THE LEGAL RESPONSE TO THE NEXT FINANCIAL CRISIS

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INTRODUCTION

Financial crises are now cross-border affairs, and yet many feel that law, and especially international law, does little to either constrain or enable the response to them.[1] This essay identifies the ways that law and regulation will affect the response to the next financial crisis, and in so doing, makes a case for law as a constraint on crisis management. The law that most obviously constrains will be domestic, rather than international—and in that sense the critics are right to suspect that traditional international law will not govern the response to what will almost certainly be an international crisis. Instead, it is local regulation, as opposed to treaty or even statute, that will form much of the underpinnings of that response. But that domestic regulation will be created and applied as the result of an international process, meaning that if the law comes from home, the governance will not.

The next crisis response will be facilitated by a track record of international coordination designed to minimize the impact of shocks to the financial system. And the precedents created by the response to the last crisis, such as central banks lending to one another, offer clues to how the next crisis will be addressed.[2] None of this means that law and tradition will supplant politics and discretion when the next crisis comes. In crisis response, as opposed to crisis preparation, international law and domestic administrative law have shown their limits; the difficulties of either regime to grapple with so-called

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1 *See* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 465 (2009); Narissa Lyngen & Glaton Simmons, *The Financial Stability Board: The New Face of International Financial Regulation*, 54 HARV. INT'L L.J. i, iii, vii–ix (2013).

2 *See e.g.*, FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 275 (2011); Dietrich Domanski, Richhild Moessner & William Nelson, *Central Banks as Lenders of Last Resort: Experiences During the 2007-2010 Crisis and Lessons for the Future* 12 (Div. of Res. & Statistics & Div. of Monetary Affairs, Fed. Reserve Bd., Fin. & Econ. Discussion Series 2014-110, 2014) (describing the Federal Reserve's practice of establishing "dollar liquidity swap lines with . . . a number of foreign central banks").

cross-border resolution authority—the power to quickly fail and recapitalize large, interconnected financial institutions—exemplify this.[3]

But that does not mean that crisis response is orthogonal to the project of international financial regulation. Financial crises are one of the rule of law's greatest tests.[4] Understanding and assessing how international financial regulation—a unique creature of international governance—will respond to catastrophe helps us to take its measure.

Classical international law focused on peace and security, not on the economic well-being of states.[5] The more modern version includes a share of treaties designed to promote economic prosperity—the all-inclusive World Trade Organization is the canonical example,[6] while the welter of bilateral and regional investment protection regimes are the growth agents.[7] Both trade and investment treaties ordinarily seek to take matters that used to be left to diplomats and delegate the resolution of them to tribunals.[8] They exemplify the turn to legalization in international economic law.[9]

But there is no financial crisis response treaty, or financial regulation treaty, of almost any sort.[10] Many believe that there could not be one, or that if there was one, that it would be ignored in a crunch.[11] International relations scholars argue that in a crisis, all bets for legal compliance are off, as nations either abandon their treaty obligations or cooperate in a way that can only be understood to be a matter of pure politics.[12]

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3 *See* INT'L MONETARY FUND, CROSS-BORDER BANK RESOLUTION: RECENT DEVELOPMENTS 1–2 (2014).

4 *Cf.* Stephen N. Zack, *Financial Crisis and the Rule of Law*, 51 JUDGES J. 14, 14–15 (2012).

5 *See* Ian Clark & Iver B. Neumann, *Conclusion*, *in* CLASSICAL THEORIES OF INTERNATIONAL RELATIONS 256, 259 (Ian Clark & Iver B. Neumann eds., 1996); Marc Weller, *Introduction: International Law and the Problem of War*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 3, 8 (Mark Weller et al. eds., 2015); David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius'* De Jure Belli ac Pacis, 10 EMORY INT'L L. REV. 1, 10 (1996).

6 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154. *See also* U.N. Charter art. 1, ¶ 3.

7 *See, e.g.*, *Trade & Investment Framework Agreements*, EXEC. OFF. OF THE PRESIDENT, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/trade-investment-framework-agreements (last visited Nov. 13, 2016) (listing dozens of bilateral and multilateral trade and investment agreements to which the U.S. is a party).

8 *See* Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUDIES Q. 1, 3–5 (2010); *see also Trade & Investment Framework Agreements*, *supra* note 7.

9 *See, e.g.*, Axel Berger, *The Politics of China's Investment Treaty-Making Program*, *in* THE POLITICS OF INTERNATIONAL ECONOMIC LAW 162, 165 (Tomer Broude et al. eds., 2011).

10 Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 CHI. J. INT'L L. 243, 245–46 (2010).

11 *Id.* at 246.

12 John J. Mearsheimer, *A Realist Reply*, 20 INT'L SEC. 82, 82 (1995) ("Realists . . . believe that institutions cannot get states to stop behaving as short-term power maximizers. . . . [I]nstitutional out-

Domestic students of regulation are also unconvinced that the response to a cross-border financial crisis is fit to be subjected to the rule of law.[13] As a matter of foreign relations, Eric Posner and Adrian Vermeule believe that the discretion necessary to respond to crises requires a relatively untrammeled executive branch.[14] Scholars in this camp predict that it will be impossible to rule out bailouts of banks during the next financial crisis, despite legal efforts to do precisely that.[15] They argue that trying to institutionalize an agency, or a council of agencies, to protect America's "financial stability" and coordinate international efforts to assure the same on a global level would reify the exercise of unfettered discretion, rather than constrained administrative action.[16]

Efforts to legally respond to crises have not enjoyed much popularity, or clear success.[17] The European Union responded to the financial crisis by trying to create strong continental-level financial supervisors, but this has created controversy among member states unhappy with this sort of federalization.[18] Moreover, European institutions have fumbled their way through

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comes invariably reflect the balance of power. Institutions, realists maintain, do not have significant independent effects on state behavior."). *See also* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 4–14 (4th ed. 1967) (describing the tenets of realism).

13 David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 701–02 (2012).

14 Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1680–81 (2009) ("The pattern of a strong executive with primacy during financial crises was established [during Roosevelt's New Deal response to the Great Depression], and it has lasted to this day. It is the normal mode of crisis governance in the administrative state.").

15 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (stating the purpose of the act is "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' [and] to protect the American taxpayer by ending bailouts . . . ."). But as Peter Conti-Brown has put it, "Dodd-Frank seeks to end government bailouts—forever. But this promise is implausible objectively, inaccurate subjectively, and, regardless, is undesirable as a matter of policy." Peter Conti-Brown, *Elective Shareholder Liability*, 64 STAN. L. REV. 409, 412 (2012) (footnote omitted).

16 Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO ST. L. J. 1087, 1089–91 (2015).

