THE DODD-FRANK WALL STREET REFORM ACT'S TURN TO INTERNATIONAL LAW

This panel was convened at 3:30 pm, Wednesday, April 9, by its moderator, Yesha Yadov of Vanderbilt Law School, who introduced the panelists: Michael Barr of the University of Michigan Law School; Christopher Brummer of Georgetown University Law Center; Jonathan Macey of Yale Law School; and David Zaring of the University of Pennsylvania's Wharton School.[*]

Global Administrative Law and the Post-Crisis Financial Order

By Michael S. Barr[†]

The global financial crisis caused widespread harm not just to the financial system, but also to millions of households and businesses, and to the global economy.[1] The crisis revealed substantive, fundamental weaknesses in global financial regulation, and raised serious questions about whether national regulators and the international financial regulatory system could ever be up to the task of overseeing global finance. The Bretton Woods institutions (the International Monetary Fund, the World Bank, and the World Trade Organization) were never really equipped to deal with the growing complexity, breadth, and size of the global financial system, and instead left rulemaking and supervision largely to the domestic arena. The cross-border rules that were developed—essentially by national regulators and the international standard-setting bodies that took root in this global institutional lacuna in the 1980s—proved woefully ineffective. Despite strategies to increase the accountability and legitimacy of these hybrid standard-setting bodies,[2] the rules failed substantively, and overwhelmingly. Global finance, and a ''soft-law'' architecture left unchecked by a decades-long regulatory race to the bottom, proved weak in the face of global financial institutions and crushed the real economy.

The failure of the pre-crisis regulatory architecture to manage the financial system at the global level raises two fundamental questions: First, how can we build an effective international financial architecture with more than one architect? And second, how can we foster a global regulatory architecture that is legitimate and accountable—one that reflects our most basic values?

The rubric of global administrative law (GAL) provides a useful framework for thinking about how to answer these questions. Specifically, it provides a way of thinking about how we might embed in the international regulatory architecture procedural values that are consistent with the normative justifications for this architecture.[3] At the most basic level, we want global institutions that are effective—meaning that they establish norms that are treated by national actors as obligation, that there are systems in place to monitor compliance

[*] Professors Brummer and Zaring did not submit remarks for the *Proceedings*.

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[1] My remarks on this panel are drawn from my article, *Who's in Charge of Global Finance?*, 45 Geo. J. Int'l L. 971 (2014).

[2] *See generally* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 Eur. J. Int'l L. 15 (2006).

[3] *See* Benedict Kingsburg et al., *The Emergence of Global Administrative Law*, Law & Contemp. Probs. (Summer/Autumn 2005).

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with these obligations, and that these obligations are enforced.[4] Effective global institutions will help produce rules and other mechanisms that work at a substantive level and that can prevent the significant harm the financial system can do to the real economy when it fails. We also need global institutions that are legitimate, in the sense that the decisionmaking criteria and processes they use are seen as normatively correct, and in the sense that the outcomes produced by these mechanisms respond substantively to the public's interests and values. Finally, we ought to demand accountability. At its most basic level, the international system requires accountability of its organs to national governments, but global administrative law suggests a deeper commitment to public accountability, for example, through transparency, public engagement in decisionmaking, and initiatives to embed global rule-making in national processes of public accountability, such as notice and comment rule-making.

There is important interplay between these values. Even where an institution lacks formal accountability to nations through treaty authorization, for instance, robust GAL mechanisms (for example, strong forms of due process and review, or high levels of responsiveness to notice-and-comment rule-making) nevertheless might foster a sense of legitimacy, increase the substantive efficacy of outputs, and encourage adoption by state or private-sector actors.[5] Conversely, an organization might represent an unusually broad set of interests but have difficulty producing effective rules widely adopted by national actors. An array of subsidiary values, such as transparency, can also contribute to institutional legitimacy and accountability.[6] On an institution-by-institution basis, the configuration of these values—the degree to which each value is embedded in the procedures and underlying structure of an international organization—is often highly variable, particularly when measured against institutional mission. Assessing the extent to which the international financial regulatory architecture ''embodies'' a set of democratic values thus requires an understanding of what the different institutional actors are designed to do, the sources of their authority, how they might relate to one another, and the type of lawmaking in which they are engaged.

