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Financial Crisis and Civil Society

Claire R. Kelly, Brooklyn Law School
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 take it as a given that greater civil society participation lends greater legitimacy to international financial institutions. Rather we should examine various types of civil society contributions at various stages and attempt to identify when and what kind of participation would be most helpful in

* Claire R. Kelly, Professor of Law and Associate Director of the Dennis J. Block Center for the Study of International Business Law. I am very grateful for comments from Douglas Arner, Emlios Avgouleas, Chris Brummer, Steven Davidoff, Adam Feibelman, Cristie Ford, Anna Gelpen, Erik Gerding, Roberta Karmel, Cynthia Lichtenstein, Patricia McCoy, Saule Omarova’s, Dal Singh, Eric Pan, Pierre-Hugues Verdier, Verity Winship, Chuck Yablon, and David Zaring. Thank you to Boris Brownstein and Carrie Allyn Ross for their helpful research assistance. I also appreciate the support of Brooklyn Law School’s sabbatical program.
light of the role played by the different institutions involved. As a general
rule and subject to certain caveats, civil society groups whose mission is
closely related to interests affected by the institutions’ actions could
contribute more 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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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
took on added legitimacy challenges. This paper 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.

1 See e.g., Chair’s Statement, Workshop on Securing Sustainable Economic
generally Financial Stability Board, Publications – Ongoing work for Sound Financial
(last visited July 26, 2010).
Any analysis of global systemic crises should distinguish the various opportunities for action as well as the need for coordination. Part I recounts the different roles that international financial institutions play at different stages of a crisis. Part I 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 implicates plethora of public concerns. Any effort to prevent, contain, or resolve financial crisis will need to balance the costs and benefits 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. Part II highlights some of the policy choices involved in setting regulatory standards to prevent crisis as well as those involved in containing and resolving the crisis.

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 from a practical perspective. That which actors do not perceive as legitimate will be less likely to succeed. Part III will briefly explain how we might assess the legitimacy of global regulatory efforts. Part III also examines the scope of civil society participation that may be permitted; the costs and benefits of inclusion, and assesses the value of participation at the different regulatory stages. It does so by categorizing both the institutions that make norms as well as the civil society organizations that wish to influence them. Generally speaking civil society groups whose mission closely relates to interests affected by the institutions actions should be more involved with institutions at the policy setting stage. Conversely, input at the rule making stage should be limited to those groups that can bring expertise to the task. This rule serves as a general guide 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 stage. 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.

I. REGULATORS AND RESCUERS

Both regulators and rescuers play a role in financial crisis. Crisis prevention and crisis resolution essentially require regulatory action, i.e., 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, 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 the burdens in the future.\(^4\) Crisis containment involves rescue. Anna Gelpern has distinguished containment which she aptly describes as the urgent and brief period where choices are made to “arrest financial collapse.”\(^5\) To different degrees regulation and rescue involve value judgments about risk, stability, and fairness.

Both regulation and rescue require global coordination of a fragmented regulatory structure\(^6\) spread throughout different organizations and national authorities. Yet one country’s regulatory failure can easily infect another.\(^7\) Some organizations are poised (or could be) to regulate prospectively to help avert systemic failures.

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2 Anna Gelpern, Financial Crisis Containment, 41CONN L REV. 1051, 1064 (2009).
3 Gelpern, supra note 2, at 1067.
4 See e.g., David M. Herszenhorm, Democrats Tweak Bank Bill to Preclude Bailouts, N.Y. TIMES, Apr. 30, 2007, at B6 (discussing a potential fund for future bank bailouts paid for by major financial institutions).
5 Gelpern, supra note 2, at 1064 (2009).
Others may contain or resolve crises and some will be useful at all stages. Among the possible institutions 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 (the 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 organizations deliberate amongst themselves, 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 sharing of data that informs regulators of potential crisis triggers. Resolution also involves burden sharing, dividing up the cost of failure.

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8 This list is not exhaustive. For example one might include the International Accounting Standards Board, http://www.iasb.org/Home.htm (last visited July 26, 2010)


Crisis prevention entails regulating to avoid risk of a systemic failure. Yet risk spurs economic activity. Actors want to take risks because they perceive that as a result of those risks they will benefit from gains. 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. Policy makers must decide how much they risk they wish to take in light of the potential gains to society that may be achieved from those risks.

Markets face different types of risks, some of which can be managed by markets participants, who can diversify to hedge against losses. Market participants can manage business risks, market risks, liquidity risks, and credit risk, to some extent, through diversification. Even if markets 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. Steven Schwarcz defines systemic risks as “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

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13 Jackson, supra note 12, at 333.


17 See Gerding, supra note 16, at 139.
financial institutions, (ii) resulting in increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility.” 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. This tragedy of the commons phenomenon supports the need for global coordination as well as regulation more generally.

Regulation will not eliminate risk, thus crisis prevention also requires warning systems. Economists and others who would monitor the financial sector need to have access to data. A warning system requires transparency. As one economist points out “while housing and balance of payments data is widely available, few economists knew that financial firms had become so leveraged or comprehended the nature

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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 Shapiro. Testimony Concerning Regulations of Systemic Risk, 173 PLI/Corp 233 (November 2009). Chairman Shapiro explains that there are actually two kinds of systemic risk. First there is the 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 or 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, BIS & FSB, *GUIDANCE TO ASSESS THE SYSTEMIC IMPORTANCE OF FINANCIAL INSTITUTIONS, MARKETS AND INSTRUMENTS: INITIAL CONSIDERATIONS* (Oct. 2009), available at http://www.financialstabilityboard.org/publications/r_091107c.pdf (last visited July 26, 2010).

19 Schwarcz, *supra* note 18, at 204.


of the real-estate-backed assets that these firms held.”

This, 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.

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 G20 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.”

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

Finally, resolution also involves exit from the measures of containment. The withdrawal of emergency measures must be managed so that so that the markets understand what will happen. Removing the temporary support can toss the financial sector back into disarray, can have serious effects of the real economy, and have cross border effects.

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. Authorities must react and respond to systemic failure in a way

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23 See *supra* 11to 22 and accompanying text.
24 See *e.g.*, Hiroko Tabuchi, *Japan’s Banks Object to Adopting Restrictions Like Those in Europe and U.S.*, NY TIMES BUS.DAY, Apr. 23, 1010, at B5.
25 Chair’s Statement, *supra* note 1, at ¶ 23.
26 See *Matthews, supra* note 20, at 559.
28 Id.
29 Gelpern, *supra* note 2, at 1064.
to contain the crisis. 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 United States government and the European Commission enacted spending measures to confront the crisis. Gelpern suggests that ensuring survival of a financial system can involve a series of decisions to suspend regulations or rescue failing financial institutions. Thus, most recently we saw national authorities “bailing out” businesses, like American International Group, because of the fear that the failure to do so will push otherwise solvent entities into insolvency. We also saw bailouts that were not necessarily tied to the risk of systemic failure, such as the U.S. 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 and phase, burden sharing may involve dividing a choice between creditors and debtors.

