liberalized-trade rules, expanded its scope to regulate trade-related issues, and developed a high-functioning system of dispute resolution. The WTO states its most important purpose as “help[ing] trade flow as freely as possible.” Lawmaking at the WTO occurs primarily through dispute resolution. As Jeffrey Atik explains,
“the WTO is starved institutionally; there is no legislature and not much administration. WTO lawmaking follows the GATT tradition of ‘rounds,’ complex multilateral negotiations that resemble constitutional conventions more than ordinary legislation.”

In times of crisis, the WTO constrains governments from taking protectionist measures. The national treatment and most-favored-nation rules enforce the nondiscrimination principle at a time when governments might like to discriminate either in favor of their own economy or against specific trading partners. The WTO has partnered with UNCTAD and the OECD to report to the G-20 on trade and investment protectionism. Their reports were cautiously optimistic with respect to trade and investment measures adopted during the time frames covered.

d) UNCTAD. UNCTAD “promotes the development-friendly integration of developing countries into the world economy.” Its work primarily focuses on developing norms in a research driven, consensus-building manner.

UNCTAD assists developing countries to implement positive economic policies in areas such as commodity diversification, competition, and consumer policies. It also assists developing countries in a variety of ways in their trade relations. While it held a public symposium on the crisis in 2009, it has had no

111 Id at 467.
112 Zaring, 10 Chi J Intl L at 478 (cited in note 49).
119 Id.
120 Id.
121 Id.
other significant role in the process of coping with the crisis directly.\textsuperscript{122} It has, however, launched the \textit{Investment Policy Monitor}, which periodically reports on the latest developments in foreign-investment policies at the national and international levels in response to the G-20's call for reporting on trade and investment protectionism.\textsuperscript{123}

e) Private law institutions: UNCITRAL, International Institute for the Unification of Private Law (UNIDROIT), The Hague Conference on Private International Law. Various private law institutions serve as forums for the international harmonization and modernization of private law. These include the UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), or the Hague Conference on Private International Law.\textsuperscript{124} These institutions do not regulate in the sense of imposing public law obligations on member states. In fact, they deal typically only with private law matters and develop standards that states may adopt or ignore at their option. Thus, they are not likely crisis preventers or managers. But some of their work could impact financial crisis regulation. For example, crisis resolution involves burden sharing, which implicates international insolvency. UNCITRAL has developed a guide on international insolvency.\textsuperscript{125} Moreover, even though these organizations cannot impose their products on members, other organizations might. Thus, the


\textsuperscript{124} General Assembly Res No 2205/21, UN Doc A/6396 ¶ II.8(b)–(d) (Dec 17, 1966), online at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/005/08/IMG/NR000508.pdf?OpenElement (visited Oct 25, 2010) (stating that UNCITRAL's function is to prepare and promote new standards, uniform interpretation of those standards, and greater participation in, and acceptance of, pre-existing laws and conventions); Statute of the International Institute for the Unification of Private Law (UNIDROIT), Art 1 (Mar 15, 1940) (as amended Mar 26, 1993), online at http://www.unidroit.org/mm/statute-e.pdf (visited Dec 1, 2010) (stating that the function of UNIDROIT is "to examine ways of harmonising and coordinating the private law of States and groups of States"); id at Art 14 (providing that the Governing Council submit any approved drafts to member governments and facilitate conferences to discuss the drafts, if desirable); Statute of the Hague Conference on Private International Law, Art 1 (July 15, 1955) (as amended Jan 1, 2007), online at http://www.hcch.net/index_en.php?act=conventions.text&cid=29 (visited Dec 1, 2010) ("The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law."); id at Art 8 (authorizing the creation of "Special Commissions to prepare draft Conventions or to study all [relevant] questions of private international law").

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World Bank might insist that borrower nations adopt an UNCITRAL Model Law or Legislative Guide.126

II. THE COST OF FAILURE

Whichever institution or institutions take part in regulating to prevent, contain, or resolve a financial crisis, they will need to balance the costs and benefits of any particular level of risk (both in terms of the probability of a crisis and its costs) against the economic development thwarted by regulation. They should also consider the costs a failure would impose on other sectors of public concern including labor, the environment, and health care, among others. In some ways the existing fragmentation of institutions has successfully avoided in-depth consideration of these linkages.127 The most recent crisis brings these costs and linkages into focus.

A. Costs for Regulation and Rescue

Each phase of a crisis has costs. Regulators balance those costs against the off-setting benefits even in instances when both are somewhat speculative. At the containment and resolution phases, issues of costs combine with issues concerning the distribution of those costs.

Regulators balance risk against gain to the benefit and detriment of market participants and the public. One needs to identify the appropriate level of restraint on the market that will maximize market gains without precipitating a crisis. National regulators face these risk choices. Thus, for example, in the US much criticism has been levied against the Federal Reserve’s actions when faced with increasing “use of derivatives and the securitization process.”128 It chose not to curtail those activities, finding that they “would better distribute risks across financial institutions.”129 The choice not to regulate also allows for gains.


127 Eyal Benvenisti and George W. Downs, The Empire’s New Clothes: Political Economy and the Fragmentation of International Law, 60 Stan L Rev 595, 599 (2007) (discussing one “fragmentation strategy” as “avoiding broad, integrative agreements in favor of a large number of narrow agreements that are functionally defined”).


129 Id.
The benefits of risk-taking extend beyond market participants. Thus, the Federal Reserve’s approach to capital markets’ role in credit intermediation lowered “the costs of market-based finance for many market participants.” The extent to which the financial markets are regulated impacts not only those regulated but also the general public. Economic growth funds all sorts of positive endeavors and programs: labor benefits, national treasuries grow, and legislatures have more money to fund worthy social projects. In some sense a deregulatory attitude benefits everyone. But some parties benefit more than others in a deregulatory setting. Thus, one needs to consider how the costs of the risk will be spread should there be a failure.

Second, if a crisis ensues, a crisis response might include regulatory action (such as changing private relationships), but also rescuing financial institutions with public money. Governments create moral hazard when they relieve legal or financial obligations. Future actors believe that they will be bailed out when their risky activities fail and therefore may be more likely to take on risk that they would not otherwise take. Moreover, bailing out failed entities costs money. The cost can be significant and can burden future generations. At the same time, systemic risk endangers the entire system and containment might save the system from the cost of failure. Otherwise, steady entities may fail because of the risky behavior of others, prompting broader systemic failure.

Third, if a crisis emerges, the issue becomes how regulators will distribute the burdens. This question arises both domestically and internationally. Domestically, governments may bail out companies with public money thereby

130 Id. See also Posner and Vermeule, Global Governance at 8–9 (cited in note 43).
133 Id at 1056.
134 Id at 1064.
135 Id at 1081.
137 See Gelpern, 41 Conn L Rev at 1058 (cited in note 2).
139 See Armer and Taylor, 32 U New S Wales L J at 491–92 (cited in note 45) (discussing different stages of crisis regulation).
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shifting the burden to the taxpayer. Conversely, contagion that stems from the failure to bail out a company may cost the taxpayers more. Internationally, as entities face collapse, their creditors will face limited assets located in different jurisdictions. The idea of burden sharing raises the possibility that states may be reluctant to sacrifice stakeholders in their own jurisdictions to benefit stakeholders elsewhere.