17 *See, e.g.*, Douglas W. Arner, *The Politics of International Financial Law and the Global Financial Crisis*, *in* THE POLITICS OF INTERNATIONAL ECONOMIC LAW 236, 254 (Tomer Broude et al. eds., 2011) (noting great attention on the "general lack of tangible success"); *The Cyprus Bail-Out: Unfair, Short-Sighted and Self-Defeating*, THE ECONOMIST, Mar. 16, 2013 [hereinafter *Cyprus Bail-Out*] (explaining that the euro zone "continues to equate bank bail-outs with sovereign bail-outs" and that bail-outs "move Europe further away from the institutional reforms . . . needed to resolve the crisis once and for all").

18 *See* Clyde Stoltenberg et. al., *The Past Decade of Regulatory Change in the U.S. and EU Capital Market Regimes: An Evolution from National Interests Toward International Harmonization with Emerging G-20 Leadership*, 29 BERKELEY J. INT'L L. 577, 643–44 (2011) (suggesting that financial reform raised "the specter of long-held underlying fears of EU Member States that the central European body will infringe on their carefully guarded national sovereignty"); *Cyprus Bail-out*, *supra* note 17. For a nice overview of European fiscal reform, see Derek Takehara, Comment, *Financial Reform in the European*

subsequent banking-related crises in Cyprus[19] and Greece, despite the legal reforms.[20]

All of this raises the question of how these institutions will respond to the next global crisis. Is there any hope for legal constraint in what will surely be an international effort requiring coordination between domestic regulators and politicians in a tense, fast-moving situation?

No one should doubt the importance of discretion and political relationships between powerful economies in a crisis. Much of the governing done during the next financial crisis will be actors making political decisions that will either be within their legal discretion or that, at least, will not be challenged during the crisis by those so worried about the threat to the economy as to be cowed from standing up for procedural regularity.

Underneath this exercise of discretion, however, lies an increasingly robust set of legal and regulatory relationships that take some crisis response options off the table—while creating frameworks for others—and a predictable and familiar system around which businesses and policymakers can plan. The question arises whether this policy coordination is "law," defined in any way you wish. In my view, you could call it law, law-ish, governance, soft law, or whatever you like, but given that it involves regulators regulating, and rules being issued through an administrative procedure, there is little point in deeming it not-law or ignoring it, even while there should be no doubt that it is not the same thing as binding international law.

Governments will attempt to forestall the next crisis by regulating their financial entities in the same way, and by reviewing one another's work to ensure consistency—this is the most recognizably law-like aspect of the response to the financial crisis.[21] When the next crisis occurs, independent central banks will stand ready to lend to one another, while finance ministers and heads of states will collaborate through institutions that can facilitate cooperative responses to macroeconomic shocks.[22] Although I differ, methodologically, from political science's constructivists and sociology's contextualists, I, like them, "foreground the role of institutions," as Victoria Nourse and

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Union: Establishing the Common Technical Rulebook, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 531, 533 (2013) ("The regulatory overhaul in the European Union provides an illustrative case study of post-crisis financial reform.").

19 *See Cyprus Bail-Out*, *supra* note 17.

20 As Anna Gelpern has put it, there are "firm commitments against fiscal transfers, such as Europe's infamous 'no-bailout' clause. Such blunt commitment devices are tested in crisis. . . . EU treaties have been creatively interpreted to permit bilateral and regional bailout facilities for Greece, Portugal, and Ireland." Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 918–19 (2012) (footnote omitted). *See also Cyprus Bail-Out*, *supra* note 17 (noting the European interventions in Greece and Cyprus).

21 *Cf.* Colleen Baker, *The Federal Reserve's Use of International Swap Lines*, 55 ARIZ. L. REV. 603, 631 (2013).

22 *See id.*; Colin Bradford et al., *Global Governance Breakthrough: The G20 Summit and the Future Agenda*, BROOKINGS INST., POLICY BRIEF #168, at 3 (Dec. 2008).

Greg Shaffer have put it, in my account of what matters in financial regulation.[23] The prominence of reinvigorated institutions like the G-20 and arrangements like central bank swap lines, along with (maybe) cooperation and coordination in the resolution of large, cross-border financial institutions, will comprise much of the institutional response to the next crisis.

There are gaps in this structure—a multinational financial institution will collapse in the future, and countries and their regulators may disagree how they will handle the corresponding race for the assets of the firm.[24] Moreover, power in this system is distributed extremely unevenly.[25] Nonetheless, as a model of global governance, this system can only be deemed an accomplishment, as it has created process and institutions over what was formerly pure discretion and, at worst, panic.

This essay begins with an overview of the current global financial regulatory framework. Second, this essay discusses how this framework will respond to the next financial crisis. Finally, this essay describes regulators' response to the failure of cross-border regulation in the last crisis, which illustrates the new paradigm of global financial regulation.

I. THE FINANCIAL REGULATORY ARCHITECTURE SO FAR

Much of what has happened in cooperative cross-border financial regulation is a matter not of crisis response, but rather of crisis prevention.[26] The next financial crisis will benefit from a procedurally regular global architecture designed to deal with the prospect of financial crisis and contagion.[27] The *response* of this architecture to the next financial crisis lies almost entirely in the *preparation* for it; it is designed to "harden the target." Done right, the cooperative preparations of regulators will make financial institutions resilient to shocks, and, by creating a common regulatory approach, will make it easier for any domestic regulator of a cross-border multinational financial institution to understand that institution.

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23 Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61, 81 (2009).

24 *See* Simon Johnson, *The Myth of Resolution Authority,* N.Y. TIMES (Mar. 31, 2011), http://economix.blogs.nytimes.com/2011/03/31/the-myth-of-resolution-authority/.

25 *Cf.* Andrew F. Cooper, *G20 Membership and Process: The Unspoken Issues*, CTR. FOR INT'L GOVERNANCE INNOVATION (June 7, 2010), https://www.cigionline.org/publications/g20-membership-and-process-unspoken-issues.

26 *See* Emilios Avgouleas, *Rationales and Designs to Implement an Institutional Big Bang in the Governance of Global Finance*, 36 SEATTLE U. L. REV. 321, 345–50 (2013); Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 55, 64 (2011).

27 *See* Avgouleas, *supra* note 26, at 378; Pan, *supra* note 10, at 254–58.

This crisis preparation endeavor covers much of what financial regulators have done with regard to their international counterparts.[28] It is an exceedingly powerful example of the possibilities of international cooperation. The remainder of this section sketches out how this architecture works.