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30 Id.
32 Gelpern, supra note 2, at 1055. As Gelpern notes, these are inherently political decisions. Id. at 1067.
34 See e.g., Lynn, Sweet, General Motors Bailout Details, available at http://blogs.suntimes.com/sweet/2009/06/general_motors_bailout_over_vi.html; Pass The Plate: If Detroit's carmakers are bailed out, Europe's will be next in line, THE ECONOMIST, Nov. 20, 2008.
35 See Gelpern, supra note 2, at 1076 (discussing government bailout as shifting loses to the public). The parties relieved of the burdens could be “local pension funds . . . foreign municipalities that count of the income to maintain vital services, . . . retirees, . . . hedge funds, . . . wall street investment banks . . . poor homeowners or wealthy corporations. Id.
shareholders and bondholders and individual entities or the taxpaying public.\textsuperscript{36}

Looking forward, from a prudential standpoint, bailing out entities and allowing them to start with a somewhat clean slate creates moral hazard.\textsuperscript{37} The G20 Workshop on Securing Sustainable Economic Recovery Workshop noted 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).

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.\textsuperscript{38}

At the same time, bailing out failed entities and shifting their losses onto others, such as taxpayers, may stave off further failures,\textsuperscript{39} even though it may be unfair to impose such a burden on taxpayers.

\textsuperscript{36} See id.
\textsuperscript{37} See id.; Chair’s Statement, supra note 1, ¶7.
\textsuperscript{38} Chair’s Statement, supra note 1, at ¶ 24-26.
\textsuperscript{39} See Gelpern, supra note 2, at 1057.
In addition to whether states will support at risk entities, how they do so matters as well. 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. It may go into debt and as a result limit its ability to address other issues of concern. Likewise, it may pay for loses through higher taxes or cuts in services. This distributive choices may be revisited and revised when it comes time to reregulate 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.

C. The Need for Coordinated Efforts

The risk of systemic failure requires a coordinated effort. National authorities have limited capabilities, conflicting policy incentives, and unique priorities. Moreover, the size of financial conglomerates makes global financial crisis difficult for any one country to handle. No matter what the efforts of one country, financial failures

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43 See Omarova, supra note 6, at 160, discussing the college of supervisors.


45 Omarova, supra note 6, at 159.
spread from country to country. Some possibilities for coordination include an international risk regulator, coordination of existing regulators, or a risk monitor. This article does not advocate a coordination model; instead it focuses on how any model might account for the views of civil society.

Several institutions might play a role in regulating or monitoring systemic risk including the G20, 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). These organizations fall into a loose structure: Executive, Coordinating Regulator, Information and Implementation Bodies, and Standard Setting Bodies. Admittedly, some entities could fall into more than one category.

The Executive: The G20

If one were to think of the various international organizations as agencies of a sort, the G20 might be considered akin to the executive.

46 See e.g., Anna Gelpern, supra note 2, at 1059 (discussing national systems and how failure travels from entity to entity.) Declaration, Finance Ministers and Central Bank Governors, Further Steps To Strengthen The Financial System ¶4 (Sept. 4-5, 2009) http://www.g20.org/Documents/FM__CBG_Declaration-_Final.pdf (stating the need to tackle “non-cooperative jurisdictions).


48 See Regulating and Resolving Institutions Considered “Too Big To Fail”: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs, 111th Cong. (May 6, 2009) (statement of Sheila C. Bair, Chairman, FDIC) (discussing the proposed Council of Regulators).


50 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. INT’L L. 475, n.11 (2010). This action seems to parallel what an executive might do on a national basis.
The Group of Twenty (G-20)\(^{51}\) 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.”\(^{52}\) As a center of discussion and coordination it already coordinates with the IMF and World Bank and established the FSB as the successor to the Financial Stability Forum (FSF).\(^{53}\) Although it aims to foster standard setting it deems as 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 IOs and transgovernmental 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.\(^{54}\)

The G-20 acted at several key points in the most recent crisis, by convening four summits of the G20 Leaders: Washington, London, Pittsburg and Toronto.\(^{55}\) As it worked through these summits, the G20 has evolved from a short term crisis manager, to long term policy

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\(^{51}\) The finance ministers and central bank governors 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, available at http://www.g20.org/about_what_is_g20.aspx (last visited July 26, 2010).

\(^{52}\) See id.

\(^{53}\) See FSB, About the FSB, History, available at http://www.financialstabilityboard.org/about/history.htm (last visited July 26, 2010).

\(^{54}\) Matthews, supra note 20, at 555.


It has directed the FSB to coordinate with other international financial institutions as well as with other international organizations (other than financial institutions) to address the linkages between financial regulations and other areas of public concern.\footnote{See e.g., Statement, The Pittsburgh Summit, supra note 20 \cite[note hereinafter Pittsburgh Food Security].}

\textbf{Coordinating Regulator: The FSB}

The Financial Stability Board aims “to enhance co-operation among the various national and international supervisory bodies and international financial institutions so as to promote stability in the international financial system.”\footnote{It was established by the G-20 which expanded the Financial Stability Forum, See FSB, About the FSB, http://www.financialstabilityboard.org/. Declaration, Finance Ministers and Central Bank Governors, \textit{supra} note 46.} The FSB has been identified by Arner and Taylor as a potential lead organization for coordination. They suggest that “standard-setting would continue to rest with individual standard-setting organizations such as the Basel Committee, IOSCO, etc. with coordination through the FSB.”\footnote{Arner & Taylor, \textit{supra} note 44, at 29. They argue that the FSB could work well for crisis prevention. \textit{Id.} at 30.} These standard setting organizations are now members of the FSB as a result of the G20’s expansion of both the FSB’s membership and mandate in 2009.\footnote{FSB, \textit{Financial Stability Board Charter}, http://www.financialstabilityboard.org/publications/sr_090925d.pdf (last visited July 26, 2010).} The FSB has issued several reports dealing with the most recent crisis and has coordinated and reported on the activities of several key institutions.\footnote{See e.g., FSB, \textit{FSF Principles for Cross Border Cooperation on Crisis Management}, http://www.financialstabilityboard.org/publications/r_0904c.pdf (last visited July 26, 2010), and FSB exit, \textit{supra} note 6. See also FSB, \textit{Ongoing and Recent Work Relevant to Sounds Financial Systems} (Sept. 11, 2009), \textit{available at www.financialstabilityboard.org/publications/on_0903.pdf} (last visited July 26, 2010).}
Information and Implementation Bodies: IMF, World Bank, and the OECD

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 alerting them to potential risks. Through its system of “bilateral surveillance” it annually evaluates all 186 of its member countries and then discusses with that country “whether there are risks to the economy’s domestic and external stability that would argue for adjustments in economic or financial policies.” It 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 dollars to aid its banking industry. The IMF could serve a role as a crisis preventer and some have suggested that it should. It could possibly use its monitoring

67 IMF, How we do it, supra note 65.
69 Matthews, supra note 20, at 579; Edwin M. Truman, The IMF and the Global Crisis: Role and Reform, Peterson Institute for International Economics (Jan. 23, 2009),
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capabilities to sound the alarm so to speak. Nonetheless, in the most recent crisis it played little or no role in crisis prevention. It has emerged as a force in the containment of the crisis with respect to Greece. In terms of crisis resolution it has assisted the G20 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 G20. When it provides resources as in the Greek bailout, it also enforces principles and standards in conjunction with providing those resources.