B. Linkages

The 2008 crisis focused attention on linkages between financial regulation and other public issue areas—linkages that had in the past been obscured to some extent by fragmentation. Economic regulation has natural linkages to a variety of societal concerns. International entities elide the discussion of linkages by claiming a narrow mandate. Fragmentation of international economic law in particular enables entities to avoid addressing non-economic law issues. For example, the WTO has received a great deal of criticism for its refusal to take up the linkage between trade and other issue areas. Other areas of economic law, including financial regulation, implicate public concerns as

140 See Gelpern, 41 Conn L Rev at 1057 (cited in note 2).
143 Leondis, 25 Bank & Fin L. Rev at 327 (cited in note 45) (noting that in the event of international crisis, some domestic governments might favor their own financially important entities).
144 See Thomas Cottier, Challenges Ahead in International Economic Law, 12 J Intl Econ L 3, 13 (2009). See, for example, Salzman, 68 L & Contemp Probs at 197 (cited in note 85) (discussing the connection between regulation of foreign direct investment and labor, the environment and other social welfare concerns).
145 See, for example, Barr and Miller, 17 Eur J Intl L at 26 (cited in note 15) (noting that despite opening up its proposals to public comment, the Basel Committee received very little input from the broader public in part because the broader social concerns were not pronounced). See also WTO, About the WTO—a Statement by the Director-General, online at http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (visited Dec 1, 2010); Gary P. Sampson, Is there a Need for Restructuring the Collaboration Among the WTO and the UN Agencies so as to Harness their Complementarities?, 7 J Intl Econ L 717, 723 (2004); Debra Steger, Afterword, The Boundaries of the WTO: The “Trade and…” Conundrum—A Commentary, 96 Am J Intl L 135, 137 (2002) (arguing that the WTO's mandate is to first and foremost about trade and promoting market access); Kyle Bagwell, Petros C. Mavroidis, Robert W. Staiger, It's a Question of Market Access, 96 Am J Intl L 56, 56 (2002) (explaining that non-trade concerns need not be dealt with within the WTO).
well. Financial crises affect every conceivable aspect of public concern. However, this breadth of affected interests should not preclude efforts to acknowledge those interests from a legitimacy perspective. In fact, as I will discuss in Section IV.B, the scope of the relationship between financial regulation and issues of public concern offers a compelling reason for a more proactive, yet nuanced, integration between civil society and financial regulators.

C. Labor

The collapse of the financial markets directly affects the real economy. When financial markets fail, credit tightens, commodity prices fluctuate, and demand falls. As a result, businesses in a broad variety of sectors suffer, causing them to cease hiring, cut hours, and/or lay workers off. Some businesses close. Even when the financial markets recover, the businesses that survived are cautious about returning people to work. Some workers never attain the same wage level they had prior to the crisis.


149 Indeed, some have characterized financial stability as a public good. See Marc Quintyn and Michael Taylor, Regulatory and Supervisory Independence and Financial Stability 4 (2002 IMF Working Paper No 02/46).

150 See notes 293 to 325 and accompanying text (discussing integration at the policy setting level). The idea that the time has come to discontinue the debate over state sovereignty versus globalization is not new. See, for example, Robert Howse, The End of the Globalization Debate: A Review Essay, 121 Harv L Rev 1528, 1530, 1533 (2008) (noting that the debate has now shifted to one over values).


152 Id.


Unemployment as a result of the 2008 crisis rose globally. In 2009, the ILO projected that unemployment worldwide will reach 7.1 percent. Workers in poorer countries suffer in particular. In 2009 alone, an estimated forty-six million more people were pushed into poverty (living on less than $1.25 a day). The process is a vicious cycle. "Job losses lead to lower consumption, which lowers industrial confidence, which leads to less investment, which results in more job losses, and so on." 

Rich and poor countries alike face labor struggles. The OECD projected that unemployment in OECD areas would average 6.3 percent in the last quarter of 2008, and peak at 7.3 percent in the second quarter of 2010. The ILO reported that "[o]ver 6 million jobs were lost in manufacturing, 2.8 million in construction and 2.3 million in wholesale and retail trade in the two years to the third quarter of 2009 among fifteen G-20 countries with available data." 

Labor leaders (and others) have made the connection between financial regulatory policy and its impact on the work force. Commenting on the impact of the financial crisis on workers, one official argued:

We need financial policies that promote productive investment, restrain speculative behaviour, ensure transparency and rebuild credibility in the system. In an open international system, the quality of national banks and other financial institutions practices and instruments should be subject to international standards of supervision. The surveillance mechanism of the IMF must apply with equal weight to big and powerful nations as well as smaller and weaker countries ... Developing integrated policies among relevant international organizations to generate Decent Work

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158 Id.

159 OECD, Impact of the Economic Crisis on Employment and Unemployment in the OECD Countries, online at http://www.oecd.org/document/63/0,3343,en_2649_33927_41727231_1_1_1_37457,00.html (visited Dec 1, 2010).

opportunities worldwide is one of the foundations of a sustainable recovery and a fair globalization.\textsuperscript{161}

D. Pensions

The financial crisis has hit pensions hard and in a very public way.\textsuperscript{162} The OECD reported that in the first ten months of 2008, private pensions in the “OECD have registered losses of nearly 20 percent of their assets (equivalent to $5 trillion).”\textsuperscript{163} Older workers were particularly at risk.\textsuperscript{164} Those who heavily invested in equities or asset-backed securities likewise were more at risk.\textsuperscript{165} Some reports expressed concern that these developments may result in backlash reactions against private pension systems, which inappropriately undervalues their long-term usefulness.\textsuperscript{166} The impact on pensions spills over into many aspects of society. Without stable pensions, “precautionary savings might have to rise, affecting consumer behavior, and there could be adverse impacts on government finances associated with a need to strengthen social safety nets.”\textsuperscript{167}

E. Health Care

As the economic crisis pushed an estimated 100 million people into poverty, some commentators have expressed the concern that the economic crisis would become a health crisis.\textsuperscript{168} The decline in private financial flows, foreign direct investment, and remittances in addition to the decrease in exports, all undermine the capacity of developing countries to provide for the health of

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\textsuperscript{164} Id.

\textsuperscript{165} Id.

\textsuperscript{166} Id (discussing a return to public systems, delaying reforms to the public system).


\textsuperscript{168} World Health Organization (WHO), \textit{The Financial Crisis and Global Health} 3 (Jan 21, 2009), online at http://www.who.int/mediacentre/events/meetings/2009_financial_crisis_report_en_.pdf (visited Dec 1, 2010) (hereinafter “\textit{Fin Crisis and Glob Health}”).
\end{footnotes}
their citizens. Moreover, resulting currency devaluations "increase the costs in local currencies of all imported health expenditures: medicines, autoclaves, syringes, X-ray machines and other hospital equipment." The threat extends to developed countries. As the WHO reports, "[m]any high-income and upper middle-income countries will experience negative real income growth and substantial increases in unemployment, with their consequent impact on health." Some have questioned physicians’ willingness to extend charity care as they have seen their pensions suffer. Others predict aspiring physicians will have a difficult time securing school loans or will trend towards more lucrative specialties exacerbating an existing primary care provider shortage. Investors will invest less in new medical technologies and hospitals will be forced to reduce new construction and layoff staff.

As in other cases, commentators have highlighted the need to link financial regulation to social issues such as health care:

Infrastructure investments and social spending on nutrition, basic education and health care are essential. . . . A new system of financial regulation should be built upon two broad principles: the need to incorporate counter-cyclical mechanisms in order to correct for the boom-bust nature of financial markets; and effective regulation whereby the domain of the regulator is the same as the domain of the market to be regulated, which is global in nature.