Much of what has happened in international financial regulation began as an effort to solve problems of coordination that appeared to be intractable under formal international law—hence the advent of the network-of-regulators formed during the 1970s, although its antecedents in financial oversight reach earlier.[29] Today, the networked institutions of international financial regulation continue to promulgate a dizzying array of standards, best practices, principles, and rules.[30] But intertwined with these substantive efforts to coordinate the global regulation of finance has been a developing agenda to make improvements in the procedures followed in international financial regulation.[31] After becoming established as the principal mechanism for coordinating global financial regulation, reform of international financial regulation focused on imposing procedural regularity and political oversight on a process that did not previously feature either.[32]

This evolution, both procedural and substantive, makes for a compelling story about a global regulatory enterprise with few peers. The old efforts to deal with the cross-border externalities of finance, which were limited in their ambitions and range, have been cast aside.[33] In their place, a new order is emerging. That order is hierarchical, procedurally regular, and politically supervised. Elsewhere, I have traced the emergence of a legal-ish system of

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28 Pan, *supra* note 10, at 254 (explaining that "transgovernmental networks" are "the links between sub-state actors, such as regulatory agencies, that 'allow domestic officials to interact with their foreign counterparts directly, without much supervision by foreign offices or senior executive branch officials . . . .'" (quoting Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI. 211, 215 (2006))).

29 The Basel Committee on Banking Supervision was founded in 1974, and was a precursor to what is now known as the International Organization of Securities Commissions (IOSCO). *See* Pan, *supra* note 10, at 255–56. *See also About IOSCO*, IOSOC, http://www.iosco.org/about/?subsection=about_iosco (last visited Oct. 14, 2016); *IOSCO Membership*, IOSCO, http://www.iosco.org/about/_display_members.cfm?printerFormat=true (last visited Oct. 22, 2016); *About the Basel Committee*, BANK FOR INT'L SETTLEMENTS, http://www.bis.org/bcbs/about.htm (last updated Sept. 23, 2016) (identifying the chairs and founding date of the Basel Committee); *Basel Committee Membership*, BANK FOR INT'L SETTLEMENTS, http://www.bis.org/bcbs/membership.htm (last visited Oct. 14, 2016).

30 *See* Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 GEO. L.J. 257, 260 (2011).

31 *See* Pan, *supra* note 10, at 256 ("Despite its lack of formal legal powers, Basel has been effective in setting forth principles and promulgating standards that have been widely accepted and implemented by bank regulators around the world, including regulators of countries that are not members of Basel.").

32 *See* Avgouleas, *supra* note 26, at 368; Pan, *supra* note 10, at 283.

33 David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 693–96 (2012) [hereinafter Zaring, *Finding Legal Principle*].

oversight of the global financial system, which looks to be one of the principal accomplishments of international governance of the modern era.[34] It is one that has developed through regulation, rather than through more traditional mechanisms of public international law.[35] Specifically, it has developed through regulatory cooperation. But while that term—regulatory cooperation—suggests a negotiated sort of informality that might be easily dismissed by lawyers as insufficiently law-like, the way the cooperation has evolved suggests something quite different.

Political supervision, increasingly regularized output, and bureaucratic order are, after all, familiar phenomena to students of the modern state. They are the fundaments of administrative law.[36] International financial regulation is looking increasingly like an administrative agency stretched into a global multilateral context.[37]

This "agencification" of international financial regulation offers a regulatory alternative to traditional public international law.[38] It creates a two-step process for legal obligation. The international context of financial regulation, where the policy is made, is the first step of the process.[39] It creates no binding obligations.[40] Those obligations come, if at all, after the international process has ended. In the second step, financial regulators return to their countries to go through the processes that make domestic administrative rules binding law.[41]

But this hardly makes the international part of international financial regulation superfluous. In fact, the first step in international financial regulation is the particularly interesting one. It is the source of the principles of international financial regulation. It is growing and developing in its own right. And it has added hierarchy, structure, and distributional consequence since the financial crisis.[42]

Post-crisis financial regulation has resulted in institutionalization along hierarchical lines, with a political overseer, a regulatory supervisor, and a

34 *Id.* at 693–700.

35 *Id.* at 688–89.

36 *Cf.* Avgouleas, *supra* note 26, at 325; Brummer, *supra* note 30, at 317; Verdier, *supra* note 26, at 61.

37 Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 17 (2006) (stating that Basel is inherently a structured global administrative legal process).

38 *Cf.* Brummer, *supra* note 30, at 274 (noting that regulators, not politicians or diplomats, are involved in the negotiations over financial authority).

39 *See* Pan, *supra* note 10, at 256 (observing that both Basel and IOSCO have "been successful in promulgating standards that have found wide acceptance among national regulators").

40 *Id.*

41 *See* Barr & Miller, *supra* note 37, at 29 (discussing U.S. rulemaking subsequent to the Basel Agreement). *See also* 12 U.S.C. § 3901(b) (2012) ("The Federal banking agencies shall consult with the banking supervisory authorities of other countries to reach understandings aimed at achieving the adoption of effective and consistent supervisory policies and practices with respect to international lending.").

42 *See generally* Pan, *supra* note 10 (discussing the international financial architecture); *see also* Brummer, *supra* note 30, at 273–84 (discussing some post 2008 crisis changes to financial regulations).

group of task-specific but increasingly coordinated regulatory networks making the rules for banks, capital markets participants, insurers, and other financial intermediaries.[43] What these regulators do is both procedurally regular and increasingly explicable with resort to a few organizing principles that mimic the fundamental principles espoused by hard law international organizations.[44]

The transformation of international financial regulation has not only been a matter of imposing procedural regularity, bureaucratization, and a degree of political oversight. It is also an increasingly tractable and definable enterprise, at least if the definition is done through a legal lens.

In conjunction with this post-crisis reform, there is an identifiable commitment to a variety of legal principles that undergird the particular regulatory decisions made in international financial regulation.[45] At least six such principles can be identified in the organization and institutionalization of the post-crisis financial regulatory settlement; although many of these principles are rooted in the cooperation extant before the financial crisis, it is the flurry of activity after the crisis that has brought them to the fore.

The legal principles include a commitment to *national treatment*, meaning that domestic and foreign financial intermediaries should be subject to roughly similar rules, and a *most favored nation* principle identifiable through the consensus practices of the organizations.[46] These principles are institutionalized through *rulemaking*, rather than adjudication—international financial regulation sets its standards in advance and without the assistance of a tribunal.[47] Those standards are administered with adherence to a principle of *subsidiarity,* whereby each agency engaged in the global financial regulatory architecture is charged with implementing the rules and standards agreed to internationally in its own domestic jurisdiction without international direction.[48] That subsidiarity is paired with a *peer review* process meant to check the implementation decisions of member agencies in lieu of a third-party dispute resolution such as that offered by the international tribunal.[49] This, paired with the sort of threats that small, familiar communities can impose on one another—shunning, and ostracism in the manner of the informal

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43 *See* Avgouleas, *supra* note 26, at 325; Pan, *supra* note 10, at 248 (providing a chart of the framework of international regulators).

44 David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 572–80 (2005).

45 Zaring, *Finding Legal Principle*, *supra* note 33, at 685–86.

46 *Id.* at 704–07.

47 *Id.* at 707–09.