The World Bank

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


Matthews, supra note 20 at 579; Arner & Taylor, supra note 44, at 20 (identifying the IMF as a potential “institutional home for financial regulation” although it is reluctant in part due to its article of agreement to take on that role.)


Communiqué, Meeting of Finance Minister Board of Governors, at ¶3 (April 23 2010), http://www.g20.org/Documents/201004_communique_WashingtonDC.pdf.


See JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 106 (2003).

The International Bank for Reconstruction and Development (“IBRD”), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). For a complete description of these five institutions see THE WORLD BANK, A GUIDE TO THE WORLD BANK 10–23 (2003).
Member countries fund it 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 or no role in either prevention or containment. To be fair though one could point to the Bank’s assistance throughout the crisis as critical for alleviating suffering during the crisis. It also assisted the G20 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.

OECD


78 For a list of IBRD’s member countries, see http://web.worldbank.org (follow “About Us”; then follow “IBRD”; follow “186 members” hyperlink); for a list of IDA’s member countries, see http://web.worldbank.org (follow “About Us”; then follow “IDA”; then follow “IDA Donors & Partners”); for IFC’s member countries, see www.ifc.org/ifcext/about.nsf/Content/Member_Countires; for MIGA’s member countries, see www.miga.org/about/index_sv.cfm?stid=1695; for ICSID’s member countries, see http://web.worldbank.org (follow “About Us”; then follow “ICSID”; follow “Member States”); for a truncated description of how the Bank Group institutions are financed, see THE WORLD BANK, A GUIDE TO THE WORLD BANK, supra note 1, at 43–47.


80 Omarova, supra note 6, at 158


82 Communiqué, Meeting of Finance Minister Board of Governors, at ¶ 3 (April 23, 2010), http://www.g20.org/Documents/201004_communique_WashingtonDC.pdf (last visited July 26, 2010). It has also partnered in the G20 Pittsburgh summit commitment to reduce fossil fuel energy subsidies.

83 See Stiglitz, supra note 75, at 75.
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 as the OECD in part in response to the cold war. There are 30 countries 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.

Standard Setting Bodies, The Basel Committee on Banking Supervision, IOSCO, WTO, UNCTAD, and Private Law Bodies

The Basel Committee on Banking Supervision

The Basel Committee on Banking Supervision in partnership with the Bank for International Settlements is a transgovernmental

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85 Id.
86 OECD, About the OECD, Members and Partners, available at http://www.oecd.org/pages /0,3417,en_36734052_36761800_1_1_1_1_1_1_00.html (last visited July 26, 2010).
87 Id.
network that “generates global public goods of information and expertise.” Its framers stated 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 has no legal standing to force anyone to do anything. It simply develops best practices. As David Zaring has 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. It has been cited by the G20 as one of the partnering organizations going forward.

**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 to:

- 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

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91 Barr & Miller, supra note 15, at 22.  
92 Zaring, supra note 50, at 475. See supra notes 17- 19, 18 and 19 and accompanying text. See also Matthews, supra note 20, at 546.  
93 Schwarcz, supra note 18, at 211–212.  
94 See Barr & Miller, supra note 15, at 17–18 (discussing Basel’s functions).  
95 Zaring, supra note 50, at 478.  
97 Communiqué, Meeting of Finance Minister Board of Governors, supra note 82, at ¶ 3.  
98 Hardening, supra note 88, at 898.
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’s Objectives and Principles of Securities Regulation (“OPSR”) bases its numerous principles of securities regulation upon three objectives: (1) the protection of investors; (2) ensuring that markets are fair, efficient, and transparent; and (3) the reduction of systemic risk.  

Yet, at least in the United States the focus of securities laws has not been prudential regulation to avoid risk but rather disclosure.  

It has engaged in some prudential regulation of broker/dealers, but without startling success.  

And like the Basel Committee it failed to offer any serious response to the most recent crisis.  

In response to the crisis it has come out with several reports dealing with the regulation of hedge funds and other important issues.  

The WTO  

The WTO operates as a trade liberalizing institution and moves much too slowly to be expected to respond to crisis in a proactive way.

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103 Zaring, supra note 50, at 478.  

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 in 1948 it has gone through a series of negotiation 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. It 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 time of crisis the WTO constrains governments from taking protectionist measures. The national treatment and most favored nation rules enforce the non discrimination principle at a time when governments might like to discriminate either in favor of their own economy or against specific trading partners. It has partnered with

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107 Id.
108 Atik, supra note 9, at 455.
109 Id. at 467.
110 Zaring, supra note 50, at 478.
UNCTAD and the OECD to report to the G20 on trade and investment protectionism.  

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.

It then assists developing countries to implement positive economic policies in areas such as commodity diversification and 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 other significant role in the process of coping with the crisis directly. It has however launched the “Investment Policy Monitor” which periodically reports on the latest developments in foreign investment policies at the national and international level” in response to the G20’s call for reporting on trade and investment protectionism.

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116 Id.
117 Id.
118 Id.

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. These institutions do not regulate in the sense that they impose public law obligations on member states. In fact, they deal typically with private law matters and develop standards which 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. Moreover, even though these organizations cannot impose their products on members, other organizations might. Thus, the World Bank might insist that borrower nations adopt a UNCITRAL Model Law or Legislative Guide.

121 G.A. Res. 2205 (XXI), 1497 plen. Mtg., U.N. Doc. A/6396, at ¶ II.8(b)–(d) (Dec. 17, 1966) (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 UNIDROIT, art. 1, Mar. 15, 1940, available at www.unidroit.org/mm/statute-e.pdf (as amended Mar. 26, 1993) (last visited July 26, 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. 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), available at http://www.hcch.net/index_en.php?act=conventions.text&cid=29 (as amended Jan. 1, 2007) (last visited July 26, 2010) (“The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.”); id. art. 8 (authorizing the creation of “Special Commissions to prepare draft Conventions or to study all [relevant] questions of private law”).