F. Food Security

Global food insecurity results from a variety of factors and threatens one billion people with malnourishment. While the financial crisis was by no

170 Newfarmer, Financial Crisis (cited in note 169).
171 WHO, Fin Crisis and Glob Health at 10 (cited in note 168).
173 Id.
174 Diana Alarcon, Stephany Griffith-Jones and Jose Antonio Ocampo, How Does the Financial Crisis Affect Developing Countries?, One Pager No 81 (Intl Poly Ctr Inclusive Growth 2009), online at http://www.ipc-undp.org/pub/IPCOnePager81.pdf (visited Dec 1, 2010).
175 See World Food Program (WFP), The State of Food Insecurity in the World: Economic Crises—Impacts and Lessons Learned 2 (2009), online at
means the cause of widespread food insecurity, it has exacerbated the crisis.\textsuperscript{176} Underinvestment in agriculture contributes greatly to food insecurity, and the financial crisis has worsened that trend.\textsuperscript{177} Increased poverty rates also cause food insecurity. After the Mexican and Asian financial crises, “poverty rates increased by up to 24 percentage points,”\textsuperscript{178} and it took five to eight years for rates to return to prior levels.\textsuperscript{179} Remittances fall during economic crises.\textsuperscript{180} Poorer countries, most vulnerable to food insecurity, have been affected by the most recent crisis to a greater extent than in past crises because the greater level of global economic integration.\textsuperscript{181} At the same time, since the most recent crisis, unlike past crises, extends beyond particular countries or regions, it has been more difficult for unaffected countries to step in and relieve suffering.\textsuperscript{182} As trade contracts as a result of the financial crisis, it is expected that the global food crisis will worsen.\textsuperscript{183} It was expected that even following the global food crisis of 2006–2008, in 2009, for example, the number of people exposed to food insecurity would increase by 2 percent, even if availability remained constant.\textsuperscript{184}

The G-20 has already started to address issues of food security by calling for the creation of the World Bank Food Security Trust Fund following the G8 Summit in L'Aquila, Italy in July, 2008.\textsuperscript{185} The G8 articulated five principles for a food security initiative: “1) Stronger coordination among donors[,] 2) Support of comprehensive strategies[,] 3) Investment through country-owned plans[,] 4)
Leveraging effective multilateral institutions[5] Sustained commitments.\textsuperscript{186} The G-20 committed to these principles in its L'Aquila Summit.\textsuperscript{187}

G. Other Areas of Concern

Financial crises touch all areas of public concern. Economic crises can thwart environmental efforts.\textsuperscript{188} Developed countries with depleted resources back away from commitments to assist developing countries with their climate change efforts.\textsuperscript{189} Businesses plead for relief from proposed regulations that they claim would threaten them while they are most vulnerable.\textsuperscript{190} Education suffers as depleted treasuries have less to spend on all levels of education. National security efforts are hampered by reductions in technology investment. A legitimate system of financial regulation must account for all of these costs and linkages.

III. LEGITIMACY IN CRISIS

The very real public costs of systemic financial failure\textsuperscript{191} call into question the legitimacy of any efforts to regulate, contain, and resolve such failure. Legitimacy matters because it helps to ensure the success of regulatory efforts. Ensuring meaningful deliberation by promoting greater participation, transparency, accountability, and reasoned decision making would arguably improve the legitimacy of international financial institutions. But these attributes have costs,\textsuperscript{192} and policy makers should carefully examine these costs at each regulatory phase of a potential crisis.

\footnotesize{\textsuperscript{186} Id.  
\textsuperscript{187} Id.  
\textsuperscript{188} See Ambassador Stuart Eizenstat, \textit{The U.S. Role in Solving Climate Change: Green Growth Policies Can Enable Leadership Despite Economic Downturn}, 30 Ener L J 1, 1 (Nov 14, 2008) (noting the cloud the economic crisis had placed over climate change efforts).  
\textsuperscript{191} Posner and Vermeule, \textit{Crisis Governance} at 6, 16 (cited in note 43) (noting that “financial regulation emerged from the recognition that financial crises are inevitable in an unregulated market, and that they can lead to economic collapse, political instability, and widespread misery”).  
\textsuperscript{192} See, for example, Barr and Miller, 17 Eur J Intl L at 26–27 (cited in note 15) (noting that participation costs in the international arena are higher than the costs of participation in domestic sphere).}
Policy makers should categorize a civil society institution by the degree of its expertise and its mission as it relates to the proposed regulatory action. Policy makers should also place institutions and the decisions they make on a continuum of norm development from policy setting to detailed rule making. Generally speaking, civil society groups whose missions closely relate to interests affected by the institutions' actions should work with institutions at the policy-setting end of the continuum while civil society groups with a high degree of expertise should contribute to institutions when they are performing detailed rule-making functions. This is a general guide and there are important caveats to prevent capture and abuse.

A. Legitimacy

Legitimacy matters from a normative and practical perspective. All institutions that establish norms, whether those norms develop into soft law, hard law, or no law at all, face legitimacy challenges.\(^{193}\) Legitimacy engenders compliance: it may transform soft law into hard law, spur the internalization of norms, or simply justify the norm-development process itself.\(^{194}\) The sociological perception that an institution can and should develop norms aids in the adoption of those norms.\(^{195}\)

Global entities face multiple legitimacy challenges.\(^{196}\) Global governance entities are seen as removed from domestic democracy.\(^{197}\) They are challenged as lacking legitimacy or accountability.\(^{198}\) Some also claim that global governance

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\(^{194}\) For a discussion of theoretical basis and practical implications of these phenomena, see generally Claire R. Kelly, Institutional Alliances and Derivative Legitimacy, 29 Mich J Intl L 605, 619 (2008). Legitimacy can be either a descriptive or sociological matter. First, an institution is descriptively legitimate if, after one accepts a normative premise of what is right, good, acceptable, desired, or appropriate, one determines as an objective fact that an institution meets that criteria. Alternatively one can think of legitimacy as socially constructed; something is legitimate because people perceive it as legitimate. Either approach requires that we assess the underlying criteria; either we must agree on what the normative baseline is to argue that something either is or is not descriptively legitimate, or we must identify criteria that people consider when they develop their perceptions. Buchanan and Keohane, 20 Ethics & Int'l Affairs at 406–07 (cited in note 148).


\(^{196}\) See, for example, Barr and Miller, 17 Eur J Intl L at 17 (cited in note 15) (discussing the Basel Committee as an example of a “transgovernmental regulatory network that exercises vast powers, seemingly without any form of democratic accountability”).


\(^{198}\) Id.
entities foster rule by elitist internationalists. Further, the fragmentation among regimes calls into question whether any regime properly accounts for all its linkages and externalities. How one addresses these legitimacy challenges depends on one’s conception of legitimacy.

Assessing legitimacy involves assessing a normative perception. Assessing beliefs is impossible, but one can assess the criteria upon which an institution claims that it is entitled to legitimacy. Professor Fritz Scharpf and later Robert Keohane and Joseph Nye have characterized legitimacy criteria as both input and output criteria. Input criteria is “the means by which constituents participate in IOs, e.g., representation, inclusiveness, or process.” Output criteria include “substantive outcomes, for example, trade liberalization, or fairness, and whether goals set by the international organizations themselves are reached, that is, [whether] the international organization [is] effective.”

In terms of input legitimacy, international entities can allow for participation of those affected by their rules, and they can attempt to structure their norms to reflect the will of the entities or people on whose behalf they


201 Id at 7–8.


203 Kelly, 29 Mich J Intl L at 613 (cited in note 194). See also Keohane and Nye, *Between Centralization at *12–15 (cited in note 202) (discussing input legitimacy criteria and noting that inputs can be either electoral or non-electoral).

204 Fritz Scharpf, *Governing in Europe: Effective and Democratic?* 2 (Oxford 1999) (discussing input and output legitimacy); Keohane and Nye, *Between Centralization at *3 (cited in note 202) (noting that both inputs and outputs can affect legitimacy).


206 See Keohane and Nye, *Between Centralization at *14 (cited in note 202) (discussing the legitimacy of domestic democracies).
International entities can improve their norm generating and law-making processes through the use of traditional administrative law devices and values, such as access to information, notice and comment, power sharing, and review.\textsuperscript{208}

Output legitimacy focusing on the ends—whether the resulting outcome is a desirable one. Will the outcome be effective, fair, just, well ordered, universally accepted, or supportive of a particular goal such as human rights or trade liberalization?\textsuperscript{209} Output legitimacy assumes a normative prescription of what is a good outcome,\textsuperscript{210} but this is unavoidable. Even if one believes that a good outcome is one that will be effective, that is, that it will liberalize trade, constrain financial markets, or tighten environmental regulation, one still needs to start with a normative prescription of what it is that one wants to do.