48 *Id.* at 709–10.

49 *Id.* at 711–13.

order developed by ranchers in Shasta County, among other things—is all the enforcement contemplated by the system.[50]

All of this evinces an approach that prefers the commitment of the institutional form of the *network* over all others, a final, discernible legal principle that governs and characterizes international financial regulation. Networks are comprised of agencies, are not disciplined or authorized by treaties, and meet informally and regularly to handle the problems posed by globalization to their task-specific issue areas.[51] But they are not creatures of formal public international law. Any effort to create a more formal treaty-based organization to ensure that financial regulation is done globally and consistently has so far been eschewed in favor of the increasingly elaborate network.[52] Global financial regulation, while idiosyncratic, has become a form of the rule of law. The problem for lawyers—and this is a problem that has long characterized all sorts of international law—is that the rule of law embodied by global financial regulation has few of the formal characteristics of the rule of domestic law, ranging from promulgation to enforcement.

II. THE NEXT FINANCIAL CRISIS

If we know anything about global financial crises, we have learned that they are ubiquitous. Since the end of the Cold War, financial crises with cross-border implications have broken out in Mexico,[53] East Asia,[54] the United States,[55] and Europe.[56] And, of course, over the same period, multinational banks have collapsed as well, many with knock-on effects, ranging from the spectacularly corrupt Bank of Credit and Commerce International (BCCI), which operated in 78 countries at the time of its 1992 collapse,[57] to

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50 ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 60–62 (1991) (discussing the way that Shasta County ranchers resolve disputes with one another without resorting to lawsuits).

51 Zaring, *Finding Legal Principle*, *supra* note 33, at 713–14.

52 *Id.* at 688–89.

53 *E.g.*, *Mexico's Self-Inflicted Peso Crisis*, CHI. TRIB., (Dec. 24, 1994), http://articles.chicagotribune.com/1994-12-24/news/9412240014_1_chiapas-rebellion-zedillo-government-free-trade.

54 *E.g.*, Jonathan Fuerbringer, *How Asian Currencies Tumbled So Quickly,* N.Y. TIMES (Dec. 10, 1997), http://partners.nytimes.com/library/review/archive/1210asia-currency.html; Richard W. Stevenson & David E. Sanger, *Asian Crisis Could Wreak Havoc on Balance of Trade*, N.Y. TIMES (Dec. 20, 1997), http://partners.nytimes.com/library/financial/122097asia-us-trade.html.

55 *E.g.*, Davidoff & Zaring, *supra* note 1, at 464–65.

56 *E.g.*, Lee C. Buchheit & G. Mitu Gulati, *How to Restructure Greek Debt* 1–2 (Duke Law Working Papers, Working Paper No. 47, 2010), http://ssrn.com/abstract=1603304; Anna Gelpern & Mitu Gulati, *Sovereign Snake Oil* 9 (Am. Univ. Wash. Coll. of Law, Working Paper No. 2011-05, 2011), http://ssrn.com/abstract=1732650.

57 Angelos Kanas, *Pure Contagion Effects in International Banking: The Case of BCCI's Failure*, 8 J. APPLIED ECON. 101, 102 (2005).

2014's Banco Espirito Santo, a nominally Eurozone bank brought low by its Angolan credit practices.[58]

For policymakers, then, the approach to the next financial crisis will be an exercise in damage minimization rather than in absolute prevention. The damage minimization will be institutionalized in two ways.

First, the cross-border crisis response—the actions governments will take once it becomes apparent that the global economy is reeling—will be derived from relationships built by the regularized interaction of heads of state, central bankers, and finance ministers through the G-20.[59] As I have argued elsewhere, the G-20 has provided the political oversight over the emerging system of financial regulation, and so the immediate response to the next crisis will be one built out of political agreement (or not).[60]

Second, the pre-crisis resilience of the financial system that will minimize the damage inflicted by the next crisis will be built by institutionalization of regulatory cooperation, an institutionalization discussed in Part I. I posit that one can think of this as a form of international administration, a legal-ish structure meant to do the sort of work that public international law does: create a structure that can facilitate international cooperation and minimize conflict and beggar-thy-neighbor policymaking.

A. *Discretion in Response: The G-20 and Central Banks*

The cross-border tools of crisis response and minimization feature diplomacy and central-bank-to-central-bank lending. Neither of these mechanisms of response is particularly constrained by law or the regulatory alternative to traditional international law outlined in Part I of this paper, but they are increasingly institutionalized practices.

1. The G-20

During the last crisis, some of the crisis response was hashed out at G-20 summits, at which heads of state and finance ministers worked to create mechanisms that would support each other.[61] At the 2009 London summit, for example, the G-20 pledged funds to the IMF and the regional development banks to support countries that needed access to funds, and also made

58 Frances Coppola, *Banco Espírito Santo: The Angolan Story,* FORBES (Aug. 9, 2014), http://www.forbes.com/sites/francescoppola/2014/08/09/banco-espirito-santo-the-angolan-story/.

59 *See, e.g.*, FIN. STABILITY BD., IMPLEMENTATION AND EFFECTS OF THE G20 FINANCIAL REGULATORY REFORMS, 17–18 (Aug., 2016), http://www.g20.org/English/Documents/Current/201609/P020160914403801355525.pdf.

60 David Zaring, *Legal Obligation in International Law and International Finance*, 48 CORNELL INT'L L.J. 175, 180 n.18 (2015).

61 Bradford et al., *supra* note 22, at 2.

the sorts of important-sounding statements meant to reassure markets that the leaders were, in fact, on the job.[62] These actions by the modern-day Concert of Europe—which the G-20 essentially is—constitute examples of international cooperation untrammeled by either law or regulation.[63] Treaties are not negotiated at the G-20, and the commitments tend to veer towards the immediate rather than the lasting—as we have seen, the G-20 itself is a political institution at the head of an increasingly bureaucratic cross-border apparatus.[64] A response to the next financial crisis worked out by the G-20 itself, without the assistance of the Financial Stability Board (FSB) and other networks of financial regulators, will be the work of politicians.

The G-20 has "begun to take shape as a global 'steering committee,'" and has also settled into a relatively predictable routine for developing and following up on its agenda.[65] G-20 meetings begin with an outline, rooted in the communique issued at the conclusion of the last meeting.[66] At pre-meetings within the finance ministries, "sherpas" facilitate the completion of much of the G-20 agenda before heads of state even meet.[67] The heads of state then meet, assuring observers and themselves that the prior work was satisfactory.[68] The meeting concludes with a carefully negotiated and drafted communique, which sets the agenda for future meetings and reports on the progress made at the current meeting.[69]

For example, the communique issued at the conclusion of the 2015 G-20 meeting in Ankara, Turkey, included both marching orders and encouragement to regulators engaged in regulatory cooperation.[70] The communique "welcome[d]" the work done by regulators on developing "rigorous and comprehensive quantitative impact assessments on a total-loss-absorbing-capacity standard (TLAC) for global systemically important banks" and "on criteria for identifying simple, transparent and comparable securitizations."[71] The communique "look[ed] forward" to

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62 G-20, Leaders Statement, London Summit (April 2, 2009), https://www.imf.org/external/np/sec/pr/2009/pdf/G-20_040209.pdf.