My article, *Who's in Charge of Global Finance?,* traces the evolution of the international financial regulatory architecture and evaluates each phase of this evolution in terms of institutional efficacy, legitimacy, and accountability. It begins with a brief analysis of two key pre-crisis phases in the development of our current global financial architecture, the birth of the Bretton Woods institutions and the rise of the so-called ''networks''—the international standard-setting bodies, such as the Basel Committee on Banking Supervision and International Organization of Securities Commissions that first began to develop cross-border rules in the 1980s.

In the third phase—the emerging post-crisis regulatory framework—contradictory trends have emerged: the international financial order is more political and more inclusive, and at the same time, its norms have hardened. Although this hardening means that minimum standards have become more difficult to avoid, in some sense races to the top have replaced races to the bottom (at least for the moment), and nations have reasserted their authority to raise standards unilaterally within their own countries and to apply—aggressively—these standards extraterritorially. In this third phase, the Group of Twenty (G-20) nations take

[4] *See* W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, *in* 1 Essays in Honour of Judge Taslim Olawale Elias 135, 135 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).

[5] Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 Int'l Orgs. L. Rev. 319, 354 (2009).

[6] Megan Donaldson & Benedict Kingsbury, *The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications*, 9 Ann. Rev. L. & Soc. Sci. 119, 121 (2013).

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center stage as the world's economic and financial decisionmakers, and the Financial Stability Board becomes the platform through which the macro-prudential blueprints of the G-20 are implemented, in part by directing and coordinating the work of the standard-setting bodies. My article then explores the interactions between these bodies and the older Bretton Woods and standard-setting institutions. Finally, the article assesses the merits of the current regulatory order and identifies key reforms aimed at strengthening the efficacy, legitimacy, and accountability of this new system before concluding with thoughts about the prospect for—and the necessity of—continued reforms over the next decade.

On a substantive level, global reform efforts to date have made the financial system safer, perhaps significantly so, but there remain real questions about whether the financial system is safe enough. Much of the reform agenda remains a work in progress, from capital standards to regulation of derivatives and other financial markets, to the mechanisms necessary to wind down immense cross-border firms that get into financial distress. Amnesia about the causes and consequences of the breakdown of the financial system may slow or even reverse reforms taken to date, just when we need to be pushing harder to complete the task. The next misunderstood financial innovation—asset boom, increase in leverage, or explosion in hot money—may find the world still globally mis-coordinated and unprepared. That is why the stakes are so high for getting the international financial architecture right.

Ultimately, the strength of these reforms cannot be judged absent the next crisis. But if the post-crisis reforms are to endure, the system must shift from the task of emergency response to the project of governance, a project that will require more institutional clarity and more sensitivity to the concerns of legitimacy and accountability, both globally and nationally. Conceptually ''easy'' answers—a treaty-based World Financial Organization, centralized adjudication, a global financial supervisor, and resolution authority, to name a few—are neither politically feasible nor normatively desirable. Instead, we are left with a messier, more iterative, less satisfying, but more realistic task: to continue to make progress on making the global financial system safer, fairer, and, one would hope, more focused on meeting the pressing needs of households and business in the real economy.

Cross-Border Insolvencies of Financial Institutions: An Obtainable Goal? / A Goal Worth Obtaining?

By Jonathan Macey[*]

The development of a harmonized system for resolving the failures of large, international financial institutions is considered by academics and policy-makers to be critical to reducing systemic risk and reducing the probability that the insolvency of a major bank will lead to a global economic collapse. Reaching agreement on how to develop this harmonized system for financial institutions with significant transnational assets and liabilities has proved elusive thus far. Commentators in favor of a more international and less parochial approach to resolving bank failures can point to a number of extremely high-profile events that demonstrate the manifest unfairness of resolving bank failures on an individual basis. The bankruptcies of Lehman Brothers and the Bank of Credit and Commerce International (BCCI) are two of many such examples.

In these remarks I will make two principal observations. First, both the United States and creditors of failed banks that settle international transactions in the United States unequally

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