As I have written elsewhere,\textsuperscript{211} I believe that an appropriate measure of legitimacy must take account of both input and output components to some extent. Alan Buchanan and Robert Keohane have proposed a normative standard for institutional legitimacy that captures both output and input criteria, which I believe is enormously helpful.\textsuperscript{212} Also, the concept of deliberative legitimacy is particularly helpful in evaluating international financial institutions.\textsuperscript{213} The deliberative democracy framework lends itself to international financial regulators and norm setters.\textsuperscript{214} It acknowledges that any attempt to justify international financial regulation solely on democratic principles will fail because international norm setters are too far removed from those affected by their work and ultimately not accountable.\textsuperscript{215} Likewise, \dots

\textsuperscript{207} See Esty, 115 Yale L J at 1504-05 (cited in note 205) (noting that claims to legitimacy are strongest where there is a sense of community, but that it is increasingly harder for constituents to identify with policymakers on a global scale).

\textsuperscript{208} Id at 1534–37 (discussing how horizontal and vertical power-sharing mechanisms can increase the legitimacy of international rulemaking); Nico Krisch and Benedict Kingsbury, \textit{Introduction: Global Governance and Global Administrative Law in the International Legal Order}, 17 Eur J Intl L 1, 4 (2006) (noting the tendency of IOs to improve participation and accountability by incorporating various administrative law mechanisms into their decision-making, including procedures for notice and comment).

\textsuperscript{209} Kelly, \textit{Legitimacy and the UNCITRAL} 23–24 (cited in note 9).

\textsuperscript{210} Buchanan and Keohane, 20 Ethics & Intl Affairs at 418 (cited in note 148) (discussing the persistent disagreement over the norms underlying legitimacy).

\textsuperscript{211} See Kelly, \textit{Legitimacy and the UNCITRAL} (cited in note 9).

\textsuperscript{212} Buchanan and Keohane, 20 Ethics & Intl Affairs at 406 (cited in note 148). They seek to construct a model that provides for the “ongoing critical revision of [an institution’s] goals, through interaction with agents and organizations outside the institution.” Id.

\textsuperscript{213} Esty, 115 Yale L J at 1520 (cited in note 205).

\textsuperscript{214} See Ferejohn, \textit{Accountability} at 23 (cited in note 197) (arguing that global institutions cannot rely on traditional democratic principles).

\textsuperscript{215} Esty, 115 Yale L J at 1520 (cited in note 205).
efficiency justifications for international financial norms fail to account for participatory values and also for complex linkages and externalities. Deliberative legitimacy would support an institution’s norms where those norms were formed as a result of deliberation among free and equal participants representing those affected by the resulting norms.\(^{216}\)

In my view it is not essential to settle upon a theory of legitimacy in all cases, but rather to identify how in particular cases one might improve both input and output legitimacy criteria whatever one’s preferred theory. Here, I would like to address legitimacy questions by considering whether the participation of civil society at the various stages of crisis regulation might improve the legitimacy of those efforts without undermining the efforts themselves.

**B. Can Civil Society Improve Legitimacy in Crisis Regulation?**

International financial institutions should carefully calibrate civil society participation to improve their legitimacy without hampering their efforts. The value of participation depends on the nature of the civil society group (its mission and expertise), the level of participation sought and, the function of the international financial institution. Civil society organizations differ. Some nongovernmental organizations (NGOs) advocate for causes or provide aid. Other members of civil society provide expertise. Some do both and others neither.\(^{217}\) NGO participation involves a range of activities from mere presence to voting powers.\(^{218}\) Likewise, international financial institutions perform different functions ranging from setting policy to coordination to rulemaking.\(^{219}\) The benefits of greater participation, which will depend on these factors, include broader representation of interests, more transparency, greater accountability, and more reasoned decision-making.\(^{220}\) These attributes can combine to increase


\(^{220}\) These are values that are being discussed in detail by scholars concerned with global governance, accountability, and legitimacy. See, for example, New York University Institute for International
an institution's legitimacy in a variety of ways.\textsuperscript{221} The costs of greater participation can include delay, manipulation, and failure.\textsuperscript{222} To determine whether participation by civil society organizations will be helpful and worth the cost, each stage of the regulatory and monitoring process needs to be examined and the respective natures of the civil society organizations and international financial institutions need to be considered.

1. The scope of participation.

Civil society is a broad term that encompasses NGOs as well as professional and academic associations.\textsuperscript{223} The United Nations 2004 Cardoso Report defines civil society:

\textit{Civil society.} Refers to the associations of citizens (outside their families, friends and businesses) entered into voluntarily to advance their interests, ideas and ideologies. The term does not include profit-making activity (the private sector) or governing (the public sector). Of particular relevance to the United Nations are mass organizations (such as organizations of peasants, women or retired people), trade unions, professional associations, social movements, indigenous people's organizations, religious and spiritual organizations, academe and public benefit non-governmental organizations.\textsuperscript{224}

Thus, civil society may refer to Amnesty International, the American Law Institute, the International Chamber of Commerce, the Catholic Church, or the International Association of Restructuring, Insolvency & Bankruptcy Professionals. NGOs are a subset of civil society that the Cardoso report defines as the following:

\textit{Non-governmental organization (NGO).} All organizations of relevance to the United Nations that are not central Governments and were not created

\begin{footnotesize}
\begin{enumerate}
\item Law and Justice Global Administrative Law Project, online at http://www.iilj.org/GAL/ (visited Dec 1, 2010).
\item See, for example, Barr and Miller, 17 Eur J Intl L at 17–18 (cited in note 15) (for example, notice and comment contributes to greater perceived legitimacy).
\item UN GA, \textit{Civil Society Relations} at 5 (cited in note 217); Jordan and van Tuijl, \textit{Rights and Responsibilities} at 9 (cited in note 217).
\item UN GA, \textit{Civil Society Relations} at 13 (cited in note 217).
\end{enumerate}
\end{footnotesize}
by intergovernmental decision, including associations of businesses, parliamentarians and local authorities. There is considerable confusion surrounding this term in United Nations circles. Elsewhere, NGO has become shorthand for public-benefit NGOs—a type of civil society organization that is formally constituted to provide a benefit to the general public or the world at large through the provision of advocacy or services. They include organizations devoted to environment, development, human rights and peace and their international networks. They may or may not be membership-based.  

Here, it is most important to distinguish between the members of civil society based upon function. Some members of civil society operate as advocacy or aid organizations in pursuit of a mission ("advocates"). Thus, Amnesty International or Greenpeace advocate in pursuit of their missions. The Episcopalian Church has a mission. Other civil society members have expertise ("experts"). The American Law Institute consists of experts in different legal fields. Both advocates and experts care about a variety of matters. The National Association of Pension Funds may be expert in pensions, not insolvency law, but it may have a very real interest in cross-border insolvency law issues. Naturally, some expert groups will have a mission and some advocate groups will have experts. The Institute of International Finance, Inc has both interest and expertise in what goes on in the Basel Committee. The Association of Consulting Engineers likely cares deeply how government procurement rules work and probably knows a significant amount about that subject.

The possibility of granting civil society more access to international financial regulation is no small task. Civil society already participates in the formation of international norms. As one author notes, as of the late 1990s, the expenditures of civil society approached $1.3 trillion, making it the “seventh largest economy, compared with the economies of states.” In fact, civil society, as a nonstate regulator, competes for legitimacy to obtain and retain its

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225 Id.
226 For a more detailed description of the various roles that civil society performs including: relief, political, social and economic development roles among others, see Shamima Ahmed and David M. Potter, NGOs in International Politics 37–58 (Kumarian 2006).
227 Terry MacDonald, Global Stakeholder Democracy 66 (Oxford 2008).
228 Id at 76, citing Lester M. Salamon, S. Wojciech Sokolowski and Regina List, Global Civil Society: An Overview (Ctr Civ Socy Studies, Inst Poly Studies, John Hopkins 2003). The figure here represents 35 countries surveyed. Others have argued in more specific context that broader civil society participation can be of significant value in international organizations, including greater access to more information leading to better decision-making and greater legitimacy. Peter Van den Bossche, Non-Governmental Organizations and the WTO: Limits to Involvement?, in Debra P. Steger, ed, Redesigning the World Trade Organization for the Twenty-first Century (Wilfrid Laurier 2009), online at http://www.idrc.ca/openebooks/455-0/ (visited Dec 1, 2010).
relevance. Indeed its participation in international institutions aids its legitimacy efforts.