63 David Zaring, *International Institutional Performance in Crisis,* 10 CHI. J. INT'L. L. 475, 477 (2010) ("[T]he G20 is not a legal or technocratic institution at all; it is a modern-day Concert of Europe.").

64 Daniel D. Bradlow, *A Framework for Assessing Global Economic Governance*, 54 B.C. INT'L & COMP. L. REV. 971, 979 (2013).

65 Cooper, *supra* note 25.

66 *See* Bradford et al., *supra* note 22, at 2.

67 *See* Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT'L. L. 491, 526–27 (2012); Zaring, *supra* note 63, at 497.

68 Zaring, *supra* note 63, at 497.

69 *See* Bradford et al., *supra* note 22, at 2–3.

70 G-20 Finance Ministers and Central Bank Governors Meeting, *Communiqué* 5–6 (Ankara, Turkey, Sept. 4-5, 2015), https://G-20.org/wp-content/uploads/2015/09/September-FMCBG-Communique.pdf.

71 *Id.* at 2.

> robust higher loss absorbency requirements for global systemically important insurers by the Antalya Summit, and completion of the previously agreed work on the extension of the contractual recognition of temporary stays on early termination rights for OTC derivatives contracts to include other instruments and firms, excessive variability in risk-weighted asset calculations for bank capital ratios and implementation of the G-20 shadow banking roadmap.[72]

This sort of chivvying along of the international regulatory process, by recording accomplishments and setting forth an agenda, is one of the functions of the G-20. Its regular presiding over the process is also meant to create the sort of regular contact necessary to coordinate the political decisions during the next crisis.[73]

Of course, the G-20 is not without its problems. The prospect of economic governance by a minority of the world's nation states strikes some as unappealing,[74] though the G-20 includes most of the largest economies and most populous countries on the planet.[75] However, Europe is overrepresented while African and other emerging countries are underrepresented.[76] Some suspect that a small number of the members wield significant power in decisionmaking, creating even greater representation problems.[77] Indeed, the very locations of the G-20 summits are selected by only eight of the members.[78]

Moreover, the G-20 has been active in financial crisis response, but sometimes its members have not practiced close coordination when those crises arise.[79] After both the 1997–98 Asian financial crisis and the 2007–08 financial crisis, the G-20 met as its membership was crafting various individual responses to the problem, a dynamic that has been described as "together alone."[80] In the wake of crises, moreover, the cooperation has begun actively, but has proven difficult to sustain as the crisis recedes; the G-20 has been

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72 *Id.*

73 *See* Manmohan Agarwal, *Limits and Possibilities: What to Expect From the G20*, CTR. FOR INT'L GOVERNANCE INNOVATION (June 18, 2010), https://www.cigionline.org/publications/limits-and-possibilities-what-expect-g20.

74 Rohinton P. Medhora, *Smaller Developing Countries and the G20: Ensuring Their Voices Are Heard*, CTR. FOR INT'L GOVERNANCE INNOVATION (May 14, 2010), https://www.cigionline.org/publications/smaller-developing-countries-and-g20-ensuring-their-voices-are-heard.

75 *See* Jamil Mustafa, *What is the G20 and How Does it Work?*, TELEGRAPH (Sept. 3, 2016), http://www.telegraph.co.uk/business/0/what-is-the-g20-and-how-does-it-work/.

76 Cooper, *supra* note 25.

77 *Id.* (noting the influence of the G-8 members on the G-20).

78 *Id.* (observing that the G-8 selects summit locations).

79 *See, e.g.*, Jorge Braga De Macedo, *Peer Pressure to Meet G20 Commitments: A Promising Innovation*?, CTR. FOR INT'L GOVERNANCE INNOVATION (June 23, 2010), https://www.cigionline.org/publications/2010/6/peer-pressure-meet-G-20-commitments-promising-innovation.

80 *Id.*

institutionalized, to be sure, but today it meets less often than it did during the heart of the financial downturn.[81]

2. Central Bank Swaps

By the same token, the efforts of finance ministers and central bankers to coordinate their response to financial crises are also examples of cooperation unconstrained by law. During the last financial crisis, central bankers smoothly extended loans and supplied plenty of stable currencies to one another.[82] These transactions are known as currency swaps, and agreements to commit to a number of currency swaps in advance are known as swap lines.[83] "Swap lines became mechanisms to outsource the Federal Reserve's bedrock power—its lender of last resort role—to foreign central banks," Colleen Baker has observed.[84] The Fed's extension of credit lines for currency swaps to its foreign counterparts during the last crisis was a massive and barely scrutinized crisis response program.[85] Today the Fed has standing swap agreements with five other central banks.[86] During the last financial crisis, as the Council on Foreign Relations has reported, the Fed extended swap lines to Brazil, Mexico, South Korea, Singapore, and the world's largest central banks,[87] on the basis that, as one observer put it, "intensification of stresses in . . . these countries could trigger unwelcome spillovers for both the U.S. economy and the international economy more generally."[88]

Controversial though they were, swap lines during the last crisis were policy tools deemed to fall well within the Fed's discretion as a central bank, despite some doubts about their legal basis. These doubts arose from the Fed's reliance on a catch-all provision in its Depression-era governing statute that permitted it to engage in currency transactions, but that never mentioned

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81 Andrew F. Cooper & Colin I. Bradford, Jr., *The G20 and the Post-Crisis Economic Order* 5 (Ctr. for Int'l Governance Innovation G20 Papers, No. 3, 2010), https://www.cigionline.org/sites/default/files/g20_no_3_1.pdf.

82 Domanski et al., *supra* note 2, at 2.

83 *See, e.g.*, *The Spread of Central Bank Currency Swaps Since the Financial Crisis*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/international-finance/central-bank-currency-swaps-since-financial-crisis/p36419#!/?cid=from_interactives_listing (last visited Nov 10, 2016).

84 Baker, *supra* note 21, at 607.

85 As Baker observed, "Many economists have concluded that the Federal Reserve's swap lines aided in stabilizing markets during the recent financial crisis. But the swap lines also played a critical role in the expansion of the Federal Reserve's balance sheet and contribute to its expansion even today." *Id.* at 608 (footnote omitted).

86 *Central Bank Liquidity Swaps Arrangements*, FED. RESERVE BANK OF N.Y., https://www.newyorkfed.org/markets/liquidity_swap_archive.html (last visited Oct. 10, 2016).