II. **The Cost of Failure**

Whichever institution or institutions take part in the effort to regulate to prevent, contain, or resolve financial crisis they will need to balance the costs and benefits 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 has successfully avoided in depth consideration of these linkages.\(^{124}\) 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 and the off-setting benefits even where both are somewhat speculative. At the containment and resolution phases issues of costs combine with issues concerning the distribution of 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 United States much criticism has been levied against the Federal Reserve’s actions when faced with increasing “use of derivatives and the securitization process.”\(^{125}\) It chose not to

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\(^{124}\) Eyal Benvenisti & George W. Downs, *The Empire’s New Cloths: 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.”)

curtail those activities finding that “they would better distribute risks across financial institutions.”126 The choice not to regulate also allows for gains. The benefit of the risk-taking extends beyond the market participants. Thus, the Federal Reserve hands off approach to the capital markets role in credit intermediation lowered the “costs of market-based finance for many market participants.”127 The extent to which the financial markets are regulated reaches beyond those regulated into the general public.128 Economic growth funds all sorts of positive endeavors and programs. Labor benefits, national treasuries grow; legislatures have more money to fund worthy social projects. In some sense a deregulatory attitude benefits everyone. But some benefit more than others. 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 (changing private relationships) but also rescuing financial institutions (with public money).129 Governments create moral hazard when they relieve legal or financial obligations.130 Future actors believe that they will be bailed out when their risky activities fail and therefore may be more likely to engage in risk that they would not otherwise take.131 Moreover, bailing out failed entities costs money.132 The cost can be significant and can burden future generations.133 At the same time systemic risk endangers the entire system, and containment

126 Id.
127 Id. See also Posner & Vermeule, supra note 42, at 8–9.
129 See Gelpern, supra note 2 at 1057-59 (discussing alternatives during crisis).
130 Id. at 1055.
131 Id. at 1064.
132 Id. at 1081.
might save the system from the cost of failure. Otherwise steady entities may fail because of 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 shifting a burden to the taxpayer. Conversely, contagion that stems from the failure to bail out a company may costs 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 most recent crisis has focused attention on the linkages between financial regulation and other public issue areas that had in the past been obscured, to some extent, by fragmentation. Economic law regulation has natural linkages to a variety of societal concerns. International

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134 See Gelpern, supra note 2, at 1057.
136 See Arner & Taylor, supra note 44, at 491 (discussing different stages of crisis regulation).
137 See Gelpern, supra note 2, at 1057.
139 See Kaufman, supra note 135, at 19.
140 Angelique Leondis, supra note 44, at 327 (noting that in the event of international crisis, some domestic government might favor their own financially important entities).
141 See Thomas Cottier, Challenges Ahead in International Economic Law, 12 J. INT’L ECON. L. 3, 13 (2009). See e.g., Salzman, supra note 84, at 197 (discussing the connection between regulation of foreign direct investment and labor, the environment and other social welfare concerns).
organizations are able to claim a narrow mandate and exclude discussion of linkages.\textsuperscript{142} Fragmentation of international economic law in particular enables institutions to avoid addressing non economic law issues.\textsuperscript{143} 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.\textsuperscript{144} But other areas of economic law, including financial regulation, implicate public concerns as well.\textsuperscript{145} Although the cost of a crisis affects every conceivable aspect of public concern,\textsuperscript{146} that breadth should not weigh against trying to acknowledge those interests from a legitimacy perspective. In fact, as I will discuss in Part III. B. the scope of the relationship between financial regulation and issues of public concern may be a reason for a more proactive, yet nuanced, integration between civil society and financial regulators.\textsuperscript{147}

**Labor**

The collapse of the financial markets directly affects the real economy. When financial markets fail, credit tightens, commodities prices fluctuate, and demand falls.\textsuperscript{148} As a result, businesses in a broad

\textsuperscript{142}See e.g., Barr & Miller, supra note 15, at 26 (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.).

\textsuperscript{143}See Thomas Cottier, supra note 141, at 12-15 (discussing the financial crisis and fragmentation).


\textsuperscript{146}Indeed, some have characterized financial stability as a public good. Marc Quintyn & Michael Taylor, Regulatory and Supervisory Independence and Financial Stability (2002 Working Paper No. 02/46)

\textsuperscript{147}See infra notes 288 to 320 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 e.g., Robert Howse, The End of the Globalization Debate: A Review Essay, 121 HARV. L. REV 1528, 1530, 1533 (2007-08) (noting that the debate has now shifted to one over values).

variety of sectors suffer causing them to cease hiring, cut hours and/or lay people 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.

Unemployment as a result of the 2008 crisis is up globally. The ILO projected that unemployment worldwide will reach 7.9%. Workers in poorer countries suffer in particular. In 2009 alone 46 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 “over 6 million jobs were lost in

149 Id.
154 ILO Impact, supra note 152.
155 Id.
156 OECD, Employment, Impact of the economic crisis on employment and unemployment in the OECD countries, http://www.oecd.org/document/63/0,3343,en _2649_33927_41727231_1_1_1_ 374 57,00.html (last visited July 26, 2010).
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 15 G20 countries with available data.”

Labor leaders (and others) have made the connection between financial regulatory policy and its impact on the work force:

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.

Pensions

The financial crisis has hit pensions hard and in a very public way. The OECD reported that in the first 10 months of 2008 private pensions in the “OECD have registered losses of nearly 20% of their assets (equivalent to USD 5 trillion).” Older workers are particularly at risk. Those heavily invested in equities or asset back securities

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161 Id.
likewise were more at risk. Some reports expressed concern that these developments may result in backlash reactions against private pension systems which inappropriately undervalues their long term usefulness. 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.”

Health Care

As the economic crisis pushes an estimated 100 million people into poverty some commentators have expressed the concern that the economic crisis will become a health crisis. The decline in private financial flows, foreign direct investment, remittances and the decrease in experts all undermine the capacity of developing countries to provide for the health of 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: “many high income and upper middle income countries will experience

162 Id.
163 Id. (discussing a return to public systems, delaying reforms to the public system).
167 Newfarmer, supra note 166.
negative real income growth and substantial increases in unemployment, with their consequent impact on health.\footnote{168} 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 already felt primary care provider shortage.\footnote{169} Investors will invest less in new medical technologies and hospitals will be forced to reduce building and layoff staff.\footnote{170}

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

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.\footnote{171}

**Food Security (Availability)**

Global food insecurity results from a variety of factors and threatens one billion people with malnourishment.\footnote{172} While the financial

\footnotesize{\begin{itemize}
\item \footnote{168} WHO Global Health, {	extit{supra}} note 163.
\item \footnote{170} Id.
\item \footnote{171} Diana Alarcon, Stephany Griffith-Jones & José Antonio Ocampo, \textit{How Does the Financial Crisis Affect Developing Countries?} (Int’l Policy Center for Inclusive Growth, One Pager, No. 81, Apr. 2009), http://www.ipc-undp.org/pub/IPCOnePager81.pdf.


crisis was by no means the cause of widespread food insecurity, it has exacerbated the crisis. Underinvestment in agriculture contributes greatly to food insecurity and the financial crisis has exacerbated that trend. Increased poverty rates also cause food insecurity. After the Mexican and Asian financial crises “poverty rates increased an average of 24 percentage points” and it took five to eight years for rates to return to prior levels. Remittances fall during economic crises. Poorer countries, most vulnerable to food insecurity, have been affected by the crisis to a greater extent than in past crisis because the greater level of global economic integration. At the same time, since the most recent crisis, unlike past crises, extends beyond particular countries or regions making it more difficult for unaffected countries to step in and relieve suffering. As trade contracts as a result of the financial crises it is expected that the global food crisis will worsen. It is expected that in 2009 for example the number of people exposed to food insecurity will increase by 2 percent, even if availability remains constant, and this follows the global food crisis of 2006-2008.

The G20 has already started to address issues of Food Security for a World Bank Food Security Trust Fund following the G8 Summit in L’Aquila, Italy in July, 2008. The G8 articulated five principles for a food security initiative: “1) Stronger coordination among donors, 2) 

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174 WFP, Food Insecurity, supra note 172.