Existing institutions must decide whether to expand participation from those directly regulated by their efforts to those potentially affected by their efforts. More and more, international institutions appreciate the benefits of greater participation. The idea that regulators should hear from those affected by their actions is a foundational principle of administrative law. Some institutions have even gone beyond permitting the participation of the targets of their action to allowing for broader participation by all those who might be affected by regulatory action. Thus, even allowing participation by civil society raises the question of how much of civil society can and should participate. One could limit participation to those entities being regulated (for example, banks and the NGOs that represent them), to those having expertise that might aid the regulating institution (for example, the International Association of Restructuring, Insolvency & Bankruptcy Professionals), or to any group that expressed an interest (for example, labor unions).

The degree of optional participation depends on the institution and its goals. Civil society may be asked to contribute to the pre-norm development discussion. Some IOs such as the World Bank, the IMF, and the WTO organize symposia and colloquia to engage civil society. At this level, civil society


232 See Zaring, 10 Chi J Intl L at 481–84 (cited in note 51) (discussing the comment procedures of Basel II and IOSCO).


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exposes norm generators to its views, but it does not necessarily have a direct impact on how those organizations subsequently develop rules. At the next level, civil society organizations might participate as observers in norm-setting processes, either with or without the ability to speak in the proceedings. UNCITRAL allows experts and other members of civil society to (with permission) attend and observe, and also contribute to their working groups.235 These experts may contribute information to decision makers and their presence may improve transparency and accountability. The Basel Committee has solicited comments on its proposed standards.236 The WTO has permitted submission of amicus briefs.237 Finally, civil society could be given a more direct say in whether a norm or policy is adopted or not. The World Bank consults with civil society on particular projects.238

Institutions have calibrated the level of civil society participation they welcome or tolerate depending on the goals of the institution. As indicated above, although the World Bank’s Articles of Agreement do not provide specifically for NGO engagement, engagement exists nonetheless.239 The IMF has developed a policy of engaging with civil society and provides its staff with guidelines to do so.240 The OECD has been referred to as a “club” organization in the past.241 It had incorporated the views of civil society through its Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC). In the past decade the OECD has

eds), online at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case20_e.htm (visited Dec 1, 2010).


239 Sergey Ripinsky and Peter Van den Bossche, NGO Involvement in International Organizations: A Legal Analysis 152 n 5 (Brit Inst Intl & Comp L 2007); World Bank, World Bank and Civil Society (cited in note 234).


extended its cooperation to other international civil society organizations.\textsuperscript{242} As James Salzman recounts, however, the OECD has not adopted a unified procedure for incorporating administrative law principles generally, and its inclusion of civil society has varied from project to project.\textsuperscript{243} UNCTAD has made a commitment to integrating civil society and the private sector into its work.\textsuperscript{244} IOSCO submits its work for public comment and posts the comments it receives.\textsuperscript{245}

Finally, with respect to the scope and degree of participation, even if one were to opt for broad participation, it is not clear that such participation would be forthcoming or meaningful. When the Basel Committee sought notice and comment on its consultative paper, the commentators were primarily the banks that would be affected by those proposals. As Barr and Miller point out, “[M]ost participants were large financial institutions. The role of the broader public was relatively muted, which reflected in part the technical nature of the Basel Committee’s work and the fact that for most public-interested organizations, the connection between banking standards and broader social concerns was not pronounced.”\textsuperscript{246} Likewise, in 2009, IOSCO invited comments from the public on its \textit{Auditors Communications Consultation Report}. It received twenty-two comments, all from industry representatives.\textsuperscript{247} While those interested in areas of

\begin{footnotes}
\item[242] See \textit{OECD, Civil Society}, online at http://www.oecd.org/department/0,3355,en_2649_34495_1_1_1_1_1_1_1_1,00.html (visited Dec 1, 2010). For example, as a result of the most recent revisions in OECD’s Guidelines for Multinational Enterprises, approved on June 27, 2000, the revision process became much more inclusive than ever before. See Salzman, 68 Law & Contemp Probs at 213 (cited in note 85) (discussing the OECD’s Committee on International Investment and Multinational Enterprises).
\item[245] See, for example, note 232 and accompanying text.
\item[246] Barr and Miller, 17 Eur J Intl L at 26 (cited in note 15).
\end{footnotes}
public concern such as labor or health care may prefer to have their interests represented in these situations and technically have the option to do so, because these subjects are technical, arcane and frequently not followed by many in the public, it is not realistic to expect these interest groups to take advantage of these participatory invitations in order to sufficiently protect their interests ex ante.

2. The benefits of participation.

Greater participation improves representation. International institutions cannot rely upon democratic legitimacy to support their work, but they can point to the degree to which they are representative to do so. Representation of those affected by the entity is important. From an input legitimacy perspective, those affected are likely to be informed of and have a view about the relevant regulatory alternatives. They can provide important information about not only what might work but also what externalities might result. From an output legitimacy perspective, rules are perceived as more just when they take into consideration the views of those affected by them. Thus, to the extent that the inclusion of civil society means greater input in international financial institutions, that inclusion will improve the legitimacy of those institutions.

PricewaterhouseCoopers LLP, SEC Thailand, Standard Life Investments (with attachment “Guidelines for Enhanced, Disclosure”). Id.

248 See, for example, José E. Alvarez, International Organizations as Law-makers 630–31 (Oxford 2006); Esty, 115 Yale L J at 1515 (cited in note 205) (discussing democratic legitimacy).

249 Esty, 115 Yale L J at 1516 (cited in note 205) (discussing means of obtaining democratic legitimacy).


251 Carol C. Gould, On The Uneasy Relation Between International Law And Democracy, 12 ILSA J Int’l & Comp L 559, 562 (2006) (arguing that where decisions of international organizations are removed from and affect “human rights of people at a distance,” the case for “giving these people some input into” the decision-making process is the strongest).

252 Peter L. Lallas, The Role Of Process And Participation In The Development Of Effective International Environmental Agreements: A Study Of The Global Treaty On Persistent Organic Pollutants (POPs), 19 UCLA J Environ L & Pol’y 83, 127–28 (2001) (noting that some of the benefits stemming from NGO representation in the international environmental policy-making process include: “infusion of alternative perspectives into narrow mission programs; articulation of universal perspectives; direct participation in enforcement; and direct participation in resources allocation.”)

253 Erik B. Bluemel, Substance Without Process: Analyzing Trips Participatory Guarantees In Light Of Protected Indigenous Rights, 86 J Pat & Trademark Off Soc’y 671, 712 (2004) (arguing that indigenous peoples, as stakeholders, ought to participate in decision-making in the TRIPS regime, given their “unique relationship to the types of resources protected by such regimes,” as affecting their “substantive rights” under the regime).
The very presence of civil society in the financial regulation process will improve the prospects for deliberation. Deliberative legitimacy requires deliberation by free, impartial, and equal citizens. The idea here is where different persons with different views discuss their perspectives, people might change their minds. Greater participation and discussion help to legitimize the end result. One could see how members of civil society might have differing views regarding the appropriate level of risk society should tolerate in light of perceived gains. Those targeted by the regulation will likely stand to benefit directly from the risks taken whereas members of civil society might represent interests that would only be seen as indirectly benefiting from the greater degree of risk.