87 *The Spread of Central Bank Currency Swaps Since the Financial Crisis*, *supra* note 83.

88 Nathan Sheets, Address at the Meeting of the Federal Open Market Committee 10 (Oct. 28-29, 2008) (transcript available at http://www.federalreserve.gov/monetarypolicy/files/FOMC20081029meeting.pdf).

anything like swap lines, which did not exist when Congress passed the statute.[89] To be sure, swaps were consistent with the crisis response playbook, in which central banks are supposed to flood the economy with correctly denominated liquidity, encouraging lending and credit and stabilizing currencies.[90] In many countries, the liquidity supplied has to be more reliable than government-printed money—hence the extension of lines of credit from central banks with stable currencies to central banks that presided over more volatile money.[91]

In general, central banks manage to act unconstrained by the normal vagaries of administrative law, at least for much of what they do in macroeconomic policy.[92] Some worry that this leaves them with too much discretion to act as they wish when the global economy is threatened;[93] to others, their decisions on whether and how to loan one another money, and to bail out either their entire financial sector, or particularly important firms within it, are ill-suited to the traditional disciplines of administrative law.[94]

In my view, what matters is that this form of crisis response is different from formal, rule-based cooperation with other regulators; to the contrary, it is transactional and discretionary. Instead of a cooperative effort to oversee financial institutions, this form of "soft-law" action is simply about making a loan to other financial institutions. Because central bank swaps have turned into an increasingly important crisis response tool, one can expect that it will evolve to include increasingly predictable customs.

B. *Regulatory Cooperation*

Both diplomacy and central bank lending will likely be important parts of the response to the next financial crisis. Nonetheless, it would be incorrect to say that international administration will play no role.

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89 *See* Baker, *supra* note 21, at 626–28.

90 *See, e.g.*, GEORGE CHACKO ET AL., THE GLOBAL ECONOMIC SYSTEM: HOW LIQUIDITY SHOCKS AFFECT FINANCIAL INSTITUTIONS AND LEAD TO ECONOMIC CRISIS 255–56 (2011).

91 *See* Frederic S. Mishkin, Governor, Fed. Reserve, Speech at the Tenth Annual International Banking Conference, Fed. Reserve Bank of Chi., Chi., Ill.: Systemic Risk and the International Lender of Last Resort (Sept. 28, 2007).

92 *See* David Zaring, *Law and Custom on the Federal Open Market Committee,* 78 L. & CONTEMP. PROBS. 157, 158 (2015).

93 *See* Charles W. Calomiris, *Reassessing the Fed's Regulatory Role*, 30 CATO J. 311, 318 (2010); Norbert J. Michel, *Why Congress Should Institute Rules-Based Monetary Policy*, THE HERITAGE FOUND. (Feb. 11, 2015), http://www.heritage.org/research/reports/2015/02/why-congress-should-institute-rules-based-monetary-policy.

94 *See, e.g.*, William C. Dudley, President, Fed. Reserve Bank of N.Y., Speech at the Annual Meeting of the Virginia Association of Economists: The Role of the Federal Reserve: Lessons from Financial Crises (Mar. 31, 2016).

First, the legal/regulatory institutionalization of crisis response means that the communication both at the level of banking regulators and at the higher political levels of the G-20 has been regularized and routinized.[95] Communication all the way from the bottom to the top of each country's organizational chart has now been engaged in an international effort to create standards meant to minimize the risks of a financial crisis.[96]

Second, the constant coordination and international policymaking mechanisms used to set the terms of how regulators should approach the supervision of domestic banks are the focus of the damage minimization effort.[97] The signature achievement of financial regulators over the past forty years has been the Capital Adequacy Accords concluded in Basel, Switzerland.[98] The Basel Capital Accords require banks to retain a significant portion of either equity or very safe cash-like instruments against their assets.[99] The Accords include alternatives such as the Net Stable Funding Ratio and the Liquidity Coverage Ratio, both designed to ensure that banks meet a host of different tests to be considered adequately capitalized, and therefore safe to do business.[100]

The idea is that these capital requirements will prevent banks from collapsing in an overleveraged heap the next time something bad happens, because the equity cushion, which they are required by regulation to have on hand, will protect them.[101] Regulators and their political superiors are committed to this form of international coordination because financial regulation

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95 *See* Danièle Nouy, Chair, Supervisory Bd. of the European Central Bank, Address at the Fourth ECB Conference on Accounting, Financial Reporting and Corporate Governance for Central Banks, Frankfurt am Main: Regulatory and Financial Reporting Essential for Effective Banking Supervision and Financial Stability (June 3, 2014) (discussing the implementation of International Financial Reporting Standards (IFRS) in the European Union, and the European Union's use of financial regulations and reporting after the recent financial crisis).

96 *See* Basel Comm. on Banking Supervision, Bank of Int'l Settlements, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems*, ¶6 (Dec. 2010), http://www.bis.org/publ/bcbs189_dec2010.pdf (discussing the micro- and macroprudential regulation goals of the Basel Accords) [hereinafter Basel Comm., *Basel III*].

97 *See* Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Reserve Sys., Speech at the 18th Annual International Banking Conference: The Future of Large and Internationally Active Banks (Nov. 5, 2015).

98 *See* Jamie Caruana, *A Vision of Stability Within the Basel Accord*, FIN. TIMES, Oct. 29, 2003.

99 Basel Comm., *Basel III*, *supra* note 96, ¶ 50.

100 For a discussion of these ratios, see Gregory J. Lyons et. al., *Basel Bank Resilience and Liquidity Proposals Confirm the Global Paradigm Shift Toward Increased Financial Regulatory Oversight*, 127 BANKING L.J. 226, 234–36 (2010).

101 *Cf.* Basel Comm., *Basel III*, *supra* note 96, ¶¶ 8–10 (introducing changes to increase the "quality, consistency and transparency of the capital base" of financial institutions).

has a particular cross-border contagion problem.[102] Because of the interconnected nature of the financial system, a disaster in one country can very easily be exported to another country.[103] This means that regulators cannot assume their domestic banks are safe simply because they have met the domestic requirements of safety and soundness.[104]

An international disruption of the payment system, as happened in 1974, can sweep across even tightly ring-fenced domestic financial institutions.[105] And all of this is being done as a matter of regulation enforced domestically but agreed to internationally.[106]

This way, the response to the next crisis will be inflected by this regulatory cooperation that differs from traditional international law. The prelude to that crisis—the strengthening of institutions and agencies through regulatory cooperation done through notice and comment, both domestically and internationally, and subject to political supervision and bureaucratic organization—is the very definition of administrative procedure. And the creation of regulatory mechanisms like finance ministry pre-meetings before political events has resulted in the institutionalization of these practices, making it easier for the next financial crisis summit to mean something.[107]

These efforts have also become iterative. A constant process of peer review is the enforcement mechanism employed to ensure that regulatory harmonization becomes a reality.[108] There are no courts in international financial regulation, but there are supervisory committees.