175 Id. at 9.

176 Id.

177 Id. at 11.

178 Id. at 10.

179 Id. at 9-10.

180 David Loyn, UN Debates Global Food Cost Rise, BBC News, Jan 26, 2009, http://news.bbc.co.uk/2/hi/europe/7850210.stm (last visited July 26, 2010) (discussing how the world’s economic problems have only served to exacerbate the food price crisis even though it has fallen back from highs in 2008).

181 WFP Food Insecurity, supra note 172, at 22-23.

Support of comprehensive strategies, 3) Investment through country-owned plans, 4) Leveraging effective multilateral institutions, 5) Sustained commitments.” The G20 committed to these principles in its Pittsburgh Summit.  

Other Areas of Concern

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

III. LEGITIMACY IN CRISIS

The very real public costs of systemic financial failure call into question the legitimacy of any efforts to regulate, contain, and resolve such failure. Legitimacy matters because it helps to ensure the success

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183 Pittsburgh Food Security, supra note 57.
184 Id.
188 Posner & Vermeule, supra note 42, at 6, 16 (noting that “financial regulation emerged from the recognition that financial crisis are inevitable in an unregulated market, and that they can lead to economic collapse, political instability, and widespread misery.”).
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, and policymakers should carefully examine these costs for each regulatory phase of a potential crisis.

Policy makers should categorize civil society by the degree of its expertise and its mission as it relates to the proposed regulatory action, and should identify institutions on a continuum of norm development from policy setting to detailed rule making. Generally speaking civil society groups whose mission closely relates 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 not at all, face legitimacy challenges. Legitimacy engenders compliance; it may transform soft law into hard law, spur the internalization of norms or simply justify the norm development process itself. The sociological perception that an

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189 See, e.g., Barr & Miller, supra note 15, at 26–27 (noting that participation costs in the international arena are higher than the costs of participation in domestic sphere).


191 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. Int’l L. 605, 619 (2008) [hereinafter Kelly, Institutional Alliances]. 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
institution can and/or should develop norms aids in the adoption of those norms. 192

Global institutions face multiple legitimacy challenges. 193 Global governance institutions are seen as removed from domestic democracy. 194 They are challenged as lacking legitimacy or accountability. 195 Some also claim that global governance institutions foster rule by elitist internationalists. 196 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. 197 Assessing beliefs is impossible, but one can assess the criteria upon which an institution claims that it is entitled to legitimacy. 198 Professor Fritz Scharpf, and later Robert Keohane and Joseph Nye have characterized legitimacy criteria as input criteria (“the means by which constituents participate in IOs, e.g., representation, inclusiveness, or process”) 199 and output criteria 200 (“substantive outcomes, e.g., trade 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. Allen Buchanan & Keohane, supra note 145 at 406.

192 Kelly, Institutional Alliances, supra note 191, at 619.
193 See e.g., Barr & Miller, supra note 15, 16 (discussing the Basel Committee as an example of a “transgovernmental regulatory network that exercises vast powers, seemingly without any form of democratic accountability)
195 Id.
198 Id. at 7–8.
199 Kelly, Institutional Alliances, supra note 191, at 613. See also Keohane & Nye, Between Centralization and Fragmentation: the Club Model of Multilateral
liberalization, or fairness, and whether goals set by the international organizations themselves are reached, i.e., is the international organization effective”).

In terms of input legitimacy international organizations 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 on whose behalf they act. International organizations can improve process, through the use of traditional administrative law devices and values, such as access to information, notice, comment, power sharing and review.

Output legitimacy focuses on the ends, whether the resulting outcome is a good one. Will it be effective, fair, just, well-ordered, universally accepted, or supportive of a particular goal such as human rights or trade liberalization? Of course it assumes a normative prescription of what is a good outcome. Even if one believes that a


FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 2 (1999) (discussing input and output legitimacy); Keohane & Nye, supra note 199, at 3 (noting that both inputs and outputs can affect legitimacy).


See Keohane & Nye, supra note 199, at 14 (discussing the legitimacy of domestic democracies).

See Esty, supra note 201, at 1504-05 (2006) (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).

Id. at 1534–37 (discussing that horizontal and vertical power-sharing mechanisms can increase the legitimacy of international rulemaking); Nico Krisch & Benedict Kingsbury, Introduction: Global Governance and Global Administrative Law in the International Legal Order, 17 EUR. J’L. INT’L’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).

Kelly, UNCITRAL, supra note 9.

Buchanan & Keohane, supra note 145, at 418 (discussing the persistent disagreement over the norms underlying legitimacy).
good outcome is one that will be effective, i.e., it will work, then one still needs to start with a normative prescription of what it is that one wants to do.

As I have written elsewhere, 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 which captures both output and input criteria and I believe is enormously helpful. I would also argue that the concept of deliberative legitimacy may be particularly helpful in international financial organizations. The deliberative democracy framework lends itself to international financial regulators and norm setters. 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. Likewise, efficiency justifications for international financial norms fail to account for participatory values and also for complex linkages and externalities. Deliberative legitimacy would support an organization’s norms where those norms were formed as a result of deliberation of free and equal participants representing those affected by the resulting norms.

In my view it is not essential to settle upon a theory of legitimacy in all cases but 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.

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207 Kelly, UNCITRAL, supra note 9.
208 Buchanan & Keohane, supra note 145, at 406. 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.
209 Esty, supra note 201, at 1520.
210 See Ferejohn, supra note 194, at 23 (arguing that global institutions cannot rely on traditional democratic principles).
211 Esty, supra note 201, at 1520.
B. Can Civil Society Improve Legitimacy in Crisis Regulation?

International financial organizations 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 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.\(^{213}\) NGO participation involves a range of activities from mere presence to voting powers.\(^{214}\) Likewise, international financial institutions perform different functions ranging from policy setting to coordination to rulemaking.\(^{215}\) 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.\(^{216}\) These attributes can combine to increase an organization’s legitimacy in a variety of ways.\(^{217}\) The costs of greater participation can


\(^{216}\) These are values that are being discussed in detail by scholars concerned with global governance, accountability, and legitimacy. See, e.g., New York University Institute for International Law and Justice Global Administrative Law Project, www.iilj.org/GAL/ (last visited July 27, 2010).

\(^{217}\) See, e.g., Barr & Miller, supra note 15 at 17–18 (for example, notice and comment contributes to greater perceived legitimacy).
include delay, manipulation, and failure. Whether participation can be helpful and will be worth the cost needs to be examined at each stage and by considering the nature of the civil society organization and the international financial institution.

The Scope of Participation

Civil society is a broad term, one that encompasses nongovernmental organizations (NGOs) as well as professional and academic associations. The United Nations 2004 Cardoso Report defines civil society:

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.

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:

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220 See sources cited supra note 219.
Non-governmental organization (NGO). All organizations of relevance to the United Nations that are not central Governments and were not created 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. 221

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”). 222 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’s 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 experts in pensions, not insolvency law, but it may have very real interest in cross border insolvency law issues. The Institute of International Finance, Inc. has both interest and expertise in what goes on in Basel. 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

221 See sources cited supra note 219.
222 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 & DAVID M. POTTER, NGOs IN INTERNATIONAL POLITICS 37-58 (2006).
participates in the formation of international norms. As one author notes as of the late 1990’s the expenditures of civil society approached $1.3 trillion, making it the “seventh largest economy, compared with the economies of states.” This is money that civil society spends on the ground whether in aid or advocacy. This may or may not be a valuable contribution. In fact, civil society, as a non state regulator must itself compete for legitimacy to obtain and retain its relevance. Indeed its participation in international organizations aids legitimacy.