The participation of civil society might generate more legitimacy because it leads to greater transparency and accountability in international financial institutions. Arguably, civil society participation forces transparency in most cases. Civil society's participation exposes data, analysis, policy proposals and all inputs the decision makers use. In fact, it has been noted that international organizations, because of their nature and structure, "generally meet higher standard[s] of transparency and justification by reason-giving than most national systems". To the extent that the participation of a broader public facilitates or encourages this transparency, participation by civil society also facilitates the flow of information to national venues that might not otherwise receive it.

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254 Esty, 115 Yale L J at 1520 (cited in note 205). See also Ahmed and Potter, NGOs Intl Pol at 31 (cited in note 226) (discussing Robert Putman, Making Democracy Work (Princeton 1993)). Civil society participation improves government performance and in particular economic performance. Robert Putnam demonstrated that a well-functioning civil society was indeed indicative of a well-functioning government. Robert Putnam, Making Democracy Work: Civic Traditions in Modern Italy 90–99 (Princeton 1993). While Putnam’s work focused on State governments and not international financial institutions, one would then expect that generally speaking, the participation of civil society in international financial institutions would generally improve economic performance.

255 Elster, Intro at 5 (cited in note 216) (discussing Rawls and Habermas).


257 Esty, 115 Yale L J at 1520–21 (cited in note 205) (discussing deliberative legitimacy).

258 See Ahmed and Potter, NGOs Intl Pol at 82–83 (cited in note 226) (noting that NGOs raise issues within international organizations that have not been addressed at the national level). They provide information, ideas and advice. Id.

259 Salzman, 68 L & Contemp Probs at 202 (cited in note 85).


261 Id at 22.
Civil society participation may also improve accountability. In order to discuss accountability, one first needs to ask to whom these institutions are accountable in the first place and then assess whether the participation of civil society aids accountability. On the issue of to whom an institution is accountable, one can have different views. For example, one can identify IOSCO as accountable to securities regulators narrowly, to people who buy securities, or to the public at large. The WTO is accountable to the states that are represented there, but also arguably to the public that finds its government constrained by trade rules (or not constrained enough) during a crisis. Institutions often have multiple communities to which they are accountable and often even have conflicting demands among them. One could argue that legitimate institutions should continually evaluate their obligations to all of these communities.

When considering whether to take a broad or narrow view of accountability, it is worthwhile to note that global institutions are removed from political accountability. As such, they have little reason to be responsive to public sentiment. This insulation weighs in favor of a broad view. Moreover, as discussed above, the implications of these institutions’ decisions reach beyond those directly regulated by them and thus also weigh in favor of the broad view of accountability.

In national regulatory systems, judicial review aids accountability. International regulators are not subject to judicial review. However, civil society participation can enhance public pressure. Transparency “promote[s] accountability directly by exposing administrative decisions and relevant documents to public and peer scrutiny.”

263 Id.
264 Black, Constructing at 5–10 (cited in note 230).
265 See Buchanan and Keohane, 20 Ethics & Int’l Affairs at 406 (cited in note 148) (noting that legitimate global governance requires revision of goals “through interaction with agents and organizations outside the institution[.]”)
266 John Ferejohn suggests that as a result they should be encouraged to rely upon deliberation and critique within global civil society, to assure that policies are responsive to all legitimate interests. Ferejohn, Accountability at 23 (cited in note 197).
267 Id.
268 Stewart, 68 L & Contemp Probs at 69 (cited in note 262).
Lastly, civil society participation can improve reasoned decision-making. Most domestic administrative systems require reasoned decision-making. "Global-scale policymaking" needs reasoned decisions because national systems sometimes transplant globally developed norms without serious debate. Daniel Esty explains that in the global context,

All global-scale policymaking should include written decisions that (1) clearly delineate the legal basis for the policymaking activity and the scope of authority delegated to the decision making body; (2) provide a statement of the public interest that highlights the designated policy ends and presents any critical normative assumptions; (3) outline the rationale for the outcome settled upon, providing a basis for judging whether the choices made were arbitrary or capricious; (4) build on an established administrative record or docket (which also facilitates review); (5) respond to criticisms advanced through the notice-and-comment process; and (6) address relevant policy alternatives.

The notion is that the decision should respond to major arguments in a reasoned way. Reasoned decision making leads to better decisions and thus improves output legitimacy criteria. It also demonstrates deliberative legitimacy.

3. The costs of participation.

Greater participation can slow and even derail regulatory efforts. Offering the opportunity to civil society to participate takes time as does the need to respond to participants' concerns. Participants, and particularly those that might be targeted by any regulatory action, might work to shift the forum


\[271\] Barr and Miller, 17 Eur J Intl L at 20–21 (cited in note 15) (discussing Basel and noting that national enactment can be a mere formality). Kingsbury, Krisch, and Stewart, 68 L & Contemp Probs at 31–34 (cited in note 230) (discussing the domestic system as a check on the international system).

\[272\] Esty, 115 Yale L J at 1529–30 (cited in note 205).


\[274\] The delay and possible derailment may result from greater participation where special interest groups may seek to distort outcomes. See Esty, 115 Yale L J at 1531–32 (cited in note 205) (discussing the potential for interest groups to take over the debate).

\[275\] Barr and Miller, 17 Eur J Intl L at 26 (cited in note 15).
of the negotiations to another more favorable forum. Participation may even thwart negotiations altogether.

Greater participation might allow special interests to have undue influence over outcomes. Capture is likely where the benefits and costs are distributed so that majority interests are diffuse while the special interests are concentrated. One can imagine how the dangers of capture are magnified at the international level. This may be a particular problem in complex and technical fields, which require participants to be fluent in the field of regulatory action. The same groups that want access to these norm setters exist in the domestic sphere where administrative law constrains the norm setters and access to them. These actors include interest groups, business interests, and civil society. Among these groups in the international setting are those who have convinced their national governments to adopt their positions, those who failed to convince their national governments to adopt their positions, and the officials of the national governments who may have been intimately involved in formulating the national position. From the first group's perspective, less access at the international level might be better to safeguard its government's adoption of its view. The second group would almost certainly like a second bite at the apple.

The dangers of capture also remind us that civil society may already have a route to regulators that can be managed more effectively: working through

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278 Esty, 115 Yale L J at 1524–26 & 1531–32 (cited in note 205). See also, Abbott and Snidal, 42 Vand J Transnatl L at 553–55 (cited in note 233) (noting the possibility of capture but also noting the chance of capture is reduced in some instances).


280 Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 Yale J Intl L 113, 170 (2009) (noting that the more domestic autonomy regulators have, the “more likely they are to enhance international enforcement and harmonization of standards – but also to act in ways that reflect the self-interest of regulators rather than aggregate welfare.”). As Jeffrey Atik notes, capture is a particular danger in foreign relations and “[t]his is especially true with respect to international trade policy.” Atik, 33 Geo Wash Intl L Rev at 455 (cited in note 9).


282 Id at 325.

283 Id.
national authorities in national administrative law systems. On the other hand, some national systems fail to provide meaningful access to a range of constituents, making global administrative law the only alternative.

Transparency has its problems as well. Transparency can inhibit successful international negotiations, which require confidentiality and diplomatic discretion. Although it is one thing to invite civil society to participate in international fora and to give it access to the data that the decision makers will have, civil society might still be excluded from important parts of the process. In international talks, much work happens during consultative breaks and lunches. Differences are ironed out outside of the negotiating forum where transparency is nonexistent. Pushing transparency may actually push talks to less transparent venues.

Finally, the desirability of civil society participation depends in part on whether particular civil society organizations are duly accredited to speak on behalf of those whom they claim as constituents. Some international NGOs, for example, have committed to an accountability charter that sets forth certain minimal requirements of transparency, accountability and participation within NGOs. Some international institutions have established accreditation systems for NGOs.

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285 Id at 43 (citing global administrative law as a “counterweight” to “weak domestic administrative law protections”).
286 Stewart, 68 L & Contemp Probs at 68 (cited in note 262) (discussing “norms of confidentiality in negotiation”).
287 See Barr and Miller, 17 Eur J Int'l L at 23 (cited in note 15).
4. Calibrating participation during regulation and rescue.