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102 *See, e.g.*, FRANKLIN ALLEN ET AL., CROSS-BORDER BANKING IN EUROPE: IMPLICATIONS FOR FINANCIAL STABILITY AND MACROECONOMIC POLICY 3, 8–9 (2011) (explaining the contagion problem in the EU and the macroeconomic policy responses to it).

103 *See* DEPOSITORY TRUST & CLEARING CORP., UNDERSTANDING INTERCONNECTEDNESS RISKS TO BUILD A MORE RESILIENT FINANCIAL SYSTEM 5 (2015).

104 *See, e.g.*, Tarullo, *supra* note 97, at 4, 11–12. *Cf.* Baker, *supra* note 21, at 638–39 (addressing the Federal Reserve's role in attempting to prevent the effects of financial instability contagion from Europe on U.S. financial stability).

105 For a discussion of the closing of the Herstatt Bank in 1974 and the subsequent response to a threatened run on banks, see Clyde H. Farnsworth, *Failure of Herstatt Disturbs Banking*, N.Y. TIMES, June 29, 1974, at 35, 39 and *Big Bank Closed By West Germany*, N.Y. TIMES, June 27, 1974, at 65.

106 *See* William R. White, *International Agreements in the Area of Banking and Finance: Accomplishments and Outstanding Issues* 3 (Bank of Int'l Settlements, Working Paper No. 38, 1996). *See also, e.g.*, 12 U.S.C. § 3901(b) (2012) (requiring U.S. banking agencies to consult with financial authorities of other countries to achieve effective financial supervision); Barr & Miller, *supra* note 37, at 29 (2006) (discussing U.S. rule making regarding the Basel Agreement). *Cf.* Stanley Fischer, *Reforming the International Financial System*, 109 ECON. J. 557, 561 (1999) (discussing the proposed changes to the international financial system in 1999 as furthering cooperation between international institutions).

107 *See, e.g.*, Press Release 9359/12, European Commission, Economic and Financial Affairs (May 2, 2012) (discussing the Commission's discussion of the International Finance Meetings and Capital Requirements).

108 *Cf.* Bank of Int'l Settlements, Basel Comm. on Banking Supervision Charter art. II, ¶ 5 (Jan. 2013) (explaining the peer review process proposed by the Basel Accord and how banks and institutions should check each other).

In this way, the legal contribution to the response to the next financial crisis is organizational and administrative, but no less real than international law made through the pomp and circumstance of a treaty signing.

III. CROSS-BORDER RESOLUTION: A CASE STUDY

During the last financial crisis, the failure of cross-border financial institutions led to an often chaotic government response, one that probably made countries more likely to bail out banks, as the alternative—an organized cross-border resolution—looked unavailable.[109] Because banks that suspect they are covered by a government guarantee are likely to take more risks, because bailouts are politically unpopular, and because without an international process, domestic regulators may respond to crises by unproductively ring-fencing whatever assets of troubled banks they can find, there have been efforts since the last financial crisis to create a better mechanism to deal with failing multinational banks.[110] The progress has been slow, but what results there have been represent a doubling down on the promise of regulatory cooperation, either because nothing more can be achieved, or because there is consensus that cooperation is the best way to pursue international financial regulation.[111]

During the last crisis, the problems posed by a lack of cross-border resolution coordination were illustrated time and again. Fortis, a Belgian-Dutch financial conglomerate, was taken over by the Belgian and Dutch governments only to find itself in chaotic post-takeover litigation and proxy disputes.[112] Dexia, a French-Belgian bank, fared better when it received a relatively coordinated set of financing guarantees from French, Belgian, and Luxembourgian central banks, although even in that case, the banks found it difficult to agree on how they should apportion their bailout.[113] Kaupthing, the Icelandic bank that had branched or created subsidiaries in thirteen other jurisdictions, was bailed out to the point of diplomatic incident.[114] Icelandic

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109 Int'l Monetary Fund, *Cross-Border Bank Resolution: Recent Developments* 7 (IMF Policy Papers, June 2014).

110 *E.g.*, Matthew C. Turk, *Reframing International Financial Regulation After the Global Financial Crisis: Rational States and Interdependence, Not Regulatory Networks and Soft Law*, 36 MICH. J. INT'L L. 59, 97, 102–03 (2014).

111 *Id.* at 98, 106.

112 *Id.* at 99 (recounting the Fortis problems).

113 *See* Da Lin, Note, *Bank Recapitalizations: A Comparative Perspective*, 50 HARV. J. LEGIS. 513, 526–28 (2013) (providing Dexia statistics).

114 For a discussion, see Birgir T. Petursson & Andrew P. Morriss, *Global Economies, Regulatory Failure, and Loose Money: Lessons for Regulating the Finance Sector from Iceland's Financial Crisis,* 63 ALA. L. REV. 691, 792 (2012).

supervisors guaranteed the deposits of Icelandic customers, but were unwilling to bail out those located abroad.[115] Foreign regulators accordingly seized whatever assets of the bank they could find to satisfy their own citizen depositors.[116]

The problem was replicated, although in a substantially magnified way, by the failure of Lehman Brothers, which, as the Basel Committee's Cross-Border Bank Resolution Group put it, "consisted of 2,985 legal entities operated in some 50 countries."[117] When the institution failed after the American government refused to bail it out, and the British refused to sanction an emergency purchase by a large multinational bank, various regulators and creditors raced to their courthouses to find assets of the firm that could be used to satisfy the bank's obligations.[118] The result was generally thought to be chaotic.[119] The G-20 accordingly urged, during both their Summit on Financial Markets and the World Economy in 2008, and again at their London Summit in April 2009, that cross-border resolution regimes and bankruptcy laws be strengthened in a way to permit the orderly resolution of these kinds of complex institutions.[120]

However, there has been no appetite for the creation of an international organization that could coordinate these cross-border schemes.[121] Instead the effort is once again regulatory, with the Basel Committee making a series of recommendations about how resolution regimes ought to be strengthened among its member regulators.[122] These recommendations can tend to the anodyne. Basel has suggested that "national authorities should consider the de-

115 *Id.* at 765.

116 *Id.* at 769–70.

117 Basel Comm. on Banking Supervision, Bank for Int'l Settlements, *Report and Recommendation of the Cross-Border Bank Resolution Group*, ¶ 49 (Mar. 2010) [hereinafter Basel Comm., *March 2010 Report*].

118 Larry Elliot & Jill Treanor, *Lehman's Fall to Earth: The Last Hours of a Wall Street Giant*, THE GUARDIAN (Sept. 3, 2014), https://www.theguardian.com/business/2009/sep/03/lehman-brothers-rescue-bid; James B. Stewart & Peter Eavis, *Revisiting the Lehman Brothers Bailout That Never Was*, N.Y. TIMES (Sept. 29, 2014), http://www.nytimes.com/2014/09/30/business/revisiting-the-lehman-brothers-bailout-that-never-was.html?_r=0.