The scope of possible civil participation varies. 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 organizations have even gone beyond permitting the participation of the targets of their action to allowing for broader participation by all

224 Id. at 76 (citing LESTER M. SALOMON, S. WOJCIECH SOKOLOWSKI & REGINA LIST, GLOBAL CIVIL SOCIETY, AN OVERVIEW (2003))
225 Id. The figure here represents 35 countries surveyed. Id.
226 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 REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY (Debra P. Steger ed.,2009), available at http://www.idrc.ca/openebooks/455-0/.
229 Kingsbury, Krisch, and Stewart, supra note 228, at 37.
those who might be affected by regulatory action. Thus, even allowing participation by civil society raises a question of how much of civil society can and should participate. One could limit participation to entities were regulated (i.e., banks) or to those having expertise that might be helpful (i.e., International Association of Restructuring, Insolvency & Bankruptcy Professionals) or to any group that expressed an interest (i.e., labor unions).

The degree of optional participation by participants varies. Civil society may be asked to contribute to the pre norm development discussion. Some international organizations such as the World Bank, the IMF and the World Trade Organization organize symposium and colloquia to engage civil society. At this level civil society 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 the ability to speak in the proceedings or not. Thus, UNCITRAL allows experts and other members of civil society to (with permission) attend and observe and also contribute to their working groups. These experts may contribute information to decisions makers and their presence may improve transparency and

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230 See Zaring, supra note 50, at 481-84 (discussing the comment procedures of Basel II and IOSCO).


accountability. The Basel Committee has solicited comments on its proposed standards. The World Trade organization has permitted submission of amicus briefs. Finally, civil society could be given a more direct say in whether a norm is adopted or not. I know of no instance where members of civil society has been given a direct vote or participation akin to a State, but one could see how participation through notice and comment combined with the requirement that organizations give reasoned explanation for their decisions might come close the level of such participation.

Institutions vary greatly in the level of civil society participation they welcome or tolerate. The World Bank’s articles of agreement do not provide specifically for NGO engagement but some engagement exists nonetheless. The IMF has developed a policy of engaging with civil society and provides its staff with guidelines to do so. The OECD has been referred to as a “club” organization in the past. 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 more recent times the OECD has opened up to civil society, although as James Salzman recounts, the OECD’s has not adopted a unified procedure for incorporating administrative law principles generally and its inclusion of


239 OECD, Civil Society, http://www.oecd.org/department/0,3355,en_2649_34495_1_1_1_1_1_1_1_1.html (last visited July 27, 2010).
civil society has varied from project to project.\textsuperscript{240} UNCTAD has made a commitment to integrating civil society and the private sector into its work.\textsuperscript{241} IOSCO submits its work for public comment and posts the comments it receives.\textsuperscript{242}

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:

most 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-interest organizations, the connection between banking standards and broader social concerns was not pronounced.\textsuperscript{243}

Likewise, in 2009 IOSCO invited comments from the public on its Auditors Communications Consultation Report. It received 23 comments, all from industry representatives.\textsuperscript{244} While in hindsight it is

\begin{itemize}
\item \textsuperscript{240} Salzman, supra note 84, at 195, 196–217.
\item \textsuperscript{242} See e.g., supra note 230 and accompanying text.
\item \textsuperscript{243} Barr &. Miller, supra note 15, 26.
\item \textsuperscript{244} IOSCO, Auditors Communications Consultation Report: Comment Letters (Feb. 2010), available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD316.pdf. The commentators were: BDO International Limited, Canadian Public Accountability Board, The Compagnie Nationale des Comissaires aux Comptes (CNCC) and the Conseil Superieur de l’Ordre des Experts-Comptables (CSEOEC), CPA Australia/Institute of Chartered Accountants/National Institute of Accountants, Deloitte Touche Tomatsu, Dubai Financial Services Authority, European Group of International Accounting Networks and Associations, EUMEDION Corporate Governance Forum, Ernst & Young Global Limited, FAR SRS (The Institute for the Accountancy Profession in Sweden), Federation of European Accountants, Grant Thornton International Ltd., Hermes Equity Ownership Services, International Auditing
\end{itemize}
easy to speculate how those interested in labor issues or health care might have wished to avoid risks to those interests, it is not clear what they may have been able to do *ex ante* when one considers that these are technical and arcane subjects that are not followed by many in the public.

**The Benefits of Participation**

Greater participation improves representation. International organizations cannot rely upon democratic legitimacy to support their work; but, they can point to the degree to which they are representative. Representation of those affected by the organization is important. Thus, to the extent that the inclusion of civil society means greater input in international financial institutions, that inclusion will improve legitimacy.

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. The government is more likely to be responsive to the concerns of its citizenry. Societies with high level of civic participation tend to correlate to high levels of democratization and economic performance. One would then expect that generally

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and Assurance Standards Board, The Institute of Chartered Accountants of Scotland (Audit and Assurance, Committee), Instituto De Censores Jurados De Cuentas De Espana, Institut der Wirtschaftsprufer, KPMG International, The Nordic Federation of Public Accountants, PricewaterhouseCoopers LLP, SEC Thailand, Standard Life Investments (with attachment "Guidelines for Enhanced, Disclosure").

245 See, e.g., JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 630-31 (2006); Esty, *supra* note 201, at 1515 (discussing democratic legitimacy).

246 Esty, *supra* note 201, at 1516 (discussing means of obtaining democratic legitimacy).


249 Id.

speaking the participation of civil society in international financial institutions would generally improve economic performance.

The very presence of civil society in the financial regulation process will improve the prospects for deliberation.\textsuperscript{251} Deliberative legitimacy requires deliberation by free, impartial and equal citizens.\textsuperscript{252} The idea here is where different persons with different views discuss their perspectives people might change their minds.\textsuperscript{253} Greater participation and discussion help to legitimate the end result.\textsuperscript{254} 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.\textsuperscript{255} Those targeted by the regulation will likely stand to benefit directly from the risks taken where members of civil society might represent interests that would only see an indirect benefit from a 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.\textsuperscript{256} Civil society’s participation exposes it to the data, analysis, policy proposals and all inputs that the decisions makers would need. In fact, it has been noted that international organizations because of their nature and structure “generally meet higher standards [sic] of transparency and justification by reason giving than most national systems”\textsuperscript{257} To the extent that the participation of a broader public facilitates or encourages this transparency it facilitates the

\textsuperscript{251}Esty, \textit{supra} note 201, at 1520 (2006); See also Ahmed & Potter, \textit{supra} note, 222 at 32 (discussing ROBERT PUTMAN, MAKING DEMOCRACY WORK (1993)).

\textsuperscript{252}Elster, \textit{supra} note 212, at 5 (discussing Rawls and Habermas).