Entities should tailor civil society participation to allow greater access by advocates at the policy-making level and to experts at the rule-making level during both crisis prevention and resolution. The value of the additional input given by civil society—in terms of participation, transparency, accountability, and deliberation—is a contextual matter. We may not care to have Amnesty International advising the Basel Committee on banking rules, but we also do not want the G-20 to only hear from bankers. Further, we should be mindful that decisions made at the policy level determine who is an expert at the rule-making level. At the rule-making level, the participation of experts poses a special danger of capture. It seems unlikely that greater participation of either advocates or experts would be worth the cost or even possible at the containment stage.

If we consider civil society participation as something we wish to encourage, we need to identify when and how it will be most useful. As Daniel Esty has already argued, “deliberation must be structured carefully so that the gains from the participation in policymaking of business entities, NGOs, and individuals are optimized without losing the capacity to make decisions in a representative and efficient fashion.” Given the variables regarding the scope of possible participation, its costs and benefits, plus the various institutions where it might take place, it would be impossible to map exactly where and how greater participation would be worth the costs. But we can at least identify some factors to consider.

At the regulatory phases, crisis prevention and resolution, civil society participation can give regulators more input regarding costs. Civil society participants may identify costs that had not been considered or shed light on how the hardship that might flow from regulatory failure might be valued. Admittedly, this participation will lead to delays. The Basel Committee experimented with this type of broader participation in 2005 by using a notice and comment procedure. Its work slowed tremendously as a result.

The timing and the nature of the consultation matter, both in terms of the value of the participation and whether that participation hampers action. The IMF has established a Guide for Staff Relations with Civil Society Organizations in which it envisions that the participation of civil society will take the form of meetings. Staff are instructed to: give “opportunity for questions and comments; debate options; be sensitive to cultural differences; use plain language; if possible use the first language of the majority of participants; avoid impressions

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291 Esty, 115 Yale L J at 1521 (cited in note 205).
293 Verdier, 34 Yale J Intl L at 141 (cited in note 280) (discussing the comment procedure for Basel II).
of arrogance. Listening is crucial in a good working relationship.”\textsuperscript{294} The IMF also cautions staff meeting with civil society to “meet . . . early enough in policy processes that the consultation is meaningful; meet ahead of and between as well as during missions.”\textsuperscript{295} Arguably, consultations at the policy-planning stage would be helpful for gaining information from civil society and would be less likely to delay decisions in the same way that a notice and comment procedure might. It seems particularly important to hear from advocacy groups at this agenda-setting stage before detailed plans of action are formed.\textsuperscript{296} NGOs have a successful history of agenda setting, convincing “publics and governments that a new way of viewing problems opens up opportunities for resolution of those problems.”\textsuperscript{297}

The IMF’s guidelines regarding “reaching out” to civil society could be pushed a step further to envision a system where agenda setting must include a broader view of policy implications and a broader range of interests. Indeed, the coordinating activities of the G-20 suggest that it might be time to envision financial regulation as integrated with and integral to every part of society.\textsuperscript{298} It is easy enough to dispute the linkage between systemic financial and public law concerns, such as health care or the environment, as insufficient for supporting the need for greater civil society participation. After all it proves too much. The linkages merely show that when times are hard, everyone suffers. But participation is not an on/off switch; it can and should be calibrated to the function performed by the institution. The G-20, for example, sets the agenda. It coordinates the activities of other entities such as the Basel Committee, the IMF, World Bank, and FSB. In fact, it directs those organizations to accomplish tasks pursuant to certain timelines. The coordinating activities of the G-20 suggest that as an agenda-setting entity, it really must respond or be open to civil society input, especially input from advocates wishing to have their concerns placed on the agenda.

For example, one of the G-20’s projects involves the Pittsburgh Commitment to phase out fossil fuel energy subsidies in partnership with the OECD, the International Energy Agency, OPEC, and the World Bank.\textsuperscript{299} It

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  \item \textsuperscript{294} IMF, \textit{Guide} (cited in note 233).
  \item \textsuperscript{295} Id.
  \item \textsuperscript{296} See, for example, Ahmed and Potter, \textit{NGOs Intl Pol} at 48 (cited in note 226) (discussing the agenda setting roles of NGOs).
  \item \textsuperscript{297} Id.
  \item \textsuperscript{298} This shift might be appropriate because as others have noted, we are moving to a new era of globalization that focuses on the discussion of values rather than debates over the role of the state. See Howse, 121 Harv L Rev at 1533 (cited in note 150).
  \item \textsuperscript{299} G20, \textit{Pittsburgh Leaders' Statement}, Preamble ¶ 28–30 (Sept 24–25, 2009), online at http://www.pittsburghsummit.gov/mediacenter/129639.htm (visited Dec 1, 2010)
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would seem particularly helpful to have civil society advocates' input at this priority setting stage in order to identify important linkages that need to get onto the agenda. At the same time, one could also envision a more active role for certain groups within civil society when the details of programs are being discussed by, for example, the World Bank or the OECD; but in these situations, it would be more useful to hear from experts.\(^{300}\)

In the detailed rule-making setting, experts have something to add. As discussed above, both the Basel Committee and IOSCO have invited public comment with the result of only hearing from basically the same voices. They deal in technical fields where it takes some level of technical expertise to be helpful. In fact, to tout the public comment procedure in these entities is a bit misleading, as the public at large has virtually no say in the process. These notice and comment proceedings are forums for experts and to some extent forums for capture.

Another forum where it proves difficult for non-expert (advocate) members of civil society is the WTO. The WTO's trade rules constrain (to some extent)\(^ {301}\) the power that national authorities had to respond to the crisis. The explication of these rules occurs in the dispute-settlement process rather in a legislative setting.\(^ {302}\) While the WTO has allowed some public participation in its dispute-settlement process, it has been very limited by the WTO. Moreover, it is limited by the fact that the rules in place are very constraining and leave little room for interests other than trade interests. Advocates would be better served if they could influence policy matters at the WTO. Unfortunately, policy makers at the WTO are stalled and only the dispute settlement mechanism continues to roll along.\(^ {303}\)

The OECD has engaged both advocate and expert members of civil society in different projects. As an information-generating institution, it has taken advantage of civil society participation in a number of its projects including OECD Guidelines for Multinational Enterprises, food and agricultural policy, and Green Growth work.\(^ {304}\) It has also reached out to experts for its rule-

\(^{300}\) As discussed above, for example, the OECD has become more open to civil society participation (on a case-by-case basis) including on issues pertaining to sustainable development. OECD, OECD Urban Roundtable for Mayors and Ministers: Cities and Green Growth, online at http://www.oecd.org/site/0,3407,en_21571361_45068056_1_1_1_1_1_1,00.html (visited Dec 1, 2010). See also OECD, Civil Society and the OECD (OECD Observer Policy Brief Nov 2005), online at http://www.oecd.org/dataoecd/1/3/35744346.pdf (visited Dec 1, 2010).

\(^{301}\) Zaring, 10 Chi J Intl L at 487–88 (cited in note 49).

\(^{302}\) Atik, 33 Geo Wash Indl L Rev at 467 (cited in note 9).

\(^{303}\) See generally C.L. Lim, Law & Diplomacy in World Trade Disputes, 6 Sing J Intl & Comp L 436 (2002); see, for example, Raj Bhala & Lucienne Attard, Austin's Ghost And DSU Reform, 37 Intl Law 651, 652–53 (2003) (anecdotal illustration of WTO operations).