119 *E.g.*, Yesha Yadav, *The Specter of Sisyphus: Re-Making International Financial Regulation After the Global Financial Crisis,* 24 EMORY INT'L L. REV. 83, 108 (2010). For an overview of the Lehman Brothers lessons, see *id.* at 106–09.

120 For a discussion of the way the G-20 has addressed cross border resolution, see Edward F. Greene & Joshua L. Boehm, *The Limits of "Name-and-Shame" in International Financial Regulation*, 97 CORNELL L. REV. 1083, 1085–86 (2012).

121 *Cf.* Basel Comm., *March 2010 Report*, *supra* note 117, at ¶¶ 8–10 (proposing a broad agreement to share "financial burdens by stakeholders in different jurisdictions for crisis management and resolution of cross-border financial institutions and groups," but noting that "[m]embers are not in agreement").

122 *See id.* at ¶ 1.

velopment of procedures to facilitate the mutual recognition of crisis management and resolution proceedings and/or measures."[123] But not every recommendation is a platitude. For example, Basel has endorsed the power to stay the satisfaction of financial contracts upon resolution.[124]

Moreover, the approach has, if anything, suggested that banking supervisors are particularly comfortable with regulatory cooperation. For the cases of resolution of complex and interconnected cross-border financial intermediaries, Basel has urged the development of so-called "supervisory colleges."[125] Under this scheme, supervisors would "work closely with relevant home and host resolution authorities in order to understand how group structures and their individual components would be resolved in a crisis."[126] More generally, Basel encouraged supervisors to simplify and shrink financial institutions that they suspect might be vulnerable in a crisis.[127]

The FSB, which sits above the Basel Committee, has also endorsed the coordination and capacity-building approach.[128] It has identified key attributes of effective resolution regimes, and encouraged its members to ensure that they have regulators with those powers.[129] The FSB has encouraged regulators to develop so-called "bail-in" mechanisms that take debts owed by the banks and turn them into equity held by the creditors of those banks.[130] The FSB has also encouraged every authority to obtain the power to temporarily stay early termination rights in financial contracts, and encouraged authorities to require financial institutions to follow common practices with their financial contracts, including using the forms created by the International Swaps and Derivatives Association.[131]

These efforts may not suffice. Already, the United States has adopted a relatively unique approach to bailing out financial institutions, the so-called

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123 *Id.* (providing an overview of recommendation 4).

124 *Id.* ¶ at 119 (explaining recommendation 9).

125 *Id.* ¶ at 104.

126 *Id.* ¶ at 1 (summarizing recommendation 5).

127 Basel Comm., *March 2010 Report*, *supra* note 117, at ¶ 93.

128 *See generally* Letter from Mark Carney, Chair, Fin. Stability Bd., to G20 Leaders on Building a Resilient and Open Global Financial System to Support Sustainable Cross-Border Investment (Aug. 30, 2016) (available at http://www.fsb.org/wp-content/uploads/FSB-Chair's-letter-to-G20-Leaders-in-advance-of-their-meeting-in-Hangzhou-on-4-5-September..pdf) (reporting on "progress and highlight[ing] the issues which demand the attention of [G20] Leaders"). *See also* Basel Comm., *March 2010 Report*, *supra* note 117, at ¶ 19.

129 Fin. Stability Bd., Consultative Document, *Cross-Border Recognition of Resolution Action*, at 2 (Sept. 29, 2014), http://www.fsb.org/wp-content/uploads/c_140929.pdf [hereinafter Fin. Stability Bd., Consultative Document].

130 *Id.* at annex (Scenario 4b).

131 *Id.* ¶ 2.1.

"single point of entry" approach, which would recapitalize financial institutions at the holding company level.[132] Because European and other jurisdictions have not structured their financial institutions with the holding company approach, it is not clear how this could be internationalized.[133] Rumored disagreements on how to handle supervision, and how to trust, say, the supervisor of the home country of a multinational financial institution to take the lead on resolution seem on the cards.[134] The FSB has encouraged its members to honor the decisions of lead supervisors in multinational financial resolution contexts, but it is not clear that it is enough.[135]

Finally, although coordinated resolution requires courts in other countries to honor the steps taken by regulators leading the resolution, European courts have, so far, generally read the EU Directive requiring them to honor the decisions of regulators leading a resolution narrowly.[136] If coordination has been limited within Europe, one can only imagine more conflict outside of it.

Cross-border resolution is a principal way that the international regulatory architecture will respond to the next financial crisis. Although it requires coordination, the low-key sort of coordination recommended by the international institutions that have developed since the last crisis suggests that cross-border resolution will truly be one of the challenges for financial regulation during the next crisis.[137] If regulatory cooperation can work there, it can work anywhere in the world of finance.

IV. CONCLUSION

Nobody ever thought that the response to a financial crisis would be easy; crises, by definition, challenge those who must respond to them. Crisis response is particularly difficult for institutions built on informal cooperation and the cross-border coordination of domestic regulation.[138] One can see why the welter of agreements to coordinate the oversight of financial institutions

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132 Email from Stephen J. Lubben, Wiley Chair in Corp. Governance & Bus. Ethics, Seaton Hall Univ. Sch. of Law, to Robert E. Feldman, Exec. Sec'y, FDIC regarding The Resolution of Systemically Important Financial Institutions: Thoughts on Single Point of Entry Strategy (February 7, 2014), http://ssrn.com/abstract=2392450 or http://dx.doi.org/10.2139/ssrn.2392450.

133 Jeffrey N. Gordon & Wolf-Georg Ringe, *Bank Resolution in the European Banking Union: A Transatlantic Perspective on What it Would Take*, 115 COLUM. L. REV. 1297, 1363 n.286, 1364–65 (2015).

134 *See, e.g.*, *id.* at 1299.

135 *Id.* at 1338. *See also* Fin. Stability Bd., Consultative Document, *supra* note 129, at ¶ 1.2.

136 Solomon J. Noh & Fredric Sosnick, SHEARMAN & STERLING LLP, *England and Germany Limit Bank Resolution Obligations* (Sept. 6, 2016), http://corpgov.law.harvard.edu/2015/09/06/england-and-germany-limit-bank-resolution-obligations/.

137 *See, e.g.*, Pan, *supra* note 10, at 246.

138 *See, e.g.*, *id.* at 245.

generally stick to preparing for crises, trying to make the rules for crisis response. Nonetheless, these agreements have influenced the ways that crisis response will happen, both by creating the institutional vehicles through which discretion will be exercised in crisis response, and even by serving as the rickety vehicle for the takeover and recapitalization of failing financial institutions.