\textsuperscript{254}Esty, \textit{supra} note 201, at 1520–21 (discussing deliberative legitimacy).

\textsuperscript{255}See Ahmed & Potter, \textit{supra} note 222, at 82 (noting that NGOs raise issues within international organizations that have not been addressed at the national level). They provide information, ideas and advice. \textit{Id.}

\textsuperscript{256}Salzman, \textit{supra} note 84, at 202.

\textsuperscript{257}See Keohane, Macedo & Moravcsik, Democracy \textit{Enhancing Multilateralism} 31 (IILJ Working Paper 2007/4); see also Barr & Miller, \textit{supra} note 15, at 29.
flow of information to national venues that might not otherwise receive it.\textsuperscript{258}

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 civil society aids accountability.\textsuperscript{259} One can have different views.\textsuperscript{260} For example, one can identify IOSCO as accountable to securities regulators narrowly, or people who buy securities, or the public at large. The WTO is accountable to the states that are represented there, but also arguably to the public that finds their government constrained by trade rules (or not constrained enough) during a crisis. Institutions often have multiple accountability and even conflicting demands.\textsuperscript{261} One could argue that legitimate institutions should continually evaluate their obligations to these multiple communities.\textsuperscript{262}

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.\textsuperscript{263} They have little reason to be responsive to public sentiment.\textsuperscript{264} This insulation weighs in favor of a broad view. Moreover, as discussed above the implications of their decisions reach beyond those directly regulated by them and this reach also weighs in favor of the broad view.

In national regulatory systems, judicial review aids accountability.\textsuperscript{265} International regulators are not subject to judicial review. However, civil society participation can enhance public

\textsuperscript{258} Id. at 23.
\textsuperscript{260} Id.
\textsuperscript{261} Black, \textit{Constructing}, supra note 128 at 5.
\textsuperscript{262} See Buchanan & Keohane, \textit{supra} note 145, at 406 (noting that legitimate global governance requires revision of goals “through interaction with agents and organizations outside the institution.”)
\textsuperscript{263} John Ferejohn suggests as a result 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, \textit{supra} note 194, at 23
\textsuperscript{264} Id.
\textsuperscript{265} Richard B. Stewart, \textit{supra} note 259, at 68.
pressure. Transparency promotes “accountability directly by exposing administrative decisions and relevant documents to public and peer scrutiny.”

Lastly, civil society participation can improve reasoned decision making. Most domestic administrative systems require reasoned decision-making. The global setting needs reasoned decisions because national systems sometimes transplant globally developed norms without serious debate. Daniel Esty explains in the global context that:

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 decisionmaking 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 leads to better decisions and thus

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267 Kingsbury, Krisch, and Stewart, supra note 228, at 39.

268 Barr & Miller, supra note 15, at 20-21 (discussing Basel and noting that national enactment can be a mere formality). Kingsbury, Krisch, and Stewart, supra note 228, at 30 -33 where they discuss the domestic system as a check on the international system.

269 Esty, supra note 201, at 1529–30.

270 Kingsbury, Krisch, and Stewart, supra note 228, at 39.
improves output legitimacy criteria. It also demonstrates deliberative legitimacy.

The Costs of Participation

Greater participation can slow and even derail regulatory efforts.\textsuperscript{271} Offering the opportunity to participate takes time as does the need to respond to participants concerns.\textsuperscript{272} Participants, and particularly those that might be targeted by any regulatory action, might work to shift the forum of the negotiations to another more favorable forum.\textsuperscript{273} Participation may thwart negotiations altogether.\textsuperscript{274}

Greater participation might allow special interest to have undue influence on outcomes.\textsuperscript{275} Capture is likely where the benefits and costs are distributed so that majority interests are diffuse while the special interests are concentrated.\textsuperscript{276} One can imagine how the dangers of capture are magnified at the international level.\textsuperscript{277} This may be a particular problem in complex and technical fields which require

\begin{footnotesize}
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\item[271] Esty, supra note 201, at 1529-30.
\item[275] Esty, supra note 201, at 1528. See also, Abbott and Snidal, supra note 231, at 548-49 (noting the possibility of capture but also noting the chance of capture is reduced in some instances).
\item[277] Pierre-Hugues Verdier, \textit{Transnational Regulatory Networks and Their Limits}, 34 YALE J. INT’L L. 113, 170 (noting the more domestic autonomy regulators have “more likely they are to enhance international enforcement and harmonization of standards – but also to act in a way that reflect the self interest of regulators rather than aggregate welfare.”). As Jeffrey Atik notes capture is a particular danger in foreign relations “and this is especially true with respect to international trade policy.” Atik, supra note 9, at 455.
\end{enumerate}
\end{footnotesize}
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 that constrains the norm setters and access to them. 278 These actors include interest groups, business interests and civil society. 279 Among these groups in the international setting are those who have convinced their national governments to adopt their positions, and those who failed to convince their national governments to adopt their positions, as well as the officials of the national governments who may have been intimately involved in formulating the national position.280 From the first group’s perspective, less access at the international level might be better to safeguard their government’s adoption of their 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; i.e., working through national authorities in national administrative law systems.281 On the other hand some national systems fail to provide meaningful access to a range of constituents making global administrative law the only alternative.282

Transparency has its problems as well. Transparency can inhibit successful international negotiations which rely upon confidentiality and diplomatic discretion.283 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, it might still be excluded from important parts of the process.284 In international talks, much work happens during

279 Id. at 325.
280 Id.
281 See Barr & Miller, supra note 15, at 34 (discussing the role of national congressional oversight in the Basel process).
282 Id. at 43 (citing global administrative law as a “counterweight” to “weak domestic administrative law procedures”).
283 Stewart, supra note 53, at 68 (discussing “norms of confidentiality in negotiation”).
284 Barr & Miller, supra note 15, at 23.
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.

**Calibrating Participation during Regulation and Rescue**

Organizations 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 (in terms of participation, transparency, accountability and deliberation) given by civil society 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 G20 to only hear from bankers. Further, we should mindful that decisions made at the policy level will 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 during rescue, 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 candle. But we can at least identify some factors to consider.

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286 Esty, *supra* note 201, at 1521.
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 matters, both in terms of the value of the participation and whether it 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 which 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 of arrogance. Listening is crucial in a good working relationship.

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.” Arguably, consultations at the policy planning stage would be helpful in terms of 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. NGOs have a successful history of agenda setting, convincing “publics and

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288 Verdier, supra note 277, 141 (discussing the comment procedure for Basel II).
290 Id.
291 See e.g., Ahmed & Potter, supra note 222, at 48 (discussing the agenda setting roles of NGOs).
governments that a new way of viewing problems opens up opportunities for resolution of those problems.\textsuperscript{292}

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 G20 suggest that it might be time to envision financial regulation as integrated with and integral to every part of society.\textsuperscript{293} 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 G20 for example sets the agenda. It coordinates the activities of other organizations such as the Basel Committee, the IMF, World Bank and FSB. In fact it directs those organizations to accomplish task pursuant to certain timelines. The coordinating activities of the G20 suggest that as an agenda setting entity it really must respond or be open to civil society input, especially from advocates wishing to have their concerns placed on the agenda.