\(^{304}\) OECD, OECD Civil Society Newsletter (Jan 2010), online at http://www.oecd.org/dataoecd/1/20/44341841.html (visited Dec 1, 2010).
making activities. Recently, it sought public comments on its draft of Value Added Tax/Good and Services Tax (VAT/GST) Guidelines dealing with customer location for identifying the jurisdiction of taxation.\footnote{See OECD Center for Tax Policy and Administration, \textit{OECD releases draft Guidelines on the application of VAT/GST to the international trade in services and intangibles for public consultation}, online at http://www.oecd.org/document/42/0,3343,en_2649_33739_44559914_1_1_1_1,00.html (visited Dec 1, 2010).}

In terms of monitoring components of pre-crisis regulation, civil society likely could contribute by monitoring the monitors. Perhaps it could enhance transparency by doing so. Other than serving as a check on monitors, it is not clear what else civil society could add. Monitoring requires both information and expertise. Monitors need to understand the data and all its implications.

At the resolution stage, regulators wind up the prior crisis and turn their attention toward the future to reassess priority setting. This involves resolving the past crisis by dividing up the losses and establishing frameworks to monitor and avoid future crises. Thus, for example, the IMF has engaged in work with the G-20 to resolve the 2008 crisis.\footnote{See IMF, \textit{World Economic Chiefs Reinforce Cooperation to Boost Recovery}, IMF Surv Mag (Apr 25, 2010), online at http://www.imf.org/external/pubs/ft/survey/so/2010/NEW042510A.htm (visited Dec 1, 2010). See also G-20, \textit{Leaders' Statement} (cited in note 20).} Among the work planned is an assessment of whether “policies are collectively consistent with sustainable and balanced global growth. . . [including] . . . rules pertaining to capital and liquidity, a minimum toolkit for addressing systemic risk, and a framework for working out cross-border resolution issues.”\footnote{IMF, \textit{World Econ Chiefs} (cited in note 313).} These are the types of issues where broader participation may enhance legitimacy. Again, this can be characterized as policy-setting at the macro level that will be imposed upon society at large.

Resolution also requires exit from the measures taken during the period of containment.\footnote{See FSB, \textit{Exit} (cited in note 6).} In order to plan and implement a market-based exit that will preserve financial stability, regulators need to avoid surprises, have access to necessary information, and act in coordination.\footnote{\textit{Id.}} But regulators must also consider the impact of withdrawal of containment measures on the real economy. First, regulators need to identify the linkages to be considered. This is a broad policy setting exercise where advocates might be helpful. Then regulators must implement the plan. This is a narrow task, calling for expertise.

At the rescue stage, civil society participation should likely be limited. First, national authorities typically implement containment measures, so it is difficult to speculate on the effect of civil society participation at the international level. In the US, for example, the Treasury guaranteed payments to auto-parts
suppliers\(^{310}\) and the Federal Reserve provided funding to ease the purchase of Bear Stearns by JP Morgan.\(^{311}\) Participation on the national front may be warranted, but at least in the US, agencies are sometimes expected to act in emergencies when there may be little time for participation.\(^{312}\) Courts and the polling booths provide accountability in these situations.\(^{313}\)

Moreover, during a crisis, markets need swift action. Within a little over a year, the World Bank supplied over $89 billion to developing and middle-income countries.\(^ {314}\) Although the G-20 does not set standards, its actions during crisis serve to instill confidence and stabilize the markets. The G-20 acted quickly to provide greater oversight of the financial markets.\(^ {315}\) It called upon the FSB to respond as soon as possible. At the London Summit in September 2009 it called for:

> Tackling non-cooperative jurisdictions (NCJs): delivering an effective programme of peer review, capacity building and countermeasures to tackle NCJs that fail to meet regulatory standards, AML/CFT and tax information exchange standards; standing ready to use countermeasures against tax havens from March 2010; ensuring developing countries benefit from the new tax transparency, possibly including through a multilateral instrument; and calling on the FSB to report on criteria and compliance against regulatory standards by November 2009.\(^ {316}\)


\(^{313}\) Stewart, 68 L & Contemp Probs at 73 (cited in note 262) (discussing elections and judicial review); Kingsbury, Krisch, and Stewart, 68 L & Contemp Probs at 44 (cited in note 230) (discussing judicial review in the US).


\(^{315}\) European Commission, *EU wants G20 meeting to pave the way to reform of the international financial system*, online at http://ec.europa.eu/news/economy/081110_1_en.htm (visited Dec 1, 2010).

\(^{316}\) G-20, *Meeting of Fin Min¶ 4* (cited in note 47).
While it is not clear what civil society could add here, there may be some instances where broader participation would be possible. For example, regulators should plan for crisis containment; when they do, they could try to include civil society in developing their frameworks. In other words, to the extent that policy makers can plan for crises, civil society could participate in the planning. The FSB, for example, monitors a host of regulatory efforts that are in part to provide for a sound financial system, but it also prepares procedures for crisis resolution. International rules may contain crises by preventing protectionist practices. Thus, the WTO's trading rules established prior to the crisis worked to monitor and constrain protectionist trade policies. To the extent that the trading rules are established ex ante, it would seem appropriate to allow greater participation in their development, especially during a time of crisis when they will need greater legitimacy in order to be politically acceptable.

Likewise, international insolvency regimes will play a part in containment. Cross-border insolvency rules are developed pre-crisis and should include civil society participation. Several groups have grappled with the construction of cross-border insolvency rules. The G-7, G-22, the OECD, and UNCITRAL along with the development banks, have all tried to address cross border insolvency. Notably UNCITRAL has made great strides in creating its Legislative Guide on Insolvency Law. In doing so, it has opened its proceedings to an array of experts and interested entities included within civil society. While these expert entities have the opportunity to contribute to developing the

317 FSB, Publications (cited in note 1).
319 OECD, WTO, and UNCTAD, Report on G20 Trade (cited in note 116). Even still, there was a marked increase in such practices during the crisis. Chad P. Bown, Antidumping, Safeguards and Trade Remedies During the Crisis (World Bank Feb 17, 2010), online at http://web.worldbank.org/WEBSITE/EXTERNAL/EXABOUTUS/ORGANIZATION/EXTPREMNET/0,,contentMDK:22357994~pagePK:64159605~piPK:64157667~theSitePK:489961,00.html (visited Dec 1, 2010).
320 The WTO trading rules have evolved through a series of rounds. See WTO, About the WTO (cited in note 146). Under the WTO Agreement there is no procedure for establishing negotiations; the system is complex and requires a high level of agreement to move anything forward. Debra P. Steger, The Future Of The WTO: The Case for Institutional Reform, 12 J Intl Econ L 803, 811-14 (2009). As a result, rule development in the legislative sense is slow.
321 As discussed above the level of participation of civil society in the development of the trading rules is limited for a number of reasons.
322 Terence C. Halliday and Bruce G. Carruthers, Bankrupt: Global Lawmaking and the Systemic Financial Crisis 73-76 (Stanford 2009).
323 Id.
324 See UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law 10, UN Sales No E 05 V 10 (2005).
detailed rules, there has been little input on the policy setting level from advocacy groups in this area.

V. CONCLUSION

Calls abound for greater participation of civil society in international governance. The 2008 financial crisis brought into focus the linkages between financial regulation and other areas of public concern, supporting the argument that greater attention should be paid to increasing civil society participation in international financial institutions. But more is not always better, and participation can and should be calibrated. Consideration of various civil society organizations, what benefits and costs they bring and when, suggests that a nuanced approach to their participation would work best. The approach outlined in this article is just that—an approach, a general guide. Generally speaking, advocate organizations should play more of a role in the policy-setting stage of crisis regulation while experts can play more of a role in the actual standard-setting. Neither group will have much role to play in the rescue operations as these functions are largely performed on a national level and in any event need to be done quickly. Greater participation in the regulatory function will likely improve the legitimacy of these institutions, which will be beneficial at all stages to those affected by those institutions.

325 UNCITRAL's Working Methods provide for the participation of civil society but more specifically have limited that participation to groups that have a particular interest and expertise in the particular area of commercial law under consideration. See Kelly, *Legitimacy and the UNCITRAL* at 11–12 (cited in note 9).