For example, one of the G20’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{294} It would seem particularly helpful to have civil society advocate’s 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 parts of civil society when the details of programs are discussed, for example in the

\textsuperscript{292} Shamima Ahmed & David M. Potter, NGOs in International Politics 48 (2006).

\textsuperscript{293} 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 Robert Howse, \textit{supra} note 147, at 1533.

\textsuperscript{294} The Pittsburgh Summit, \textit{supra} note 20; Communiqué From the Meeting of Finance Ministers and Central Bank Governors (April 23, 2010), \textit{available at} http://www.g20.org/Documents/201004_communique_WashingtonDC.pdf.
World Bank or at the OECD, but here it would be more useful to hear from experts.\footnote{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 Urban Roundtable for Mayors and Ministers: Cities and Green Growth, http://www.oecd.org/site/0,3407,en_21571361_45068056_1_1_1_1_1,00.html. See also Civil Society and the OECD, OECD Observer Policy Brief (November 2005).}

In the detailed rulemaking setting, experts have something to add. As discussed above, Both Basel and IOSCO have invited public comment only to hear basically from 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 organizations 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)\footnote{Zaring, \textit{supra} note 50, at 487-88.} 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.\footnote{Atik, \textit{supra} note 9, at 467.} While the WTO has invited 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.\footnote{\textsc{World Trade Organization, Understanding the WTO} 101 (2008).}

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 \textit{OECD Guidelines for Multinational}
Enterprises, Food and Agricultural Policy and Green Growth Work. It has also reached out to experts for its rule making activities. Recently, it sought public comments on its draft VAT/GST Guidelines dealing with customer location for identifying the jurisdiction of taxation.

In terms of monitoring component of pre crisis regulation, civil society likely would not have much to add. Monitoring requires both information and expertise. Monitors need to understand the data and all its implications. Even if members of civil society had the capacity to act as monitors, (for example if the experts wanted to help) it is unclear what value they could add.

At the resolution stage, regulators wind up the prior crisis and must look towards the future and 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 G20 to resolve the 2008 crisis. Among the work planned an assessment of whether “policies are collectively consistent with sustainable and balanced global growth”; capital and liquidity rules, a framework for addressing systemic risk, “and a framework for working out cross-border resolution issues.” These seem like just the type of issues where broader participation may enhance legitimacy. Again, this seems like policy setting at the macro level that will be imposed upon society at large.

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300 See OECD Center For Tax Policy & Admin., OECD releases draft Guidelines on the application of VAT/GST to the international trade in services and intangibles for public consultation, http://www.oecd.org/document/42/0,3343,en_2649_33739_44559914_1_1_1_1,00.htm.
302 IMF Survey Magazine, supra note 301.
Resolution also requires exit from the measures taken during the period of containment.\(^{303}\) Regulators need information in order to successfully manage exit. They need to avoid surprises and coordinate with each other.\(^{304}\) Regulators must focus during exit on preserving financial stability and a market based exit. Thus, regulators require financial information and coordination. 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. 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 United States for example the Treasury guaranteed payments to auto maker suppliers,\(^{305}\) the Federal Reserve provided funding to ease the purchase of Bear Sterns by JP Morgan.\(^{306}\) Participation on the national front may be warranted, but at least in the United States agencies are sometimes expected to act in emergencies when there may be little time for participation.\(^{307}\) Courts and the polling booths provide accountability.\(^{308}\)

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303. FSB exit, supra note 6.
304. Id.
308. Stewart, supra note 253, at 73 (discussing elections and judicial review); Kingsbury, Krisch, and Stewart, supra note 225, at 44 (discussing judicial review in the EU).
Moreover, during a crisis markets need swift action. Within little over a year the World Bank supplied over $89 billion to developing and middle income countries.\textsuperscript{309} Although the G20 does not set standards, its acts during crisis serve to instill confidence and stabilize the markets. The G20 acted quickly to provide greater oversights of the financial markets.\textsuperscript{310} It called upon the FSB to respond as soon as possible. As 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.\textsuperscript{311}

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 and when they do they could try to include civil society in developing their frameworks. The FSB for example monitors a host of regulatory efforts that are in part to provide for a sound financial system,\textsuperscript{312} but it also prepares

procedures for crisis resolution.\footnote{FINANCIAL STABILITY FORUM, FSF - PRINCIPLES FOR CROSS-BORDER COOPERATION ON CRISIS MANAGEMENT (April 2, 2009), http://www.financialstabilityboard.org/publications/r_0904c.pdf. (last visited July 27, 2010).} International rules may contain crisis by preventing protectionist practices. Thus, the WTO’s trading rules established prior to the crisis worked to monitor and constrain protectionist trade policies.\footnote{WTO, OECD, UNCTAD, REPORT ON G20 TRADE AND INVESTMENT MEASURES (Sept. 14, 2009), http://www.unctad.org/en/docs/wto_oecd_unctad2009_en.pdf (last visited July 27, 2010). Even still, there was a marked increase in such practices during the crisis. Chad P. Bown, Antidumping, Safeguards and Trade Remedies during the Crisis, Feb. 17, 2010, http://web.worldbank.org/WEBSITE/EXTERNAL/EXTRANATIONAL/EXTPREMEME/0,,contentMDK:22357994-pagePK:64159605-piPK:64157667-theSitePK:489961,00.html.} To the extent that the trading rules are established \textit{ex ante} it would seem appropriate to allow greater participation in their development,\footnote{The WTO trading rules have evolved through a series of rounds. See WTO, About the WTO, a Statement by the Director General, http://www.wto.org/english/trade/memb_gov/memb_rec/trek_e.htm 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, \textit{The Future Of The WTO: The Case For Institutional Reform}, 12 J. INT’L ECON. L. 803, 811-814 (2009). As a result rule development in the legislative sense is slow.} especially during a time of crisis they will need greater legitimacy in order to be politically acceptable.\footnote{As discussed above the level of participation of civil society in the development of the trading rules is limited for a number of reasons.}

Likewise, international insolvency regimes will play a part in containment and several institutions have grappled with cross border insolvency. These rules are developed pre crisis and should include civil society participation. Several groups have tried to construct cross border insolvency rules.\footnote{TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, \textit{Bankrupt: Global Lawmaking and the Systemic Financial Crisis} 73-76. (2009).} The G-7, G-22, along with the development banks, tried after the Asian Financial Crisis, the development and the OECD as well as UNCITRAL tried as well.\footnote{\textit{Id.}} Notably UNCITRAL has made great stride its Legislative Guide on Insolvency Law and in doing so has opened its proceedings to an array of experts and interested
entities included within civil society. These entities are expert entities and can contribute to developing the detailed rules. But there has been little input on the policy setting level from advocacy groups in this area.

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 greater attention should be paid to the idea of greater civil society participation in international financial institutions. But more is not always more, and participation can and should be calibrated. Consideration of various civil society organizations, what benefits and costs they bring and when, suggests than a nuanced approach to their participation would work best. This approach 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 should improve the legitimacy of these institutions which will be beneficial at all stages.


320 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, UNCITRAL, supra note 9.